Greater Boston Chamber of Commerce

POLICY BRIEF

Massachusetts Non-Compete Reform

After years of debate on non-competition agreements in Massachusetts, a new statute governing non-competes included in this year's economic development bill will take effect on October 1, 2018.

The law now limits non-competes to one year, requires employees receive notice and time for review, and exempts lower-paid employees. It also institutes garden leave, which requires an employer to pay an employee during the time their employment is restricted by a non-compete. Importantly, in lieu of garden leave it allows for "mutually agreed upon consideration" to give employers flexibility in determining what constitutes compensation related to the restricted period.

Through a non-compete agreement an employer may prohibit an employee from engaging in competitive activities once he/she leaves the organization. Those activities may include working at a new or existing firm that is considered a competitor and starting a business that competes with the former employer's business. Other covenants, like non-solicitation agreements, are not considered non-competition agreements.[1]

Historically, Massachusetts did not address non-compete agreements in statute and instead relied upon case law. Although the newly adopted statute codifies many existing standards, it changes or creates new standards in some cases. This brief provides a summary of the new law and highlights those changes in addition to providing information about what the law does not cover.

Requirements Under Law

Non-competition agreements will have to meet the following **minimum requirements** to be legally valid and enforceable:

Notification and review period for new and existing employees

The new law requires that any employee signing a non-compete have 10 days to review the agreement and that it expressly states that the employee may seek legal advice prior to signing. All agreements must be in writing.

For new employees, employers must provide the agreement either before making a formal offer of employment or 10 days before employment commences, whichever comes first. For existing employees who are asked to sign new non-compete agreements, the agreement must be provided at least 10 business days before it becomes effective and must be supported by fair and reasonable consideration (something of value). Continued employment is not a sufficient form of consideration under the new law.

[1] As defined in the new law, An Act Relative to Economic Development in the Commonwealth, Chapter 228 of the Acts of 2018, non-competes are agreements 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 he or she will not engage in certain specified activities competitive with his or her employer after that employment relationship has ended.

No Broader than Necessary

The agreement must be restricted to the factors that are necessary to protect one or more of the following legitimate business interests of an employer, including:

- All trade secrets of the employer
- The employer's confidential information that otherwise would not qualify as a trade secret
- The employer's good will

A non-competition agreement may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement.

Restricted Time Period

Non-competes cannot restrict employees longer than **one year** from the date of termination of employment. If an employee has breached the employee's fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, the restricted period may be no longer than **two years** from the date of termination of employment.

Geographic Reach and Scope

Non-competes must be reasonable in geographic reach, which means that a non-compete can only apply to the geographic areas in which the employee provided services or had a material presence or influence during any time within the last two years of employment.

The non-compete agreement must also be reasonable in the scope of proscribed activities in relation to the interests protected. This means that in order to be considered reasonable, an agreement can only restrict activities that protect a legitimate business interest and must be limited to only the specific types of services provided by the employee at any time during the last two years of employment.

Compensation During Restricted Period or "Garden Leave"

Agreements must include compensation to employees if the employer chooses to enforce a non-compete agreement. This compensation can be in the form of **garden leave**, which is paid during the enforcement period, **or other mutually-agreed upon consideration** between the employer and employee.

- Garden leave must provide for 50 percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination during the enforcement period.
- Other mutually agreed upon consideration can take many forms, such as a signing bonus or other agreed upon compensation and must be specified in the non-compete agreement at the time of signing.

Exclusions

While non-compete agreements must meet the requirements explained above, they **cannot be enforced** against the following types of employees:

- Employees classified as nonexempt under the Fair Labor Standards Act (FLSA). Importantly, the FLSA exemption applies not only to lower wage workers – those earning $23,600 per year or less – but may also apply to employees without supervisory duties. If an employee is eligible to earn overtime, an employer is likely prohibited from requiring a non-compete agreement.
- Undergraduate or graduate students partaking in internships or short-term employment relationships whether paid or unpaid;
- Employees that have been terminated without cause or laid off; and
- Employees 18 years old or younger.

Other Employee Agreements

There are a number of other types of agreements or restrictive covenants between employers and employees that will not be treated as non-competition agreements and therefore are not impacted under this law. These types of agreements include:

- Covenants not to solicit or hire employees of the employer.
- Covenants not to solicit or transact business with customers, clients, or vendors of the employer.
- Non-competition agreements made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership when the party restricted by the non-competition agreement is a significant owner of, or member or partner in, the business entity that would receive significant consideration or benefit from the sale or disposal.
- Non-competition agreements made outside of an employment relationship.
- Forfeiture agreements.
- Nondisclosure agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance.
- Agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

While the above agreements are not impacted, non-compete agreements do include forfeiture for competition agreements, which will have to conform to the same requirements and restrictions under the new law. A forfeiture for competition agreement imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship if the employee engages in competitive activities.

Role of the Courts

Reformation/Blue Pencil: The new law allows judges, in their discretion, to reform or otherwise revise a non-competition agreement. Referred to as "blue penciling," the standard in the new law allows judges flexibility to make changes to limited parts of a non-compete, rather than having to choose between enforcing or voiding the agreement in its entirety (referred to as "red penciling").

Jurisdiction: All civil actions relating to a non-competition agreement must be brought in the county where the employee resides, or, if mutually agreed upon by the employer and employee, in Suffolk County. If the action is brought in Suffolk County, the law directs that the superior court or the business litigation session of the superior court will have exclusive jurisdiction.

Effective Date

The new law takes effect on **October 1, 2018**. It will apply to all non-competition agreements entered into after this date, but not retroactively to agreements that are already in place.

For further questions on the new law, please contact the Carolyn Ryan or Kristin Grazioso on the Chamber's Policy Team.