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WHITE PAPER

July 2020

An Update on Noncompete Legislation Following Passage of Massachusetts' Non-Compete Law

In October 2018, businesses across the country braced for the effects of a noncompete law that was enacted in Massachusetts. The "garden leave" clause in Massachusetts' non-compete law dictated that during the period in which a departed employee is prohibited from working for a competitor, the previous employer must compensate the departed employee with at least 50% of his or her salary. However, compromise language added to the final version of the law permits "mutually-agreed upon consideration" to be substituted for the "garden leave" compensation.

Since Massachusetts enacted its statute, several other jurisdictions have created or amended noncompete laws. Much of the legislation invalidates noncompete agreements as contrary to public policy, particularly with respect to low-wage workers, or creates significant limits on enforceability.

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On October 1, 2018, two Massachusetts laws[1] went into effect that significantly impacted businesses across the country that operate in the Commonwealth.[2] The enactment of these laws, which govern noncompete agreements and trade secrets, signaled a compromise between Massachusetts' emerging high-tech culture and its more established industries, which had been battling over legislative reform in these areas for years. Since then, a number of jurisdictions have passed new noncompete legislation. This *White Paper* provides an overview of these new laws.

NEW NONCOMPETE LEGISLATION

After the Massachusetts noncompete legislation went into effect, many other jurisdictions enacted new noncompete legislation. Many of the new laws impose restrictions on noncompete clauses in employment agreements, including Maryland, Oregon, Maine, and Nebraska. This new legislation is discussed below, beginning with the most restrictive laws.

Maryland Noncompete Legislation

Effective October 1, 2019, Maryland enacted noncompete legislation that limits the enforceability of some noncompete provisions as contrary to public policy.[3] Specifically, section 3-716(b) of the law provides that a noncompete or conflict of interest provision in an employment agreement that restricts the ability of an employee to enter into employment with a new employer or to become self-employed in the same or similar business is void as contrary to public policy.

Oregon Noncompete Legislation

Oregon enacted three statutes between January 2018 and January 2020 relating to noncompete agreements.[4] The most recent legislation,[5] effective January 1, 2020, focuses on noncompete and bonus restriction agreements. The statute provides that a noncompete agreement entered into between an employer and employee is voidable and may not be enforced unless it meets certain conditions, including: (i) the employer must provide a written employment agreement containing a noncompete provision at least two weeks prior to the first day of employment; or (ii) the agreement is entered into upon a subsequent bona fide advancement of the employee by the employer; (iii) the employee is an excluded employee pursuant to § 653.020; (iv) the employer has a protectable interest; or (v) the total amount of the employee's annual gross salary and commissions at the time of termination exceeds the median family income for a four-person family, as determined by the U.S. Census Bureau. Further, the term of a noncompete agreement may not exceed 18 months from the date of termination.

Maine Noncompete Legislation

In 2019, Maine passed new noncompete legislation.[6] Maine's new legislation has both a public policy component and specific requirements for enforcement. The law defines a noncompete agreement as a contractual provision that prohibits an employee or prospective employee from working in the same or a similar profession or in a specified geographic area for a certain period following termination.

The new legislation makes clear that noncompete agreements are contrary to public policy. As such, Maine's noncompete legislation makes noncompete agreements enforceable only if they are reasonable and no broader than necessary to protect at least one legitimate business interest. Legitimate business interests include: (i) the employer's trade secrets[7]; (ii) the employer's confidential information that does not qualify as a trade secret; or (iii) the employer's goodwill.

Furthermore, although noncompete provisions are generally disfavored, they may be deemed necessary in certain situations. For example, a noncompete agreement may be needed in situations where a business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a nonsolicitation agreement or a nondisclosure or confidentiality agreement.

If a noncompete clause is reasonable, protects one or more legitimate business interests, or is deemed necessary, certain requirements set forth in the law still must be met. For example, an employer is required to disclose, prior to an offer of employment, that it will require the employee to accept a noncompete agreement. And the employer must notify an employee or prospective employee of a noncompete agreement requirement and provide a copy of the noncompete agreement not less than three business days before the employer requires the agreement to be signed, to allow time for the employee or prospective employee to review and negotiate the terms with the employer if he or she wishes to do so.

Last, under the new law, the terms of a noncompete agreement cannot take effect until one year after employment begins, or

six months from the date the agreement was signed, whichever is later.

Nebraska Noncompete Legislation

Effective April 12, 2018, Nebraska enacted legislation governing noncompete agreements as they relate to franchise practices.[8] Specifically, under the Nebraska law, if restrictions in a noncompete agreement are found by a court or arbitrator to unreasonably restrain competition, the court or arbitrator shall reform the terms to the extent necessary to render the restrictions reasonable and enforceable. To date, no court has defined "reasonable and enforceable" restrictions.

