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New Massachusetts Law Restricting Noncompetition Agreements

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On August 10, 2018, Governor Charlie Baker signed into law a bill substantially limiting the use of noncompetition agreements in Massachusetts. The new Massachusetts Noncompetition Agreement Act of 2018 (the "Noncompetition Law") applies to all post-employment noncompetition agreements entered into on or after October 1, 2018 between an employer and an employee or otherwise arising out of an employment relationship. It also broadly applies to independent contractors and includes any "forfeiture for competition" agreement.

How does the new law limit noncompetition agreements?

Duration, Nature, and Geographic Scope

Massachusetts common law currently provides that to be enforceable, a noncompetition agreement must be no broader than necessary to protect the legitimate business interests of the employer, such as the employer's trade secrets, confidential information and/or goodwill. It also provides that noncompetition agreements must be reasonable in duration, geographic scope and scope of proscribed activities. The Noncompetition Law not only codifies these principles, but goes further in limiting noncompetition agreements to no more than 12 months post-employment in duration (or 24 months if the employee breaches his or her fiduciary duty to the former employer or takes the former employer's property). Previously, depending on the circumstances, employers had had a reasonable prospect of success in enforcing noncompetes of two years' duration, and even three-year restrictions were sometimes upheld. The new law also deems presumptively reasonable (1) a geographic scope that is limited to the areas in which the employee provided services or had a material presence or influence within the last two years of employment, and (2) a scope of proscribed activities that is limited to only the specific types of services provided by the employee at any time during the last two years of employment. An employer seeking to enforce a noncompete covering a larger geographic area or barring a broader range of activities will likely face an uphill battle, and probably will be expected to produce strong evidence justifying its position.

Employees Who Cannot Be Bound

Another significant change imposed by the Noncompetition Law is a listing of categories of employees who cannot be bound by a noncompete. Under prior court decisions, there had been no categorical exclusions of this sort. The new law prevents employers from enforcing noncompetition agreements against the following types of workers: employees who are classified as nonexempt under federal overtime law; employees who have been laid off or whose employment is terminated without cause ("cause" is not defined in the statute); students participating in internships or other short-term employment relationships with an employer; and employees age 18 or younger.

Economic Consideration Required

Under the Noncompetition Law, noncompetition agreements must be supported by a "garden leave" clause or "other mutually agreed upon consideration," which must be specified in the agreement. As the statute is written, it is not clear whether an initial offer of employment constitutes adequate consideration for a noncompete imposed at the start of the employment relationship. The statute expressly provides that if the noncompetition agreement is entered into during employment rather than at the outset, "fair and reasonable consideration," apart from continued employment, must be provided. A "garden leave" clause must provide for payment on a prorated basis during the entire restricted

period of at least 50% of the employee's highest annualized base salary within the two years preceding the employee's termination. Noncompetition agreements must be in writing, signed by both the employer and the employee, expressly state that the employee has the right to consult with counsel prior to signing, and given to the employee (1) if entered into at the start of employment, by the earlier of a job offer or ten business days before the employee's starting date, and (2) if entered into during employment, at least ten business days before the agreement becomes effective.

What are the exceptions to the new law?

There are several important exceptions within the Noncompetition Law. For example, the new law does not apply to restrictions on competition during employment. In addition, the following types of arrangements are expressly excluded from the new restrictions:

i. covenants not to solicit or hire employees;

ii. covenants not to solicit or transact business with customers, clients or vendors;

iii. noncompetition agreements made in connection with the sale of a business or substantially all of its operating assets, "or otherwise disposing of the ownership interest" of a business, division or subsidiary, for "significant" owners who will receive "significant" consideration or benefit from the sale or disposal;

iv. noncompetition agreements outside of an employment relationship;

v. forfeiture agreements;

vi. non-disclosure/confidentiality agreements;

vii. invention assignment agreements;

viii. garden leave clauses;

ix. noncompetition agreements made in connection with cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance; or

x. agreements by which an employee agrees not to reapply for employment to the same employer after termination of the employee.

Notably, the new law expressly provides that a court may (but is not required to) modify or revise an overbroad noncompetition agreement to render it valid and enforceable to the extent necessary to protect the employer's legitimate business interests.

Can an employer contract around the law through choice of law or forum selection provisions?

Employers cannot avoid the new limitations under the Noncompetition Law by selecting another state's law in their noncompetition agreements. Under the new law, a choice of law provision applying the law of any state other than Massachusetts will not be enforceable if the employee has been a resident of, or employed in, Massachusetts for at least 30 days immediately prior to termination of employment. Employers seeking to enforce noncompetition agreements entered into on or after October 1, 2018 must bring any enforcement action in the county where the employee lives, or if mutually agreed upon by the employer and employee, in Suffolk County's superior court or its business litigation session.

What legal and practical questions remain unresolved by the new law?

The new Noncompetition Law leaves many critical questions unanswered, such as the following:

- It is unclear whether partners in a limited partnership or members in a limited liability corporation would be considered "employees" under the law.

- The new law does not define "fair and reasonable consideration," so while the consideration given to an employee in exchange for a noncompete imposed mid-employment must be more than a *de minimis* amount, it remains uncertain how much consideration would be enough.
- "Other mutually agreed upon consideration" (which an employer may supply as an alternative to a "garden leave clause") is also undefined, leaving open the possibility that adequate consideration for a pre-employment noncompetition agreement could be an amount significantly less than the 50% of base pay under a garden leave (e.g., a signing bonus or, perhaps, simply an offer of employment).
- The precise contours of the sale-of-business exception remain uncertain (e.g., what constitutes a "significant" owner or "significant" consideration or benefit).
- The exclusion of "garden leave clauses" from those noncompetes covered by the law is perplexing, given that the statute separately provides that a garden leave clause is a component of a covered noncompetition agreement and one of the forms of consideration that will support a noncompete.
- It is uncertain whether Massachusetts has the legal authority to apply its law to an out-of-state employer with limited contacts in the Commonwealth based solely on that employer's employing, outside of Massachusetts, a Massachusetts resident.

These questions and many others remain open, so employers should stay tuned as these issues are litigated in the future, and confer with legal counsel for the best approaches to these issues.

If you have questions concerning these important changes, or the various approaches to them, please reach out to Jenny Cooper, Stephanie Bruce or your Ropes & Gray labor & employment advisor.