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LABOR AND EMPLOYMENT

ALERT

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# MASSACHUSETTS LAW TO TIGHTLY REGULATE POST-EMPLOYMENT COVENANTS NOT TO COMPETE; UNIFORM TRADE SECRET ACT IS ADOPTED

*By Scott J. Wenner*

Effective October 1, 2018, employers seeking to bind employees to post-termination non-compete agreements will face significant new requirements and limitations.

Important elements of the new law include:

- Limitation of otherwise lawful non-competition period to one year;
- Restriction of non-competition agreements to overtime exempt employees only;
- Prohibition of enforcement of non-competition agreements against any employee whose employment terminated without cause or due to layoff;
- *Non-compete for newly hired employees*: requirement that non-compete agreement be provided on the earlier of the date of the offer of employment or ten days before the commencement of employment;
- *New non-compete for existing employees*: requirement that newly-required non-compete be supported by "fair and reasonable" consideration that is independent from continued employment;
- Elimination of continued employment as sufficient consideration for post-employment non-competition agreements;
- Requirement that former employee be placed on "garden leave" during non-competition period and paid during that time a minimum of 50% of his/her highest annualized base salary paid by the employer within the 2 years preceding employee's termination, *or* provided "other mutually agreed-upon consideration";
- Declaration that choice-of-law clauses naming states other than Massachusetts are unenforceable as against residents of Massachusetts or workers employed in Massachusetts for more than thirty days;
- Inclusion of independent contractors as parties protected by the new law.

While extremely comprehensive, the new law has several important exclusions from its coverage. These include:

- Non-compete agreements in existence as of October 1, 2018;
- Customer and employee non-solicitation agreements;
- Non-competes entered into in connection with the sale of a business entity or of a substantial ownership interest in that entity;
- Non-competition agreements agreed to in connection with separation from employment;
- Nondisclosure agreements.

**Background**

The Massachusetts legislature has considered legislation to regulate post-employment restrictions on employee competition for many years, without success until now. Rather than reflecting the typical split between employee advocates and employers over restrictive covenants in general, and non-competition agreements in particular, the pressure for legislation in this area was largely the product of a split within the employer community. Massachusetts's powerful technology industry had long supported legislation to limit the use and scope of non-competition agreements by employers in the state - breaking away from manufacturing and other more traditional members of the business community. The primary reason for this fissure on the issue of non-competition agreements stemmed from California's statutory prohibition of post-employment non-competes embodied in Sections 16600*, et seq*., of the California Business and Professions Code. In essence, Massachusetts tech companies believed they were losing the talent wars to their competitors in Silicon Valley, at least in part because of the free movement of employees among employers enshrined in California law. Representatives of employers in the state's other industries continued to argue that non-competes were essential to the protection of their intellectual property.[1]

The resulting legislation reflects a true compromise between the competing interests. It preserves the right of Massachusetts employers to impose reasonable restrictions on post-employment competitive activities of those most likely to have been exposed to its trade secrets – at a financial cost – while leaving employers free to negotiate different arrangements, within limits, at the start of employment, as well as upon termination of the relationship as part of a separation agreement. Moreover, it leaves the common law rules untouched with respect to non-solicitation of customers.

**Imposing Enforceable Post-Employment Non-Competes**

Those employers interested in imposing a post-employment non-compete immediately upon or during employment must pay careful attention to detail and keep in mind that a different process applies depending on when the non-compete is presented to the employee.

At commencement of employment: to be effective, agreement must:

- Be signed by both the employer and employee;
- Expressly state that the employee has a right to consult with counsel before signing the agreement; and
- Be provided to the employee (i) with the formal offer letter, or (ii) at least 10 business days prior to the employee's first day of employment, *whichever is earlier.*

During employment: to be effective, agreement must:

- Provide consideration that is both "fair and reasonable" and independent of and separate from continued employment by the employer;
- Be given to the employee at least 10 business days' notice before the non-compete is effective;
- Presented in writing;
- Signed by the employer and the employee; and
- Expressly advise the employee of his/her right to seek the advice of counsel.

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[1] *See, e.g.,* Blog of the Associated Industries of Massachusetts (aimblog), August 1, 2018, available here.

**Common Law Standards Preserved**

While employers wishing to restrict post-employment non-competes will have to limit them to exempt employees, pay for them or provide other undefined "fair and reasonable" consideration, and satisfy the new advance notice and other process-related requirements, certain presently-applicable common law standards remain. Thus, under the new law:

- The scope of the non-compete restriction may not be any broader than is necessary to protect the employer's legitimate, protectable business interests
    - These interests are generally confined to trade secrets, other confidential business information and customer goodwill
- The scope of the restricted activities, the geographic range and the duration of the non-compete all must be reasonable
    - The new law gives specific guidance on reasonableness standards to be applied directing that a geographic scope limited to locations where the employee provided services or had real influence in the last two years of employment will be presumed to be reasonable, as will a scope of activity that is limited to the employee's activities in the last two years
- The non-compete restriction must be consistent with public policy
- The law permits a court to revise a non-competition agreement that it finds is overly broad in scope or unenforceable for other reasons

**Uniform Trade Secrets Act Adopted**

As part of recently signed non-competition legislation, Massachusetts becomes the 49th state to adopt the Uniform Trade Secrets Act ("UTSA") in some form. This codifies a cause of action for misappropriation of trade secrets and also allows for the employer's recovery of attorneys' fees against an employee found to have misappropriated its trade secrets. The adoption by Massachusetts of UTSA leaves New York as the lone holdout among the states.

**Going Forward**

Employers seeking to bind employees to post-employment non-competes after October 1, 2018 obviously must closely review their existing forms of agreement and also decide, with the advice of qualified counsel, on forms of consideration they are prepared to offer to employees whose agreements they need to secure. However, even though the new law does not apply to agreements executed prior to its October 1 effective date, the new standards are likely to become part of the backdrop against which the reasonableness of existing agreements will be measured. Therefore, review, and perhaps modification, of current non-compete agreements would be prudent. Finally, a similar review of current forms of separation agreements that contain non-competition obligations likewise is in order. ◆



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