LIMITATIONS ON NONCOMPETES WITH LOW-WAGE WORKERS[9]

Maine, Maryland, Rhode Island, Virginia, New Hampshire, and Washington have enacted legislation restricting the enforcement of noncompete agreements against low-wage workers.

Maine

Maine's general noncompete legislation also address noncompete clauses as they relate to low-wage workers.[10] Specifically, the legislation prohibits noncompete agreements with employees earning less than 400% of the federal poverty level (or, for 2020, $51,040). There is also a penalty of at least $5,000 for each violation.

Maryland

In addition to the previously discussed public policy considerations, the new Maryland law further provides that employers are prohibited from requiring noncompete or conflict of interest provisions in employment agreements with employees who earn (i) $15 or less per hour; or (ii) $31,200 or less annually.[11]

Rhode Island

Under a new Rhode Island law,[12] which became effective July 15, 2019, noncompete agreements are prohibited with employees in four categories: (i) nonexempt employees under the Fair Labor Standards Act; (ii) students working in internships or short-term employment while enrolled in school; (iii) individuals who are 18 years of age or younger; or (iv) low-wage workers, defined as those workers earning less than 250% of the federal poverty level. The law does not apply to noncompete agreements entered into in connection with the sale of a business, outside the employment relationship, or in connection with an employment termination if the employee has seven business days to consider it.

Virginia

In April 2020, Virginia amended its noncompete law to prohibit employers from entering into, enforcing, or threatening to enforce noncompete agreements with low-wage workers, defined as employees earning less than the average weekly wage in Virginia as calculated for workers' compensation purposes ($1,137 as of July 1, 2020).[13] The law does not carve out nonsolicitation agreements, but provides that a noncompete clause cannot prohibit an employee from servicing a former customer without soliciting them or where the customer initiates the contact. The law also allows agreements expressly protecting trade secrets and other confidential information. Finally, employers must post a notice with the provisions of the law or an approved summary.

New Hampshire

Effective September 8, 2019, a new New Hampshire law prohibits noncompete agreements with low-wage workers, defined as employees who earn an hourly rate less than or equal to 200% of the federal minimum wage or the tipped minimum wage under New Hampshire law.[14]

Washington

On April 26, 2019, Washington enacted the "Non-Compete Act" prohibiting noncompete agreements (but not non-solicitation or confidentiality agreements) with either (i) employees who annually earn $100,000 or less; or (ii) independent contractors who annually earn $250,000 or less.[15] The law applies to all proceedings commenced on or after January 1, 2020, regardless of when the cause of action arose.[16]

CONCLUSION

Over the past 18 months, there has been considerable new legislation restricting noncompete agreements. The new legislation generally disfavors noncompete agreements as against public policy, and creates significant limitations on enforcement. Employers should take care to ensure that their employment agreements are compliant.

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Special thanks to Kate M. Thompson, an associate in the Boston Office, for her contributions in preparing this White Paper.

ENDNOTES

1 Mass. Gen. Laws ch. 149, § 24L & Mass. Gen. Laws ch. 266, § 30(4).

2 This *White Paper* serves as an update to a Jones Day October 2018 *White Paper* entitled, "Massachusetts Noncompete and Trade Secret Reform Will Have Far-Reaching Impact."

3 MD Code, Lab. & Empl., § 3-716.

4 O.R.S. § 410.631: Noncompetition agreement with home care worker is voidable by home care worker; O.R.S. § 410.631: Noncompetition agreements; voidable by home care worker or personal support worker; and O.R.S. § 653.295: Noncompetition agreements; bonus restriction agreements.

5 O.R.S. § 653.295.

6 26 M.R.S.A. § 599-A.

7 Trade secret means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that: A. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and B. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. 10 M.R.S.A. §1542(4).

8 Neb. Rev. St. § 87-404(2).

9 Several courts have refused to enforce noncompete restrictions on low-wage workers as unreasonable, even absent any statutory prohibition. *See*, *e.g.*, *BHB Inv. Holdings, LLC v. Ogg*, 2017 WL 723789, at *2 (Mich. Ct. App. Feb. 21, 2017); *Ecology Servs., Inc. v. Clym Envtl. Servs., LLC*, 952 A. 2d 999, 1004-05 (Md. App. 2008).

10 26 M.R.S.A. §§ 599-A, 599-B.

11 MD Code, Lab. & Empl., § 3-716(a)(1)(i).

12 R.I. Gen. Laws §§ 28-58-1 to 28-58-3.

13 Va. Code § 40.1-28.7:8.

14 N.H. RSA 275:70-a.

15 Wash. Rev. Code § 49.62.005, *et seq*.

16 Wash. Rev. Code § 49.62.100.