

Client Advisory | *May 2010*

Massachusetts Legislature to Consider “Noncompetition Agreement Act”

If enacted, House No. 4607, a bill known as the “Noncompetition Agreement Act” (the “Act”), will have a major impact on Massachusetts law governing the enforceability of noncompetition agreements. The Act was recently reported favorably by the Legislature’s Joint Committee on Labor and Workforce Development and referred to the House Committee on Steering, Policy and Scheduling. The Act aims to establish new rules and to amend and codify existing Massachusetts law concerning the parameters and enforceability of noncompetition agreements.



Timothy P. Van Dyck
Partner



Kori Anderson-Deasy
Associate

While the Act will not apply to noncompetition agreements already in existence if and when the bill becomes law, employers will have to reassess their prospective use of noncompetition agreements to incorporate any new requirements. The Act, in its current form, includes the following provisions:

- **Salary Requirements:** noncompetition agreements will only be enforceable as to employees earning a minimum of \$75,000, plus \$1,500 for each additional year from the Act’s effective date;
- **Separate Writing:** noncompetition agreements must be contained in a separate writing, signed by the employer and employee;
- **Notice for Future Employees:** if the noncompetition agreement is a condition of employment, the agreement and an express statement that the agreement is a condition of employment must be provided, to the extent reasonably feasible, to the employee seven business days prior to the commencement of employment or when any written offer is made, whichever is earlier;
- **Oral Offers of Employment:** if an offer of employment is first communicated orally, the employee must either simultaneously be informed that a noncompetition agreement will be a condition of employment or receive the required written notification prior to tendering resignation from any then-current employment;
- **Consideration:** a noncompetition agreement entered into after the commencement of employment requires “reasonably adequate consideration.” Continuation of employment is not adequate consideration but 10% or more of the employee’s current annual salary is presumptively deemed adequate consideration;
- **Protectable Interests:** a noncompetition agreement must be necessary to protect the employer’s trade secrets, confidential information, or goodwill;
- **Duration:** any restricted period must be reasonable in relation to the duration of actual employment, with a period of no more than 6 months deemed presumptively reasonable; the maximum restrictive period is one year from the date of cessation of employment;
- **Judicial Discretion:** “a court may decline to enforce some or all of the restrictions in an otherwise valid and enforceable noncompetition agreement: (1) in extraordinary circumstances; (2) where otherwise necessary to prevent injustice or an unduly harsh result; or (3) based on any other common law or statutory legal or equitable defense or doctrine, or on other equitable factors that would militate against enforcement;”

- **Geographic Reach:** geographic reach must be reasonable in relation to the interests served, and is presumptively reasonable if limited to only the geographic area in which the employee provided services or had a material presence or influence;
- **Scope of Proscribed Activities:** the scope of proscribed activities in relation to the interests served must be reasonable, and is presumptively reasonable if restrictions are limited to the specific types of services provided by the employee at any time during the last two years of employment;
- **Employee’s Attorneys’ Fees:** a court *shall* award an employee’s reasonable attorneys’ fees and costs if the court declines to enforce a material restriction, reforms a restriction in a material respect, finds the employee acted in bad faith, or adopts the specific mea-

asures concerning the protection of the employer’s legitimate business interests that were presented by the employee prior to commencing a lawsuit;

- **Employer’s Attorneys’ Fees:** a court *may* award a former employer’s reasonable attorneys’ fees and costs if: (1) the noncompetition agreement was presumptively reasonable in duration, geographic reach, and scope of proscribed activities; (2) the agreement was enforced by the court without substantial modification; and (3) the court finds that the employee engaged in bad faith conduct; and
- **Choice of Law:** choice of law provisions aimed at avoiding the Act’s requirements are unenforceable if the employee is, and has been for at least 30 days, a resident of or working in Massachusetts at the time of his or her termination of employment.

By its terms, the Act does not apply to or alter existing laws concerning: “(1) covenants not to solicit employees of the employer; (2) covenants not to solicit or transact business with customers of the employer; (3) restrictive covenants made in connection with the sale of a business or the assets of a business; (4) agreements by which an employee agrees not to reapply to the same employer after termination of employment; or (5) the payment of wages.”

While the Act may not ultimately become law or may undergo revisions before it is enacted, employers should monitor this legislation closely. If the bill ultimately becomes law, employers will certainly have to reassess which employees may be required to sign non-competition agreements, the parameters of drafting and executing such agreements, and the means of enforcing any restrictions contained therein.

BOSTON MA | FT. LAUDERDALE FL | HARTFORD CT | MADISON NJ | NEW YORK NY | NEWPORT BEACH CA | PROVIDENCE RI
STAMFORD CT | WASHINGTON DC | WEST PALM BEACH FL | WILMINGTON DE | LONDON UK | HONG KONG (ASSOCIATED OFFICE)

This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you have any questions regarding noncompetition agreements, please contact the authors, the Edwards Angell Palmer & Dodge LLP attorney responsible for your matters or another member of the EAPD Labor & Employment practice.

Timothy P. Van Dyck, Partner
Kori Anderson-Deasy, Associate

617.951.2254
617.239.0206

tvandyck@eapdlaw.com
kanderson@eapdlaw.com

This advisory is published by Edwards Angell Palmer & Dodge for the benefit of clients, friends and fellow professionals on matters of interest. The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances. The Firm is not authorized under the U.K. Financial Services and Markets Act 2000 to offer UK investment services to clients. In certain circumstances, as members of the U.K. Law Society, we are able to provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Please note that your contact details, which may have been used to provide this bulletin to you, will be used for communications with you only. If you would prefer to discontinue receiving information from the Firm, or wish that we not contact you for any purpose other than to receive future issues of this bulletin, please contact us at contactus@eapdlaw.com.

© 2010 Edwards Angell Palmer & Dodge LLP a Delaware limited liability partnership including professional corporations and Edwards Angell Palmer & Dodge UK LLP a limited liability partnership registered in England (registered number OC333092) and regulated by the Solicitors Regulation Authority.

Disclosure required under U.S. Circular 230: Edwards Angell Palmer & Dodge LLP informs you that any tax advice contained in this communication, including any attachments, was not intended or written to be used, and cannot be used, for the purpose of avoiding federal tax related penalties, or promoting, marketing or recommending to another party any transaction or matter addressed herein.

ATTORNEY ADVERTISING: This publication may be considered “advertising material” under the rules of professional conduct governing attorneys in some states. The hiring of an attorney is an important decision that should not be based solely on advertisements. Prior results do not guarantee similar outcomes.

EDWARDS
ANGELL
PALMER &
DODGE

eapdlaw.com