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THE NEW MASSACHUSETTS NONCOMPETITION AGREEMENT ACT: PRACTICAL AND TIMELY TIPS FOR EMPLOYERS

The new Massachusetts Noncompetition Agreement Act goes into effect on October 1, 2018. Employers immediately need to consider how the new law will impact their current practices and what changes they will need to make going forward. As discussed below, some employers will want to take action before the effective date, particularly with respect to existing employees, and all employers that use noncompetes will need to make changes after the effective date.

FOR EXISTING EMPLOYEES

For current employees who have no noncompetes or who have inadequate noncompetes, now is the time for employers to get them to sign a (new) noncompete. Noncompetes signed before October 1, 2018 are not covered by the new statute, which imposes limitations and obligations that most employers would prefer to avoid, including:

- limitations on the kinds of employees who can be subject to noncompetes;
- limitations on the scope and duration of noncompetes;
- a requirement that the employer, in essence, pay the employee during the restricted period;
- prohibition on enforcement of noncompetes with respect to employees who are terminated by the employer (unless for cause); and
- limitations on forfeiture for competition clauses.[1]

Employers may want to act immediately to avoid the coverage of the statute, particularly if they:

- need noncompetes for employees who are non-exempt under the overtime laws;
- are out-of-state and/or want to take advantage of the law or venue of a state other than Massachusetts; or
- have the need for a noncompete that is longer than one year for any particular employee(s).

[1] Additional detail concerning the new statute can be found at: http://www.hrwlawyers.com/legal-insights/hrw-client-alert-massachusetts-legislature-passes-major-non-compete-reform-legislation/.

When it comes to enforcement lawsuits, it is foreseeable that courts could adopt the principles of the new statute, even in cases that involve pre-statute noncompetes. Courts may also look critically at noncompetes that employers proffer to their employees in the time period between enactment of the new statute and the October effective date. For these reasons, an employer would want to approach the spirit of the new law in drafting the new noncompete. For example, the employer may want to give the employee "fair and reasonable" consideration for signing the noncompete. The employer would also want to give the employee a reasonable time period in which to consider the new noncompete before signing.

There is a downside risk to presenting new noncompetes to employees who already have noncompetes. Some Massachusetts courts have found this set of facts to constitute evidence that the employer and employee have abandoned the old noncompete, supporting the common law "material change" defense which would potentially render the old noncompete unenforceable even if the employee did not agree to the new noncompete. Other courts have rejected the defense on similar facts. To foreclose the risk, however, the employer would need to take the harsh step of terminating any employee who is unwilling to sign the new noncompete. This leaves the employer to assess whether the bird in hand (the existing noncompete) is better than two in the bush (the possibility of a new noncompete).

For employees who already have adequate noncompetes, employers should make sure that the agreement is signed by both employer and employee.

FOR NEW HIRES OR NONCOMPETES ENTERED INTO AFTER OCTOBER 1, 2018

After the statute's effective date, employers should only use noncompetes that fully comply with the new law. Procedurally, the noncompete must be (1) in writing; (2) provided to a prospective employee the *earlier* of either a formal offer of employment or ten business days prior to the commencement of employment; and (3) expressly state that the employee has the right to consult with counsel before signing. The agreement must be signed by both employee and employer (which seems obvious, but employers often put the employee-signed agreement in the file without counter-executing; under the new statute, this would invalidate the noncompete). The agreement should contain sufficient inventions, confidentiality, non-solicitation, and other standard provisions.

Critically, in addition to the foregoing, the agreement should include the following if the employer wishes to impose a restriction on post-employment competition:

1. A one-year (at most) restricted period, with a "springing noncompete" of two years in the event that the employee breaches a fiduciary duty or steals company information.

2. An acknowledgement by the employee that the noncompetition restriction is no broader than necessary to protect the employer's interests in its trade secrets, confidential information, and/or goodwill.

3. An acknowledgement by the employee that the noncompetition restriction cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement.

4. A reasonable geographic limitation. If adequate to protect the company's interests, limit the geographic scope to "areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence" – this is presumptively reasonable. If a wider geographic scope is needed, articulate the precise reasons why, and get the employee to acknowledge those reasons.

5. A reasonable limitation on restricted activities. If adequate to protect the company's interests, adopt a limit that "protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last 2 years of employment." If a broader restriction is needed, articulate the precise reasons why, and get the employee to acknowledge those reasons.

6. A provision that provides for garden leave (payment by the employer during the restricted period specified by the noncompetition agreement) or "other mutually agreed-upon consideration." "Garden leave" must be at least fifty percent (50%) of the employee's highest annualized base salary paid by the employer in the 2 years before termination, payable for the duration of the restricted period. The "other mutually agreed-upon consideration" alternative is causing the most uncertainty among employers and employment lawyers. Its meaning is completely unclear. Nothing in the legislative history or discussions with the legislative sponsors give us a clue. The sponsors knew this was an issue, but passed the bill anyway. As a result, courts will be required to interpret this provision. I think that some courts will likely accept any mutually agreed-upon consideration, without assessing its magnitude. Support for this position is found in the fact that while the statute requires "fair and reasonable" consideration for the *signing* of a noncompete, the requirement pertaining to post-termination consideration does not contain any such qualitative adjectives – only that it be mutually agreed-upon. I fear, however, that some courts will find that the fifty percent garden leave should be interpreted as benchmark or a floor, with "other mutually agreed-upon consideration" required to meet or exceed that. Unfortunately, at this point, it will be difficult to predict what courts will require. And the stakes are high; a miscalculation could result in a court invalidating the noncompete. Employers may consider offering garden leave or higher for employees whose noncompetes are particularly important to the company.

7. A mechanism for waiver of the noncompete. Though the language of the statute is less than clear, and contains a potentially contradictory provision, it appears to permit an employer to avoid paying garden leave if the employer waives the restriction on post-employment activities. For this reason, an employer may wish to add language stating the method and timeline to be used by the employer in considering and communicating the waiver.

8. A liberal definition of "cause." Under the new statute, an employer cannot enforce a noncompete if it terminates an employee, unless the termination is for cause. The statute does not provide a definition of "cause." Employers should include a definition of "cause" which permits the employer to invoke it liberally, but with the understanding that a court is not required to adopt the employer's definition of "cause."

9. A provision that provides that any action to enforce the agreement must be brought in either the county where the employee resides or, if mutually agreed upon by the employee and employer, in Suffolk Superior Court. If Suffolk County is most convenient for the employer, the agreement should call for the action to be brought there.

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