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ADVISOR BLOG

New Massachusetts Non-Compete Law Goes into Effect Next Week—Is Your Company Ready?

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Starting next week, an employer's ability to enter into an enforceable non-compete agreement will be significantly reduced and regulated in the state of Massachusetts. On October 1, 2018, the Commonwealth will join other states that have also recently passed regulation of employee non-compete agreements. Significantly, new agreements cannot last longer than one year and must provide the employee with compensation in consideration for compliance. Furthermore, the agreements will not be enforceable following a termination without cause (a layoff) or with respect to non-exempt employees. This blog highlights further details of the new restriction, and actions to be considered as the new law goes into effect.

What is the general scope of coverage?

The new law applies to non-compete agreements entered into on or after October 1, 2018 between an employer and an employee or independent contractor. A non-compete generally includes an agreement with an employer whereby the employee or independent contractor promises not to engage in certain specified activities deemed to be competitive with the employer after the employment relationship ends.

Will any new non-competes be enforceable in Massachusetts after October 1?

Yes, but only in limited scenarios. Employers in Massachusetts will not be able to enforce new non-compete agreements ***unless certain requirements*** are met, including:

- **Form**: Agreements must be in writing, signed by both the employer and employee, and expressly state the employee's right to consult with counsel prior to signing.

- **Notice**: The employer must provide notice of the agreement to the employee, the form and timing of which depends on when the employee is asked to sign the agreement:
    - ***Prior to start***: A copy of the agreement must be given to the employee either before making a formal offer or 10 days before the employee starts, whichever comes first.
    - ***During employment***: A notice of the agreement must be given to the employee not less than 10 business days before the agreement becomes effective, and be supported by independent consideration (something other than just continued employment, e.g., a signing bonus).
- **Garden Leave Clause**: Agreements must contain language requiring an employer to pay the employee mutually agreed upon consideration for the duration of the non-compete period of at least 50% of the employee's highest salary within the last two years of employment. The employer may stop paying the garden leave if the employee breaches the agreement.
- **Reasonable Scope**: The covenant not to compete must be:
    - ***Narrow and necessary***: It cannot be broader than necessary to protect a legitimate business interest (e.g., trade secrets, confidential information, good-will) which cannot otherwise be protected by a non-solicit or non-disclosure covenant.
    - ***Limited in activities proscribed***: It must be limited to the types of activities the employee performed during the last two years of employment.
    - ***Limited in duration***: It cannot exceed one year post-employment (unless the employee breaches a fiduciary duty or steals employer property, in which case the non-compete can last up to two years).
    - ***Limited in geography***: It must have a reasonable geographic scope which includes the geographic areas where the employee provided material services in the past two years of employment.

The law allows courts to rewrite non-competes to make them valid and enforceable, to the extent necessary to protect the employer's legitimate business interest. However, such modifications are within the court's discretion, so employers should not rely on a "blue pencil" provision to save a non-compete that would otherwise be unenforceable.

Who is covered by the new law?

The new law applies to both employees and independent contractors. It protects anyone who is a resident or has been employed in Massachusetts for at least 30 days immediately preceding termination of employment. In other words, employers cannot designate a choice of law outside of Massachusetts to circumvent the new law.

The law also ***specifically prohibits any non-competes*** (even if the above requirements are met) for the following individuals:

- Non-exempt employees;
- Undergraduate or graduate employees engaged in short-term employment;
- Employees terminated without cause or who have been laid-off; and
- Employees who are 18 or younger.

Are other covenants permitted?

There are certain covenants that are unaffected by the new law, and will continue to be otherwise enforceable under Massachusetts common law, including:

- Non-compete agreements made in connection with the sale of a business;
- Non-solicitation covenants with respect to employees, customers, clients, and vendors; and
- Non-disclosure of confidential information.

What should Massachusetts employers do now?

Companies should review current forms of non-compete, employment, severance, change-in-control, and/or equity grant agreements, as well as offer letters. Going forward, these documents should be provided with and contain the proper formalities in terms of form and process, and have the following features:

- Non-compete terms of no longer than one year;
- Consideration (e.g., garden leave);
- Reasonable scope (in terms of activities and geography); and
- A carefully drafted “Cause” definition as the non-compete will be completely disregarded following a termination without cause.

Now that consideration must be provided as part of the non-compete, employers should revisit whether requiring such covenants on a broad-based level is worth the cost.

In any event, employers should ensure that they maintain strong non-disclosures, non-solicits, and confidentiality agreements for all employees going forward, especially since non-competes will not be enforced either following a termination without cause or with respect to certain individuals (e.g., non-exempts).

About the Author

Deborah Lifshey is a managing director in the New York office, where she specializes in advising clients on compensation matters from a legal perspective including securities disclosure, taxation and corporate governance issues, negotiation contracts, and reasonableness opinion letters. She is a graduate of the Industrial and Labor Relations School at Cornell University and the University of Florida College of Law, and served as a federal clerk for the Honorable Judge Susan H. Black on the Eleventh Circuit Court of Appeals. Prior to joining Pearl Meyer, Ms. Lifshey practiced at Fried, Frank, Harris, Shriver & Jacobson, where she specialized in executive compensation, ERISA matters, and corporate transactions, and at Holland and Knight, where she specialized in employment litigation matters.

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