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CLIENT ALERT

Massachusetts Passes Legislation Regarding Employee Noncompetition Agreements

AUGUST 20, 2018

On August 10, 2018, Massachusetts Governor Charlie Baker signed into law the Massachusetts Noncompetition Agreement Act (the Act). The Act substantially restricts an employer's ability to enforce post-employment covenants not to compete against former employees who reside or work in Massachusetts on the date employment terminates or during the 30 days before employment terminates. The Act applies to agreements entered on or after October 1, 2018.

Agreements Covered by the Act

By its terms, the Act regulates the enforceability of "noncompetition agreements," which the Act defines as agreements between an employer and employee "under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." The Act also covers "forfeiture for competition agreements," which are defined as agreements imposing "adverse financial consequences" on an employee who engages in competitive activity after his or her employment has ended. "Employee" is defined to include independent contractors.

Critically, the Act clarifies that "noncompetition agreements" do not include other types of restrictive covenants, including, among others:

1. Non-disclosure or confidentiality agreements;
2. Agreements not to solicit employees;
3. Agreements not to solicit or conduct business with an employer's customers, clients, or vendors;
4. Noncompetition agreements related to the sale of a business where the restricted party is a significant owner of the entity and will receive significant consideration from the business transaction;
5. Noncompetition agreements formed outside of an employment relationship;
6. Garden leave clauses, which the Act defines; and

7. A noncompetition agreement entered by an employee in connection with the termination of employment, provided that the employee is expressly provided seven business days to revoke acceptance.

Minimum Requirements for Noncompetition Agreements to be Enforceable

The Act provides that for a covered noncompetition agreement to be valid and enforceable, it must satisfy numerous procedural and substantive requirements.

For example, for agreements entered into with new employees, the Act requires that the agreement: (i) be in writing and signed by the employee and employer; (ii) expressly state that the employee has the right to consult with an attorney before signing; and (iii) be provided to the employee with a formal offer of employment or 10 business days before the employee's start date, whichever is earlier.

For agreements entered into with existing employees, the Act requires that notice of the agreement be provided to the employee at least 10 business days before the effective date and that the agreement: (i) be supported by "fair and reasonable consideration independent from continued employment"; (ii) be in writing and signed by the employee and employer; and (iii) expressly state that the employee has the right to consult with an attorney before signing. The Act does not define "fair and reasonable consideration independent from continued employment."

Substantively, the Act prohibits covered noncompetition agreements from restricting competition for more than 12 months from the date of employment termination, except in cases where the employee has breached his or her fiduciary duty or unlawfully taken the employer's property, in which case the restricted period may not exceed two years from the date the employee ceased employment. The Act also requires that covered agreements be "no broader than necessary to protect one or more" of three legitimate business interests: (1) the employer's trade secrets, as that term is defined in the Massachusetts Trade Secrets Act; (2) the employer's confidential information that does not meet the definition of a trade secret; or (3) the employer's good will.

The Act also addresses the requirements that covered noncompetition agreements be reasonable in geographic scope and that the scope of proscribed activities relates to the interests protected. In this vein, the Act identifies situations where the scope will be "presumptively reasonable." For example, an agreement that prohibits competitive activities "only [in] the geographic areas in which the employee, during any time within the last 2 years of employment provided services or had a material presence or influence is presumptively reasonable." Likewise, "[a] restriction on activities that 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 2 years of employment is presumptively reasonable."

To be enforceable, a covered agreement must also contain a garden leave clause "or other mutually agreed upon consideration between the employer and the employee." An adequate garden leave clause must provide for the payment on a pro-rata basis throughout the restricted period of "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." Importantly, the Act does not define "other mutually agreed upon consideration," either in terms of an amount that would make such consideration sufficient or whether such other consideration can be paid lump sum, as opposed to "pro-rata . . . during the entirety of the restricted period."

Unenforceable Noncompetition Agreements

The Act identifies four types of workers against whom a noncompetition agreement cannot be enforced: (1) employees classified as nonexempt under the Fair Labor Standards Act; (2) undergraduate or graduate students engaged in an internship or short-term employment while enrolled at a full- or part-time undergraduate or graduate educational institution; (3) employees who are terminated without cause or laid off; and (4) employees who are 18 years old or younger. The Act does not define what constitutes "cause" in an involuntary termination.

Choice of Law Provisions

The Act deems unenforceable choice-of-law provisions that would circumvent the Act in cases where the employee (a) is a resident of or employed in Massachusetts at the time of employment termination; or (b) was a resident of or employed in Massachusetts for at least 30 days immediately preceding his or her employment termination.

Recommendations

The Act applies only to those noncompetition agreements entered on or after October 1, 2018. Accordingly, employers who wish to avoid the requirements of the Act should consider entering such agreements with existing employees who work or reside in Massachusetts (or who may in the future work or reside in Massachusetts) in advance of that effective date.

To support enforceability of noncompetition agreements subject to the Act, employers entering such agreements on or after October 1, 2018 with newly hired or existing employees living and working in Massachusetts must ensure such agreements are carefully drafted to comply with the procedural and substantive requirements set forth in the Act, including those outlined above.

If you have questions, please contact any of the Labor and Employment Practice Group attorneys listed below or your usual Winston & Strawn contact.

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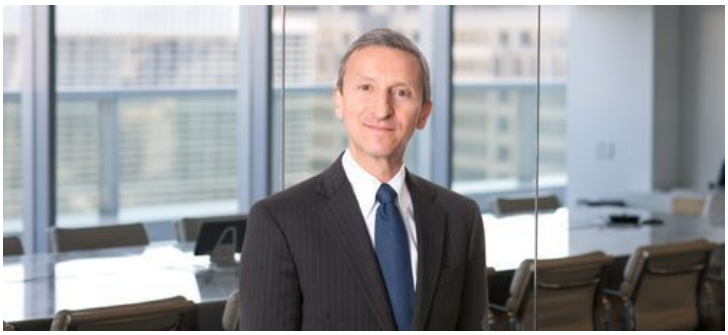

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