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Alert | Labor & Employment

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Significant Changes Ahead as Massachusetts Noncompetition Agreement Act Signed Into Law

On August 10, 2018, Governor Baker signed into law the Massachusetts Noncompetition Agreement Act (the Act). The new law brings significant changes to the use and enforcement of noncompetition agreements in Massachusetts. The Act was passed as part of a comprehensive economic development bill and applies to noncompetition agreements entered into on or after October 1, 2018.

Definition of Noncompetition Agreement

The new law defines a "noncompetition agreement" as "an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." For the purpose of this law, the term employee includes independent contractor.

The definition of noncompetition agreement under the Act does not include the following types of agreements, which are not subject to the requirements of the new law:

- Noncompetition agreements made in connection with the sale of a business, when the party restricted by the agreement is a significant owner or partner in the business entity who will receive significant consideration from the transaction
- Noncompetition agreements outside of an employment relationship

- Noncompetition agreements made in connection with separation of employment if the employee is expressly given seven (7) business days to rescind acceptance
- Covenants not to solicit or hire employees of the employer
- Covenants not to solicit or transact business with customers, clients, or vendors of the employer
- Forfeiture agreements
- Nondisclosure or confidentiality agreements
- Invention assignment agreements
- Agreements by which an employee agrees not to reapply for employment after termination

Basic Requirements of a Valid Noncompetition Agreement

A noncompetition agreement entered into in connection with the *commencement of employment* must satisfy the following requirements:

- Be in writing
- Be signed by the employer and employee
- Expressly state that the employee has the right to consult with counsel prior to signing
- Be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of employment

A noncompetition agreement entered into *after the commencement of employment*, but not in connection with separation from employment, must satisfy the following requirements:

- Be in writing
- Be signed by the employer and employee
- Expressly state that the employee has the right to consult with counsel prior to signing
- Be supported by fair and reasonable consideration independent from continued employment
- Notice of the agreement must be provided to the employee at least ten (10) business days prior to its effective date

The noncompetition agreement must be necessary to protect one or more of the following legitimate business interests of the employer: trade secrets; confidential information that does not qualify as a trade secret; or goodwill.

The agreement must be reasonable in geographic scope.

Statutory Presumptions

The Act contains a number of presumptions to aid in determining whether certain contractual provisions will be considered reasonable. For example, the Act provides that a restriction on the scope of proscribed activities is presumptively reasonable if it protects a legitimate business interest and is limited to only the specific types of services provided by the employee during the last two years of employment.

A contractual provision relating to geographic scope is presumptively reasonable if it is limited to the geographic areas where the employee, during the last two years of employment, provided services or had a material presence.

Duration of the Restricted Period

The Act provides that the restricted period under the noncompetition agreement cannot exceed 12 months from the date of separation from employment. However, in circumstances where the employee has breached his or her fiduciary duty to the employer or has unlawfully taken property belonging to the employer, the duration of the restricted period may be extended to two years from the date of separation.

Garden Leave or "Other" Consideration

One of the most significant changes contained in the Act is a requirement that the employer provide consideration to the employee during the restricted period. Specifically, the statute states that the employer must provide "garden leave" or "other mutually agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement."

To constitute a valid garden leave clause, the agreement must (1) provide for the payment, on a pro-rata basis during the entirety of the restricted period, of at least 50 percent of the employee's highest annualized base salary within the two years preceding separation; and (2) provide that, except in the event of an employee's breach, the employer cannot unilaterally discontinue or refuse to make the payments. If the restricted period is increased beyond twelve months as a result of the employee's breach or unlawful taking of the employer's property, the employer will not be required to provide the garden leave payment during the extended restricted period.

Conspicuously absent from the new law is a definition of "other mutually agreed upon consideration."

Noncompetition Agreement Prohibited for Certain Workers

A noncompetition agreement will not be enforceable in Massachusetts against the following types of workers:

- Nonexempt employees under the Fair Labor Standards Act
- Undergraduate and graduate students working as interns or short-term employment, paid or unpaid, while enrolled in school
- Employees terminated without cause or laid off
- Employees age 18 or younger

This section does not preclude a court from imposing a noncompetition restriction on the above referenced categories of employees, whether by preliminary or permanent injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or common law duty.

Judicial Enforcement and Choice of Law

The new law grants the courts discretion to reform or otherwise revise a noncompetition agreement to make it valid and enforceable to the extent necessary to protect an employer's legitimate business interests.

A choice of law provision that seeks to apply to an agreement the laws of a state other than Massachusetts will not be valid if the employee is, and has been for at least 30 days immediately preceding his or her separation from employment, a resident of Massachusetts or employed in Massachusetts.

Final Note

The Act does not apply to pre-existing noncompetition agreements. However, for any such agreements entered into on or after October 1, 2018, Massachusetts employers and employees should be aware of the new law's many requirements.

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