Client Alert | Employment, Compensation & Benefits

Massachusetts Restricts "Employee" Non-Competition Agreements

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Authors: Jeffrey Ii, Tal Marnin, Henrik Patel

The Massachusetts Noncompetition Agreement Act (the "Act") takes effect on October 1, 2018, and will, in most circumstances, govern the use of non-competition agreements for employees (and independent contractors) in Massachusetts.

Details regarding the requirements of the Act are discussed below, but some of the key provisions of the Act include the requirement to provide advance notice of any requested restrictions, a maximum duration of the restricted period, a requirement to provide garden leave or some other form of "mutually-agreed" consideration during the restricted period, the discretionary right of courts to reform overbroad provisions, prohibition on choice of law provisions to avoid the requirements of the Act, and exclusive jurisdiction in Massachusetts for any disputes.

Background

The Act applies to non-competition agreements (including forfeiture for competition agreements) between an employer and an employee, in connection with an existing or anticipated employment relationship, which are entered into on or after October 1, 2018. The definition of "employee" in the Act includes independent contractors as well as employees.

Certain agreements are not treated as non-competition agreements for purposes of the Act, including:

- 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;
- Agreements made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership (or otherwise disposing of the ownership interest of a business entity or partnership, or a division or subsidiary thereof), when the restricted party is a "significant owner of, or member or partner in, the business entity" and will receive "significant consideration or benefit from the sale or disposal,"
- Agreements outside of an employment relationship;

- Forfeiture agreements (i.e., an agreement that imposes adverse financial consequences as a result of the termination of employment, regardless of whether the employee engages in competitive activities);
- Nondisclosure or confidentiality agreements and invention assignment agreements;
- Garden leave clauses;
- Agreements made in connection with the cessation or separation from employment (as long as the employee is expressly given seven (7) days to rescind acceptance); or
- Agreements not to reapply for employment with the same employer following termination.

Requirements for an Enforceable Non-Competition Agreement

The Act sets forth specific requirements that a non-competition agreement must satisfy in order to be enforceable. These requirements include the following:

- **Written Agreement**. The agreement must be in writing and signed by both the employer and the employee. In addition, the agreement must specifically indicate that the employee has the right to consult with counsel prior to signing.
- **Advance Notice and Consideration for Continuing Employees.**
  - For an agreement entered into in connection with the commencement of employment, the agreement must be provided to the employee before the earlier of (i) the time that the formal employment offer is made, or (ii) ten (10) business days prior to the employee's start date.
  - For employees who enter into a non-competition agreement after the commencement of employment, the employer must provide advance notice of the agreement of not less than ten (10) business days before the agreement is effective. In addition, the Act requires the employer to provide "fair and reasonable" consideration to the continuing employee (i.e. continued employment is not sufficient consideration). However, the Act does not provide any details as to what consideration will be considered "fair and reasonable."
- **Restricted Period**. The Act provides that the restricted period may not exceed one (1) year from the date of termination, although this period may be extended (but not beyond two (2) years after termination) if the employee has breached his or her fiduciary duty to the employer or has unlawfully taken the employer's property.
- **Scope**. The agreement must be no broader than necessary to protect the employer's trade secrets, confidential information or goodwill. The agreement must be reasonable in geographic scope and in scope of prohibited activities. The geographic scope will be presumed reasonable if it is limited to the geographic area in which the employee, at any time during the last two (2) years of his or her employment, provided services or had a material presence or influence. The scope of prohibited activities will be presumed reasonable if limited to only the specific types of services provided the employee at any time during the last two (2) years of employment.
- **Garden Leave/Other Consideration**. The Act requires that the non-competition agreement must include a garden leave clause or provide "other mutually-agreed upon" consideration between the employer and the employee (although no guidance is provided with respect to what constitutes other mutually-agreed upon consideration that will suffice for purposes of the Act). The garden leave clause must provide for payment to the employee on a pro-rata basis during the entirety of the restricted period at least 50% of the employee's highest annualized base salary paid by the employer during the two (2) years preceding termination (but such payment does not need to be made in the second year for any extension of the restricted period due to the employee's breach of fiduciary duty to the employer or unlawfully taking the employer's property, as noted above).

The agreement cannot provide the employer with a unilateral right to discontinue or otherwise fail or refuse to make the payments, except in the event of a breach by the employee—although the Act's definition of "garden leave clause" notes that the clause becomes effective "unless the restriction upon post-employment activities are waived by the employer" and therefore it appears that an employer can waive the restrictions to avoid paying the previously-agreed garden leave payments, assuming the clause is written in that manner).

- **Choice of Law; Exclusive Jurisdiction**. The Act provides that no choice of law provision—presumably specifying the law of a state other than Massachusetts—shall be effective to avoid the requirements of the Act if the employee is, and has been for at least 30 days immediately prior to the termination of employment, a Massachusetts resident or if the employee is employed in Massachusetts at the time of termination. The Act also provides that all civil actions relating to agreements covered by the Act must be brought in the county where the employee resides or if mutually agreed upon, in the county of Suffolk. Actions in the county of Suffolk must be adjudicated in the superior court or business litigation section of the superior court (i.e. not in a federal court located in the county of Suffolk).
- **Reformation/Blue Pencil**. The Act allows a court, in its discretion, to reform or otherwise revise an agreement that is too broad, in order to render it valid to protect the employer's legitimate business interests. The Act also states that nothing therein shall render void or unenforceable the remainder of a contract that contains an unenforceable non-competition agreement.

Prohibitions on Non-Competition Agreements for Certain Employees

The Act also provides that a noncompetition agreement is not enforceable against the following types of employees: (1) an employee who is classified as non-exempt for overtime purposes under the federal Fair Labor Standards Act (which could include "inside sales" employees, typically classified as non-exempt); (2) a student (undergraduate or graduate) who is an intern or who is hired for a short-term period of employment while he or she is enrolled in college; (3) an employee who has been terminated without cause (note that the Act does not include a definition of cause) or was laid off (unless entered into with such employee in connection with the cessation or separation of employment); or (4) an employee who is 18 years old or younger.

White & Case LLP
1221 Avenue of the Americas
New York, New York 10020-1095
United States

T +1 212 819 8200