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Does Your Non-Compete Agreement Survive Under Massachusetts' New Non-Compete Law?

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The Bay State's long-anticipated non-compete law has finally hit the books. After years of debate, speculation, and worry, the final result does not appear to be as bad for employers as we feared

The Basics

First, let's review what the new Massachusetts law does ***not*** do.

The law – which impacts agreements entered into on or after October 1, 2018 – only applies to *non-competes*, or similar provisions under which an employee promises not to compete with the employer after the employment relationship ends.

It *does not apply* to covenants for the non-solicitation of customers, non-solicitation of employees, non-disclosure of information (aka confidentiality agreements), agreements concerning the sale of a business, or clauses concerning the assignment of inventions. So, what if you have a provision that restricts an employee from soliciting or transacting business with the employer's customers, clients or vendors? Those types of clauses are expressly *excluded* from the definition of non-competition agreement contained in the statute.

Now, let's talk about what the new Massachusetts law ***does*** do.

For starters, it prohibits non-competes applicable to non-exempt employees (*e.g.* hourly, non-management employees), students who work as paid or unpaid interns, and employees under 18 years old. So, if you want to roll out a non-compete for your hourly, unpaid, under-18 intern, you better hurry and get it signed before October 1.

The new law also prohibits the enforcement of a non-compete against an employee who has been terminated without cause or laid off. In other words, if you plan on firing that hourly, unpaid, under-18 intern who signed your non-compete, you better get moving on that, too. But seriously, if you fire someone without cause or lay them off, even if you have a signed non-compete, the provision no longer will be enforceable in Massachusetts.

Other key aspects of the statute include the following:

- It applies to both new and existing employees.
- It applies to independent contractors.
- Agreements for new employees must (a) be in writing; (b) be signed by

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both parties [and if you think this is silly, you actually might be surprised how often employers fail to sign off on their own contracts]; (c) state that the employee has a right to consult an attorney; and (d) be given to the employee either when the employment offer is made or 10 days after they start working.

- Agreements for existing employees must (a) be in writing; (b) be signed by both parties; (c) state that the employee has a right to consult an attorney; (d) be supported by "fair and reasonable consideration *independent of the continuation of employment*;" and (e) be given to the employee at least 10 days before its effective date.

The statute also asserts that a non-compete agreement cannot be broader than necessary to protect a legitimate interest of the employer. Examples of an employer's "legitimate interest" include protecting the company's trade secrets, confidential information, or goodwill.

The non-compete also must be reasonable in the following ways:

- in scope [restrictions limited to the types of services the employee provided to the company in the last two years are presumptively reasonable];
- in time [restrictions limited to one year are presumptively reasonable]; and
- in geographic area [restrictions limited to the geographic areas in which the employee, during any time within the last two years of employment, provided services or had a material presence or influence, are presumptively reasonable].

Choice of Law/Forum

To the extent there are any fights about the meaning of the terms in the non-compete agreement, Massachusetts has decided to keep those close to the vest.

The new statute says that the law of Massachusetts will apply to any covenant concerning a worker who resided in the Commonwealth within 30 days of termination of employment, and any action must be brought on home turf in the Massachusetts County where the employee resided. So, cutting and pasting your typical choice of law and forum clause into the agreement likely will not work

Garden Leave

One provision in the statute that may cause some confusion is garden leave – the practice of paying an employee not to compete during the restricted period. To qualify as garden leave under the new law, the employee should receive 50 percent of their highest base salary over the last two years during the entire restricted period, and the company may not unilaterally discontinue these payments unless the employee breaches the non-compete covenant.

At first glance, it appears that garden leave is mandatory under the new statute for an enforceable covenant. But, upon closer inspection, that is not the case. The statute explicitly states that the agreement must include "a garden leave clause *or other mutually-agreed upon consideration* between the employer and the employee; provided, however, that such consideration shall be specified in the agreement; provided further, that a garden leave

clause within the meaning of this clause shall . . .” (emphasis added).

The reference to the “other mutually-agreed upon consideration” is clearly distinct from garden leave. Plus, nothing in this clause or in the definition of garden leave defines the “consideration” to be the same as the garden leave, or that the “consideration” must comprise post-termination payments to the employee during the restricted period. Similarly, nothing in the statute itself provides that the “other mutually-agreed upon consideration” must be different from the consideration provided to the employee for signing the agreement in the first place. Therefore, providing consideration up front and describing the consideration clearly in the agreement looks like it would fit squarely within the requirements of the statute.

Of course, it stands to reason that this issue will be developed further by the courts in cases interpreting the statute. As such, employers and practitioners who use or handle non-competes in the Bay State should pay careful attention to any developments.

Forget Something?

The statute expressly allows for mulligans. If a non-compete is regarded as unenforceable, the employer still has a shot at getting an injunction to block competition, if it is entitled to an injunction based on another provision (perhaps non-solicitation or non-disclosure), or based on statutory or common law.

Even if a court considers a term in the covenant to be unenforceable, this is not the end of the world. The statute allows a court, in its discretion (so be careful not to upset the judge) to reform or revise an overbroad or otherwise unenforceable non-compete to make it enforceable.

The Long View

Massachusetts joins a growing list of states that have enacted laws to limit or constrain the enforceability of non-competes. Overall, the new Bay State statute is positive for employers. Although it has some interesting nuances to navigate, the terms are generally consistent with common law in many other states. Nevertheless, the new law illustrates the importance for employers who engage in multi-state operations – and want to have the ability to enforce non-competes – to keep tabs on the ever-changing legal landscape so that they can properly tailor their agreements to accommodate all of the necessary changes in the law.