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Answers to Key Questions About Massachusetts' New Non-Compete Law

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Client Advisory
August 23, 2018 by Jeffrey S. Boxer

Massachusetts Governor Charlie Baker recently signed legislation enacting a sweeping overhaul of Massachusetts' non-compete law. Here are answers to some key questions raised by the new statute:

Does the new law cover all post-employment restrictive covenants in Massachusetts? No.

The new law applies only to non-compete agreements. It does not cover agreements not to solicit clients, employees or vendors.

For purposes of the Massachusetts statute, an agreement in which an employee suffers "adverse financial consequences" for competing is treated as a non-compete agreement that must meet the requirements of the statute.

Non-compete restrictions in separation agreements are not governed by the new law if the separation agreement expressly gives the employee seven days after execution to rescind acceptance.

The new law does not apply to non-compete restrictions agreed to in connection with the sale of a business if the individual bound by the non-compete "is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit" from the sale.

Does the new law cover existing non-competes? No.

The new law applies to non-compete agreements entered into with employees or independent contractors on or after October 1, 2018. It does not impact existing agreements.

Are there categories of employees who cannot be subjected to non-competes? Yes.

The Massachusetts statute prohibits non-competes for employees who are nonexempt under the federal Fair Labor Standards Act. In general, this means that a non-compete cannot be enforced against an employee who is entitled to overtime compensation under the FLSA. Independent contractors are not classified as nonexempt under the FLSA, so this prohibition should not apply to independent contractors.

The Massachusetts statute also prohibits enforcement of non-competes against employees who are terminated without cause or who are laid off.

Employees who are under 18 and students working through an internship or short term employment relationship cannot be bound by non-compete agreements under the new statute.

Does the new law limit the length or scope of non-competes? Yes.

One big change under the statute is the permissible length of a non-compete. Non-competes covered by the new statute may not exceed 12 months from the last day of employment, unless the employee breaches his or her fiduciary duty or unlawfully takes the employer's property, in which case the non-compete may not exceed two years.

The statute provides that a non-compete must not be broader than necessary to protect the legitimate interests of the employer, and it defines legitimate interests as trade secrets, confidential information, and goodwill. This is generally consistent with existing common law and does not represent a material change from current law.

A non-compete must be reasonable in geographic reach. This also is generally consistent with existing common law. The statute provides that a non-compete that is limited to the geographic areas in which the employee provided services or had a material presence or influence during any time in the prior 2 years of employment is presumptively reasonable.

A non-compete must be reasonable in the scope of prohibited activities. Again, this is generally consistent with existing common law. A restriction that protects an employer's legitimate business interest and is limited to "only the specific services provided by the employee at any time during the last 2 years of employment is presumptively reasonable."

The statute preserves the courts' power to modify an unreasonable non-compete to render it enforceable.

Does the new law address garden leaves? Yes.

The new statute authorizes garden leaves if certain criteria are met.

If the non-compete contains a garden leave provision, then the employee must be paid at least 50% of his or her highest annualized base salary in the two years prior to termination. The payment must be made in a manner consistent with normal payroll practices under Massachusetts law and must be paid "on a pro-rata basis during the entirety of the restricted period."

Does the new law impose other requirements? Yes.

All non-competes must be in writing and must be signed by both the employer and the employee.

The non-compete agreement must expressly state that employee has the right to consult with counsel prior to signing the agreement.

The non-compete must be provided to a new employee at the earlier of (a) formal offer of employment or (b) 10 business days before commencement of employment. A non-compete for an existing employee must be provided to the employee at least 10 business days before the agreement is to be effective.

The non-compete must specify the consideration provided to the employee in exchange for the non-compete. If an employer enters into a non-compete with an existing employee, there must be "fair and reasonable consideration independent from the continuation of employment."

Does the statute limit choice of law or choice of forum provisions? Yes.

All court actions relating to a non-compete governed by the statute must be brought in the county where the employee resides or (if the parties agree in writing) in Suffolk County, Massachusetts.

If the employee resides or is employed in Massachusetts for at least 30 days prior to the termination of employment, then the statute voids a choice of law provision selecting any other state's law. Thus, the Massachusetts statute will apply to non-competes of employees who live or work in Massachusetts immediately prior to the termination of employment.

What should employers with employees in Massachusetts do in light of this new law? Careful preparation now can minimize unexpected outcomes down the road.

Employers should prepare for the new law by consulting with counsel to review and revise their non-compete and employment agreement templates. For example, since non-competes governed by the statute will not be enforceable against an employee who is terminated without cause, contracts with employees subject to non-competes should contain clear definitions of what constitutes cause for termination.

Non-competes governed by the new statute can, in some situations, include language extending the length of the non-compete beyond the one year limit if the employee breaches his or her fiduciary duty or takes company property, and employers should consult with counsel on when it is appropriate to extend a non-compete beyond one year and what language to use in the agreement to accomplish this goal.

The Massachusetts statute applies to non-competes entered into on or after October 1, 2018, but it does not explicitly address whether it applies to non-competes in existing agreements that automatically renew, are extended or are modified after October 1. Employers should be wary of altering existing non-competes to avoid potentially triggering application of the new statute.

Before entering into a new non-compete agreement with an employee, the employer and its counsel should carefully consider whether the employee falls into one of the categories against whom a non-compete is unenforceable. Since the Massachusetts statute prohibits non-competes for nonexempt employees, there likely will be increased focus and litigation on whether an individual employee is exempt under the Fair Labor Standards Act.

Employers also need to adjust their procedures to ensure that they give employees the advance notice of the non-compete required by the statute.

Employers should consider increasing their use of other types of post-employment restrictions such as non-solicitation and confidentiality agreements.

For more information concerning the matters discussed in this publication, please contact the author Jeff Boxer (212-238-8626, boxer@clm.com), or your regular Carter Ledyard attorney.

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