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Client Alert Commentary

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13 Takeaways Regarding Massachusetts' New Noncompetition Agreement Law

A new Massachusetts law significantly limits when and with whom an employer can enforce a noncompetition agreement entered into on or after October 1, 2018.

On August 10, 2018, Massachusetts Governor Charlie Baker signed into law the Massachusetts Noncompetition Agreement Act (the Act), which overhauls existing noncompetition case law and heavily restricts an employer's ability to limit an employee's competitive activities.

Under the Act, employee noncompetition agreements entered into on or after October 1, 2018 are invalid unless they provide pay during the restricted period (so called "garden leave") and comply with other express statutory requirements.

Employers entering into noncompetition agreements with Massachusetts-based employees on or after October 1, 2018 should be mindful of the following 13 key takeaways from the Act:

1. The noncompetition agreement must be in writing, signed by both the employer and employee, and expressly state that the employee has a right to consult with counsel prior to signing.

2. An employee entering into a noncompetition agreement upon hire must receive the agreement by the earlier of a formal offer of employment or 10 business days before the commencement of employment.

3. A noncompetition agreement entered into after employment has commenced requires fair and reasonable consideration (which is undefined) beyond continued employment.

4. The post-employment restricted period cannot exceed one year from the employee's termination date, but may be extended to two years if the employee breaches his or her fiduciary duty or unlawfully takes the employer's property.

5. During any post-employment restricted period, the employee must receive garden leave that equals at least 50% of the employee's highest annualized base salary within the two years prior to termination or other mutually-agreed upon consideration (which is undefined); however, no pay is required during any extended restricted period due to the employee's fiduciary duty breach or unlawful taking of the employer's property, or if the employer waives the noncompetition covenant.

6. Consistent with prior case law, the noncompetition agreement must be reasonable and be no broader than necessary to protect the employer's legitimate business interests (*i.e.*, its trade secrets, confidential information, or goodwill).

7. The geographic scope of the noncompetition agreement is presumed reasonable if it is limited to any geographic areas in which the employee provided services or had a material presence or influence at any time during the last two years of his or her employment.

8. The activity restraint of the noncompetition agreement is presumed reasonable if it is limited to the specific type of services the employee provided at any time during the last two years of his or her employment.

9. The Act covers noncompetition agreements entered into with independent contractors as well.

10. The Act applies to forfeiture-for-competition agreements, but not to other types of restrictions, including employee, customer, or vendor nonsolicitation agreements, nondisclosure or confidentiality agreements, invention assignment agreements, or noncompetition agreements entered into in connection with the sale of a business.

11. The Act does not apply to noncompetition agreements entered into upon a termination of employment, provided the employee is expressly given seven business days to rescind his or her acceptance of the agreement.

12. Noncompetition agreements will not be enforceable, even if they otherwise comply with the Act, for employees who are not exempt from overtime pay under the Fair Labor Standards Act, employees who are age 18 or younger, undergraduate or graduate students, or employees who are laid off or terminated without cause (which is undefined).

13. Significantly, the Act's garden leave and other onerous statutory requirements do not apply to noncompetition agreements entered into at any time through September 30, 2018; these agreements remain subject to existing Massachusetts noncompetition case law.

Employers should review their form noncompetition agreements and human resources practices with counsel, and ensure all noncompetition agreements entered into with Massachusetts-based employees and independent contractors on or after October 1, 2018 comply with the Act.

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