FOLEY HOAG LLP

The New Massachusetts Noncompete Law: What You Need to Know

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Speakers

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Existing (Old) Massachusetts Law

To be enforceable, a noncompete must be:

- Supported by consideration
- Necessary to protect employer's legitimate business interests
  - Trade secrets or confidential information
  - Customer good will
- Reasonable in scope, as to both duration and geographic reach

Statutory exceptions:

- Broadcasters
- Physicians and nurses
- Social workers
- Psychologists
- Lawyers (ethics rules)

New Noncompete Law

- August 10, 2018: Governor Charlie Baker signs new legislation into law

  Mass. Gen. L. c. 149, §24K

- Applies only to noncompete agreements executed on or after October 1, 2018

- Compromise legislation follows almost 10 years of debate, including proposals to abolish noncompetes in MA altogether

Coverage and Application

- Applies to Massachusetts employees and independent contractors
- Employers cannot avoid the law using a choice of law provision for individuals who have been resident of, or employed in, Massachusetts for 30 days prior to termination
- Types of agreements covered:
  - Traditional non-competition agreements
  - “Forfeiture for competition” agreements
- Not covered:
  - Non-disclosure agreements
  - Assignment of inventions provisions
  - Non-solicitation/non-interference provisions (as to both customers and employees)
  - No-hire provisions
  - Sale of business noncompetes
  - Noncompetes included in separation agreements (with conditions)

New Exclusions

Noncompete agreements will not be enforceable against:

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

Exclusions: Takeaways/Questions

- Non-exempt employees
  - FLSA exemptions are frequent subject of wage/hour litigation
  - Not all “salaried” employees are exempt
- What is “cause”?
  - Not defined by new law
  - Some employers define “cause” quite narrowly in severance provisions
  - Massachusetts courts have defined “cause” more broadly:
    - “a reasonable basis for employer dissatisfaction with a new employee, entertained in good faith, for reasons such as lack of capacity or diligence, failure to conform to usual standards of conduct, or other culpable or inappropriate behavior,” or
    - “grounds for discharge reasonably related, in the employer’s honest judgment, to the needs of his business”
  - Unclear if this definition will apply at all here
  - Consider defining “cause” within noncompete agreement

New Requirements for Signing

If entered into at hire:

- Must be signed by *both* employer and employee
- Agreement must state that employee has a right to consult with legal counsel prior to signing
- Must be provided to the employee by the earlier of (a) formal offer of employment or (b) 10 business days prior to hire date

If entered into during employment:

- Signed by both employer and employee
- Agreement must state that employee has a right to consult with legal counsel prior to signing
- Must be provided with 10 business days' notice
- Additional "fair and reasonable" consideration is required (apart from continuation of employment)

Offers: Takeaways/Questions

- Must give noncompete on the earlier of “formal offer” or 10 business days before hire

- What is a formal offer of employment?
  - Oral offer may suffice

- Logistical issues:
  - Provide noncompete agreement during interview process?
  - Send noncompete agreement with written offer letter?
    - Consider stating that offer letter “supersedes” previous oral communications
  - What if formal offer is made fewer than 10 days before commencement of employment?
  - What if employee signs noncompete and requests to start work early?

Requirements

Duration Cannot Exceed 12 Months

- Unless employee breached fiduciary duty or unlawfully took employer's property, in which case the agreement can provide for a duration of up to two years

Substantive Scope

- No broader than necessary to protect employer's trade secrets, confidential information and/or goodwill (similar to existing law)

- The law presumes this is met where the interests cannot adequately be protected through other restrictions (e.g., non-solicitation, non-disclosure)

Requirements

Geographic Scope must be reasonable (same as existing law)

- Considered presumptively reasonable if covers areas where the employee "provided services or had a material presence or influence" during last two years of employment

Reasonable in Scope of prohibited activities **as related to interests** protected

- Considered presumptively reasonable if limited to specific types of services provided by employee during last two years of employment

Requirements

Must contain "**Garden Leave**" clause or "**other mutually agreed-upon consideration**"

- Definition of Garden Leave: payment during the restricted period of at least 50% of the employee's highest annualized base salary within the preceding two years, **or**
- "Other mutually agreed-upon consideration" - not defined further
- Employer cannot unilaterally decide to stop paying garden leave in return for no longer enforcing noncompete
- Obligation to pay garden leave "during the restricted period" does not extend past 12 months if restricted period is extended to two years for employee's misconduct

Garden Leave or Other Consideration: Open Questions

- Garden leave provision: clearly defined in the law
- What is “other mutually agreed-upon consideration”?
  - Basic legal principle: “consideration” is anything of value, and courts generally do not analyze whether it is adequate
  - Can the alternative to statutorily-defined garden leave be significantly less than 50% salary during the restrictive period?
  - Must it be at least equivalent? (How is this valued?)
- What if employer decides it doesn’t need the noncompete at the time the employee leaves?
  - Contradictory language:
    - Employer cannot unilaterally discontinue or otherwise fail or refuse to make the payment
    - But “Garden Leave” definition allows for waiver by the employer

Procedural Issues

- Judges still have discretion to reform or otherwise revise a noncompete so as to render it valid and enforceable

- Civil actions must be brought in the county where the employee resides or, if agreed upon by the parties, Suffolk County Business Litigation Session
  - Uncertainty about federal court jurisdiction

Separation Agreements

- New law excludes from coverage “an agreement made in connection with the cessation of or separation from employment”
  - Employee must be given 7 business days to rescind acceptance
- Separation agreements will be key for employees terminated without “cause”
- Uncertain:
  - Enforceability of noncompete reaffirmed as part of termination letter
  - Necessity of providing separate consideration for noncompete agreed to in separation agreement

Key Takeaways

Employers need a strategic approach to imposition of noncompetes in MA

- Message from legislature: noncompetes are overused
- Consider when noncompetes are truly necessary
- Utilize lesser restrictions for less critical personnel
  - Example: non-solicitation and non-interference for sales people

Most existing templates will need to be overhauled

- Must be signed by both employer and employee (many forms don't require this)
- Must include notification of right to consult counsel
- Duration of restricted period (up to 1 year, but 2 if misconduct occurs)
- Scope of restrictions – tailor to make presumptively valid
- Garden leave or other consideration
- Carve-out for layoffs and without cause terminations

Concluding Thoughts

- Less than a month and a half until October 1, 2018
- Employers should use this time to:
  - Assess practices to ensure adequate notice to incoming employees
  - Revise forms to comply with new statutory requirements

Thank you!

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