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Publications

Massachusetts Legislature (Finally) Passes Non-Compete Law

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The Massachusetts Legislature, at long last, has passed a bill regulating the use and enforcement of non-compete agreements in the private sector. Once "An Act relative to the judicial enforcement of noncompetition agreements" is signed by Governor Charlie Baker, it will take effect on October 1, 2018.

The Legislature has attempted for nearly a decade to negotiate a bill that could pass both the House and Senate. For more on the state's contentious non-compete reform efforts, see Massachusetts Non-Compete Legislation – A Walk Through the 'Garden' ... Leave Provision, Massachusetts Legislature Close to Deal on Non-Compete Law? and Massachusetts Legislature Pushes Forward With Amended Non-Compete Bill. During the 2017 legislative session, no fewer than six competing bills were submitted for consideration.

Definition of "Noncompetition Agreement"

The Act limits the ability of employers to enter into "noncompetition agreements" with, and ultimately enforce those agreements against, "employees" who work in the Commonwealth.

A "noncompetition agreement" is defined as:

> [A]n agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended[.]

In addition to defining the types of agreements that it regulates, the Act identifies certain covenants that fall outside of the definition of a "noncompetition agreement." Such covenants include:

- Non-compete agreements made in connection with the sale of a business;
- Non-compete agreements made in connection with the cessation or separation of employment (provided the employee is given seven business days to rescind acceptance);
- Employee non-solicitation covenants;
- Customer/client/vendor non-solicitation covenants; and
- Non-disclosure of confidential information agreements.

Such excluded covenants will continue to be evaluated under Massachusetts common law.

Definition of Employee

Significantly, although the Act regulates only the use of noncompetition agreements with "employees," the definition of a covered "employee" includes independent contractors.

The Garden Leave "Requirement"

Similar to three bills introduced in the 2017 legislative session, the Act requires the payment of "garden leave pay" or some "other mutually-agreed upon consideration." (For more on the "garden leave" concept, see Massachusetts Non-Compete Legislation – A Walk Through the 'Garden' ... Leave Provision.) Agreements that call for "garden leave pay" (as opposed to "other ... consideration") 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."

Unlike the 2017 garden leave bills, the Act imposes no specific requirements on the value or timing of

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any "other" consideration the employer and employee may agree upon as an alternative to garden leave. Under the 2017 bills, the value of the alternative consideration must be equal to or greater than the statutorily defined garden leave payments and the timing of the consideration must be in line with the applicable garden leave period. The Act imposes no such conditions. It appears to allow parties to agree to less valuable consideration that could be provided to the employee at any time, including the commencement of employment (*e.g.,* a hiring bonus). Thus, what was proposed initially as a garden leave "requirement" appears to be more of an optional contractual provision.

Structural and Procedural Requirements

In addition to the garden leave provision, the Act imposes other structural requirements on non-compete agreements entered into both at and after the commencement of employment. All such agreements must:

- Be in writing;
- Be signed by *both* the employer and employee; and
- Expressly affirm the employee's right to consult with counsel prior to signing.

The Act's requirements differ based on the timing of execution of the non-compete agreement. First, 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. (One senator had proposed an exception for where it would be impractical for the parties to wait 10 days from the presentation of the non-compete until the commencement of employment. That amendment was withdrawn, and the exception is omitted from the Act.)

Second, the Act requires that a non-compete agreement signed *after* the commencement of employment be "supported by fair and reasonable consideration independent from the continuation of employment." The implication is that the promise of continued employment would be sufficient, by itself, to support a non-compete signed *at* the commencement of employment. However, as explained above, *all non-competes* must provide consideration independent from the continuation of employment in the form of "garden leave pay" or some "other mutually-agreed upon consideration." Therefore, it is unclear whether the Act actually requires additional consideration for a non-compete executed *after* the commencement of employment, as compared to one signed *at* the commencement of employment.

If the payment of "garden leave [or] other mutually-agreed upon consideration" is required even for non-competes signed at the commencement of employment, then the question is what *additional* consideration, if any, would be required for a subsequently executed non-compete? The Act leaves this unanswered.

