Massachusetts Legislature Passes Non-Compete Reform Bill

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After many years of debate, the Massachusetts Legislature passed a comprehensive non-compete reform bill. If Governor Baker signs the bill into law (as is expected), the new law would prohibit employers from requiring that certain types of employees sign non-competition agreements and would establish minimum requirements – largely consistent with existing case law – that non-competition agreements must meet to be enforceable. If signed by the governor, the law will take effect on October 1, 2018 and apply to agreements executed after that date. (It does not apply retroactively to existing agreements.)

Coverage and Application

The measure passed by the Legislature applies to employees and independent contractors who are, or have been for at least 30 days immediately prior to termination, a resident of or employed in Massachusetts. Employers cannot avoid the law's requirements by including a choice of law provision requiring that a different state's law to apply to the agreement. Thus, employers based outside of Massachusetts will not be able to subject their Massachusetts employees to another state's law.

The law would apply to traditional non-competition agreements, which prohibit competitive activities after employment ends, and "forfeiture for competition" agreements, which impose adverse financial consequences if an employee competes. It would not apply to other kinds of restrictive covenants, including non-disclosure agreements, assignment of invention provisions, and non-solicitation restrictions (as to employees, customers and vendors). All of these restrictions will continue to be governed by existing common (judge-made) law.

Importantly, the law's requirements would not apply to non-competes included in a separation agreement, so long as the employee has been given seven days to rescind acceptance of the agreement.

New Prohibitions

A non-competition agreement will not be enforceable against the following categories of employees:

- Non-exempt (overtime eligible) employees under the Fair Labor Standards Act;
- Undergraduate or graduate students employed as interns;
- Employees terminated "without cause" or who are laid off; and
- Employees age 18 or younger.

New Requirements

Under the new law, non-competition agreements would have to meet eight minimum requirements to be valid and enforceable:

1. If entered into at hire, the agreement must be signed by both the employer and the employee, expressly state that the employee has the right to counsel prior to signing, and must be provided to the employee by the earlier of a formal offer of employment or 10 business days before the hire date;
2. If entered into during employment (after hire), there must be additional consideration (something of value) supporting it, and the requirements above (signed by both parties, employee given 10 days' notice, employee given notice of right to counsel) must be

met.

3. The duration of the restriction cannot exceed 12 months, except that the duration can be as long 2 years where the employee breached his or her fiduciary duty or unlawfully took the employer's property.
4. Incorporating long-standing common law requirements, the agreement must be no broader than necessary to protect an employer's trade secrets, confidential information and/or good will. A non-compete is presumed to be necessary where these interests cannot be adequately protected through other restrictions.
5. Also incorporating existing law, the restriction must be reasonable in geographic scope. If the scope is defined as the areas in which the employee "provided services or had a material presence or influence" during the past 2 years, it will be considered presumptively reasonable.
6. The agreement also must be reasonable in the scope of the prohibited activities in relation to the interests protected. It will be presumptively reasonable if it is limited to only the specific types of services provided by the employee during the last 2 years of employment.
7. The agreement must include a "garden leave" clause or "other mutually-agreed upon consideration." "Garden leave" is defined as payment during the restricted period of at least 50% of the employee's highest annualized base salary within the preceding two years. However, "other mutually-agreed upon consideration" is not defined. Thus, it appears that an employer and employee could agree to something less than 50% pay while still satisfying this requirement.
8. The agreement must be consistent with public policy (as is the case under existing common law).

All actions to enforce a non-compete must be brought in Massachusetts in the employee's county or Suffolk County's Business Litigation Session.

Assuming Governor Baker signs the bill into law, employers in Massachusetts will need to carefully review and revise their existing forms of non-competition agreements to ensure compliance with the requirements summarized above. Employers also will need to ensure that their hiring practices comply with the notice requirements of the law.

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