Massachusetts Employers - Beware of New Non-Compete Law

By: Laura D. Windsor

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Do you have employees in Massachusetts? Do you use non-compete agreements with those employees? Come October, your ability to enter into those types of agreements will be curtailed significantly. Earlier this month, the Governor of Massachusetts signed into law a bill limiting the ability of employers to enter into and enforce non-compete agreements, particularly with regard to non-exempt employees. This law has been under development for several years, and it is part of a growing movement to restrict non-compete agreements for lower level employees. Here are a few things you should be aware of:

When Does the Law Take Effect?

The law will cover all applicable agreements entered into on or after October 1, 2018. It will not apply retroactively.

What Agreements Are Covered?

The law applies to non-compete employment agreements with Massachusetts residents and employees, including independent contractors. It does not apply to other restrictive covenants, such as non-disclosure agreements, non-solicitation agreements, and invention assignment agreements. It also does not apply to non-compete agreements entered in connection with an employee?s separation, provided the employee has seven days to rescind acceptance, or to non-compete agreements made in connection with the sale of a business.

What Employees are Excluded?

Under the law, non-compete agreements may not be enforced against the following types of employees:

1. Employees who are classified as non-exempt under the Fair Labor Standards Act (or comparable Massachusetts law);
2. Undergraduate or graduate students who are engaged in short-term employment;

3. Employees who have been terminated without cause or laid off; or
4. Employees who are 18 years of age or younger.

What Does the Law Prohibit/Require?

1. All non-compete agreements must:

a. Be in writing;
b. Be signed by both the employer and the employee; and
c. Expressly affirm the employee?s right to consult with counsel prior to signing.

2. All non-compete agreements must be reasonable. Accordingly, the non-compete must:

a. Be no broader than necessary to protect a legitimate business interest, defined in the act as one of the following: ?(a) the employer?s trade secrets; (b) the employer?s confidential information that otherwise would not qualify as a trade secret; and (c) the employer?s goodwill.?
b. Not exceed one year in duration, unless the employee has breached a fiduciary duty or unlawfully taken property from the employer, in which case the restricted period may be tolled up to two years.
c. Be reasonable in geographic scope. There is no definition of what is reasonable here, but there is a presumption of reasonableness if the restriction is limited to areas where the employee ?during any time within the last 2 years of employment, provided services or had a material presence or influence.? This provision is vague, and is basically an invitation to litigation.
d. Be reasonable ?in the scope of proscribed activities in relation to the interests protected.? Under the law, if a non-compete agreement?s ?proscription on activities ? protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last two years of employment,? such proscription will be afforded a presumption of reasonableness.

3. The law requires employers to pay either ?garden leave pay? or ?other mutually-agreed upon consideration? to departing employees with a non-compete agreement. Agreements that call for ?garden leave pay? require the employer, during the restricted period, to continue paying the former employee an amount defined as ?at least 50 percent of the employee?s highest annualized base salary paid by the employer within the 2 years preceding the employee?s termination.? There are no specific requirements on what constitutes ?other . . . consideration.? Consideration that is less valuable than what an employee?s ?garden leave pay? would be may be sufficient. Time will tell as courts start interpreting this provision.

4. If a non-compete is signed at the commencement of employment, it must be presented to the employee at the time the offer of employment is made or 10 days before the commencement of employment, whichever is earlier. A non-compete agreement signed after the commencement of employment must be ?supported by fair and reasonable consideration independent from the continuation of employment.? The law does not explain what constitutes ?fair and reasonable consideration.?

5. Lastly, the law permits ?blue-penciling.? All this means is that, if an agreement is overly broad or unenforceable, the court may ?reform or otherwise revise? that agreement so that it conforms to the

law?s requirements. Furthermore, if a court decides not to reform or revise an unenforceable provision and instead finds that provision void under the law, that ruling has no effect on the enforceability of the other provisions in the agreement. Instead, the unenforceable provision is essentially written out of the agreement.

Conclusion

The passage of this law will dramatically change how non-compete agreements are drafted, entered into, and enforced with respect to Massachusetts employees. If you suspect that you may enter into such an agreement in the future, please consult with employment counsel prior to doing so in order to ensure that any such agreements comply with the requirements of this law.

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- Laura D. Windsor ? 804.420.6466 ? lwindsor@williamsmullen.com

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