Reasonableness Requirements

Pursuant to the Act, a non-compete covenant must be reasonable. The non-compete must:

1. *Be no broader than necessary to protect a legitimate business interest.* The Act recognizes three "legitimate business interests": (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. Under the Act, the non-compete covenant will be presumed to satisfy this element if the employer can demonstrate that no other type of restrictive covenant (*e.g.,* a non-solicitation or non-disclosure covenant) would be sufficient to protect the legitimate business interest at issue.
2. *Not exceed one year in duration.* An exception to this requirement is where an employee is shown to have breached a fiduciary duty to the employer or has unlawfully taken (physically or electronically) property belonging to the employer. The exception allows the restricted period to be tolled for up to two years from the date of cessation of employment.
3. *Be reasonable in geographic scope.* Under the Act, the geographic scope will be presumed reasonable as long as it is limited to 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." The vagueness of the geographic term ("areas") virtually guarantees that this presumption will be heavily contested in litigation.
4. *Be reasonable "in the scope of proscribed activities in relation to the interests protected."* Under the Act, 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. For example, it would not be reasonable if a pharmaceutical company seeks to prohibit one of its scientists from subsequently working as a janitor for a competing pharmaceutical company.

Excluded Employees

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

- Employees who are classified as non-exempt under the Fair Labor Standards Act;

- Undergraduate or graduate students who are engaged in short-term employment;
- Employees who have been terminated without cause or laid off; or
- Employees who are 18 years of age or younger.

Blue-Penciling and Severance Permitted

The Act permits courts to "reform or otherwise revise" an overly broad non-compete covenant to the extent necessary to protect the applicable legitimate business interests. This concession is particularly notable as most of the bills proposed in 2017 would have rendered overly broad covenants null and void.

Additionally, if a court elects *not* to blue-pencil a non-compete covenant and instead declares the covenant null and void, the Act provides that such action will not affect any other provisions in the agreement. Rather, the non-compete covenant will be severed and the remainder of the agreement will remain in effect.

Inconsistent Venue Requirements

According to the Act, a party seeking to enforce or challenge a non-compete agreement must bring the action in the county in which the employee resides or, if the parties mutually consent, in Suffolk County. Further, the Act requires that any actions in Suffolk County must be brought in the state-level "superior court or the business litigation session of the superior court."

By attempting to confer the superior court with exclusive jurisdiction over any non-compete actions *brought* in Suffolk County only, the Act appears to prohibit parties from commencing such actions in, or removing them to, the federal court located in that county (oddly, the Act imposes no similar restrictions on actions brought outside of Suffolk County). For now, it is unclear how the courts will interpret this restriction, or whether they will find it to be legitimate. Generally, defendants are entitled to initially file in, or remove certain actions to, federal court where the action includes at least one federal claim or where there is diversity of parties and the amount in controversy exceeds $75,000.

Effective Date

The Act will apply only to agreements entered into on or after October 1, 2018.

Employers may wish to have current employees execute new restrictive covenants in compliance with the Act for more predictability as to potential enforcement in the future.

Next Steps

Employers who maintain non-competes for Massachusetts employees should consult with qualified employment counsel to determine how to ensure their agreements are in compliance with the requirements of the Act.

Members of Jackson Lewis' Non-Competes and Protection Against Unfair Competition practice group are ready to ensure employers are fully prepared for this important development. Please contact a Jackson Lewis attorney for assistance.

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Massachusetts Legislature Close to Deal on Non-Compete Law?

The Massachusetts Legislature, after a decade of attempts, may pass restrictions on the use of non-compete covenants in the Commonwealth. The co-chairmen of the Joint Committee on Labor and Workforce Development, Senator Jason Lewis and Representative Paul Brodeur, reportedly are optimistic that the Legislature is "closing in on a...

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New Hampshire, Pennsylvania, Vermont May Restrict Use of Non-Compete Agreements in Employment

Proposals to restrict the use of non-compete agreements in employment have been introduced in New Hampshire, Pennsylvania, and Vermont. This appears to be the continuation of a trend that started nearly a year ago. On January 23, 2017, the Massachusetts Legislature introduced six separate bills seeking to curb employers' use of non-...

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