Gesmer Updegrove LLP

ClientUpdate

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Massachusetts Law Dramatically Changes Non-Competition Rules

The Massachusetts Legislature has attempted to pass legislation regulating noncompete agreements every year since 2009. This year, it finally succeeded. The new law, which will take effect on October 1, 2018, makes important changes to the body of Massachusetts non-compete "common-law" that has evolved over many decades.

Here are the highlights of the new law:

Not Retroactive. The law is not retroactive. Any noncompete entered into before October 1, 2018 (we refer to this as simply "2018" from this point forward) is unaffected. This means that, as a practical matter, there will be two bodies of law: judges will apply the "old" law to pre-2018 agreements, and the new statute to agreements entered into after 2018.

The Ten Day Notice Requirement. For a non-compete to be enforceable the employer must follow certain procedures. The most important of these is that a written noncompete agreement must be provided to the employee before a formal offer of employment is made, and at least 10 days before employment begins. This means that the new employee can't be ambushed with a noncompete at the last minute. "You'll start work tomorrow" is a thing of the past, at least where the employer wants a noncompete in place.

The One Year Limitation. A noncompete agreement may not impose a "restricted period" (the law's term for the post-employment period the noncompete is in effect) longer than one year, but there is an exception: the agreement may be longer if the employee has breached a fiduciary duty to the employer or unlawfully taken physical or electronic property belonging to the employer. Since, as a practical matter, employers will only learn this after-the-fact (during or following employment), this may mean that agreements will include an "alternative" provision that will take effect only if an employee engages in one of these violations.

Employees Terminated Without Cause/Laid Off. A noncompete agreement may not be enforced against certain categories of employees. The most important category is employees terminated without cause or laid off. This means that noncompetes will only be enforceable against employees who voluntarily resign or who are terminated for "cause" – a term that is left undefined in the law. This is a significant change from the pre-2018 law.

Hourly Employees Exempt. In addition, the law does not permit enforcement of noncompete agreements against "non-exempt" employees (such as hourly employees eligible for overtime) and students.

Noncompetes and the Sale of a Business. Massachusetts common law has treated non-compete agreements tied to the sale of a business more liberally than employer/employee agreements. The new law does not change this – it does not regulate noncompetes entered into by business owners in connection with the sale of a business.

Non-Solicitation/No-Hire Agreements. The law does not affect agreements in which an employee agrees not to solicit or hire employees of the employer or not to solicit or transact business with customers of the employer ("non-solicitation"/"no-hire" agreements). This is an important exception that employers will want to utilize. However, it is not a blank check to impose lengthy restrictions, since these agreements will

still be subject to the reasonableness standard of Massachusetts common law.

Garden Leave. The provision in the law that has perhaps received the most attention is the "garden leave" provision. This requires the employer to continue paying the employee, during the restricted period on a pro rata basis, no less than 50% of the employee's annualized base salary. The garden leave clause providing for this payment must be included in the noncompete agreement.

However, the law contains an important exception (some would say a loophole) to garden leave payments: the employer and employee may agree on "other mutually-agreed upon consideration." While the interpretation of this phrase is likely to be the subject of litigation, on its face there is nothing requiring that the agreed upon consideration be "reasonable." For example, the parties may agree that the employee will receive garden leave payments in an amount less than 50% and still be subject to a noncompete.

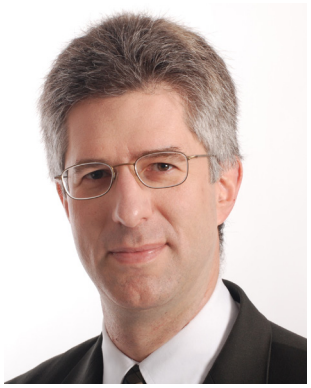
Noncompetes After the Employee Has Started Work. In cases where an employer fails to ask an employee to sign a noncompete when hired, employers sometimes will ask employees to enter into noncompetes after they have started working, sometimes months or years later. Whether the employee's continued employment is adequate consideration to the employee for such an agreement has been the subject of legal controversy: most courts, but not all, have held that continued employment is sufficient consideration for a noncompete.

The new law attempts to clear this up by requiring that under these circumstances the agreement be supported by "fair and reasonable consideration independent from the continuation of employment." However, as noted above, all noncompetes must provide "garden leave" pay or some "other mutually agreed upon consideration." It is unclear whether the reference to "fair and reasonable consideration" is a reference to garden leave pay, mutually agreed upon consideration or something more. We'll be watching to see how the courts interpret this section of the law.

Employers Outside Massachusetts. Employers based outside of Massachusetts may not be able to avoid the Massachusetts noncompete law by stating that a noncompete agreement is subject to the laws of another state or treating the employee as an independent contractor. The law applies if the employee is, and has been for at least 30 days immediately preceding cessation of employment, a resident of or employed in Massachusetts at the time of termination of employment. And, the law expressly applies to independent contractors.

What To Do Now. Many companies have standard noncompete agreements that they have used for years, and that they rarely review. It is safe to assume that these agreements do not comply with the new Massachusetts compete law. Very likely, every existing boilerplate noncompete agreement covering a Massachusetts employee will be obsolete (and unenforceable) beginning on October 1, 2018. The new noncompete regime in Massachusetts is complex, and it will be in effect in less than two months. Any company that plans to use a noncompete agreement after that date should begin the process of revising their agreements in time to meet this deadline.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the new noncompete law, please contact Joe Laferrera or Lee Gesmer at (617) 350-6800, or email them at joe.laferrera@gesmer.com or lee.gesmer@gesmer.com.



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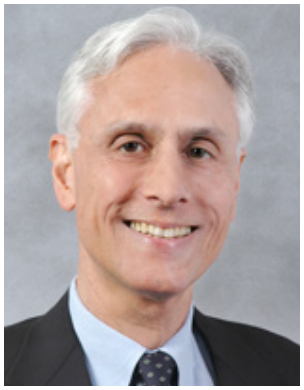

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