WILMERHALE

New Massachusetts Non-Compete Law Requires Employers to Make Immediate Changes to Their Non-Competition Agreements

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On August 10, 2018, Massachusetts Governor Charlie Baker signed a bill reforming Massachusetts law regarding non-competition agreements. This new law, which takes effect on October 1, 2018, will require employers to modify their non-competition agreements entered into on and after October 1st. Set forth below are the law's main components of which employers should be aware. While employers should immediately take steps to modify their non-competition agreements to comply with the new law's requirements, they should do so with the understanding that the new law contains some undefined terms and ambiguities, rendering it unclear about what exactly will—and will not—be deemed permissible in a non-competition agreement. Hopefully more clarity will be forthcoming once the courts have had a chance to interpret and enforce this new law.

Coverage

The new law applies to non-competition (including "forfeiture for competition") agreements entered into on and after October 1, 2018, whether by an employee or independent contractor (each referred to in the new law and this alert as an "employee"). The new law applies to any employee who was a resident of, or was employed in, Massachusetts for at least 30 days before his/her termination date.

Notably, the new law does not apply to any other type of restrictive covenant agreement, including non-solicitation agreements (whether addressing solicitation of employees, customers, clients or vendors), non-disclosure or confidentiality agreements, invention assignment agreements, or non-competition agreements entered into in connection with the sale of a business. In addition, the new law does not apply to a non-competition agreement entered into in connection with an employee's separation from employment, provided that the employee is expressly given seven business days to rescind such agreement.

Unenforceable Agreements

Under the new law, non-competition agreements (other than those signed in connection with an employee's separation) are **not** enforceable against the following types of individuals:

- Employees who are classified as **non-exempt** under the Fair Labor Standards Act;
- Employees who have been terminated **without cause** or **laid off** (neither of which term is defined in the statute);
- Undergraduate or graduate students partaking in an internship or otherwise entering into a short-term employment relationship, whether paid or unpaid, while enrolled in a full-time or part-time educational institution; and
- Employees age 18 or younger.

Requirements for Enforceability

Under the new law, a non-competition agreement must meet the following requirements to be valid and enforceable:

- The agreement must be in writing, signed by both the employee and the employer.
- The agreement must expressly state that the employee has the right to consult with counsel prior to signing.
- The agreement must be provided to a prospective employee by the earlier of (x) a date before a formal offer of employment is made, and (y) 10 business days before the employee commences employment.
- If given to a current employee, the agreement must (i) be provided at least 10 business days before the agreement is to be effective, and (ii) be supported by "fair and reasonable consideration" (which term is not defined).
- The agreement must be no broader than necessary to protect the employer's trade secrets, confidential information, or goodwill.
- The duration of the non-compete may not exceed 1 year following the employee's termination date, unless the employee has breached his or her fiduciary duty to the employer or unlawfully taken employer property, in which case the duration may not exceed two years following the employee's termination date.
- The agreement must be reasonable in geographic scope in relation to the interests protected (the new law finds presumptively reasonable a geographic scope limited to those areas in which the employee provided services or had a material presence or influence at any time within the last two years of employment).
- The agreement must be reasonable in the scope of proscribed activities in relation to the interests protected (the new law finds presumptively reasonable a restriction limited to the specific types of services provided by the employee at any time within the last two years of employment).
- The agreement must be consistent with public policy.

Consideration for the Noncompete

The new law further requires that, in order to be valid and enforceable, a non-competition agreement must include either a "garden leave" clause or other "mutually-agreed upon consideration."

A "garden leave" clause must provide the employee, during the post-employment non-compete

period, with payments equal to 50% of the highest base salary rate the employee received within the preceding two years (with no right for the employer to discontinue such payments).

While the new law does not define or give examples of what would constitute other "mutually-agreed upon consideration," the law should permit an employer to provide, in lieu of the garden leave post-employment payments, some other amount or type of consideration in exchange for the non-compete (such as an up-front signing bonus, equity grant, or salary raise). However, it ultimately will be up to the courts to determine: (i) what consideration will be deemed sufficient, (ii) whether the consideration may be provided upfront rather than during the post-employment non-compete period, and (iii) whether the mutually-agreed upon consideration could also satisfy the requirement of "fair and reasonable consideration" that must be given to current employees in exchange for their execution of a non-competition agreement. Until then, to enhance the likelihood of enforceability, best practice dictates that employers provide consideration that is fair and reasonable and that they specifically tie such consideration to the employee's execution of the non-competition agreement.

Enforcement

Importantly, the law continues to grant courts the ability (in their discretion) to reform or otherwise revise a non-competition agreement to make it valid and enforceable.

Employers may not circumvent the new law simply by including a non-Massachusetts choice of law provision, as the new law renders such a provision unenforceable if the employee has been, for at least 30 days immediately preceding his or her termination date, a resident of, or employed in, Massachusetts.

Any actions related to this new law must be brought in a court in the county in which the employee resides or, if mutually agreed upon by the employer and employee, in the superior court or business litigation session of the superior court of Suffolk County.

Next Steps for Employers

Employers who are located or employing individuals in Massachusetts should immediately review their non-competition agreements and practices, as the new law takes effect in just a few weeks.

Employers are encouraged to reach out to counsel for assistance in modifying their non-competition agreements, offer letters, and policies, to ensure that these documents are in compliance with the new law. Employers are also advised to review and consider strengthening their other restrictive covenant agreements that are not covered by the new law.

Finally, employers should remain on alert following October 1st for guidance about how the courts ultimately interpret and enforce this new law, and should work with counsel to make any additional modifications to their non-competition agreements that are recommended in light of future clarifications. If you have any questions or would like assistance modifying your company's non-competition agreement to comply with the new law, we encourage you to contact a member of our Labor and Employment Group.

Authors

Jonathan Rosenfeld

RETIRED PARTNER

jonathan.rosenfeld@wilmerhale.com

+1 617 526 6000

Laura E. Schneider

PARTNER

Chair, Labor and Employment Practice

laura.schneider@wilmerhale.com

+1 617 526 6846

Ariella Feingold

PARTNER

ariella.feingold@wilmerhale.com

+1 617 526 6140

Andrew Stauber

SPECIAL COUNSEL

andrew.stauber@wilmerhale.com

+1 617 526 6815

Julie Murphy

ATTORNEY

julie.murphy@wilmerhale.com

+1 617 526 6684