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Client Alert: Massachusetts Employers Should Review Existing and Contemplated Non-Competition Agreements

By: Rich May

On August 10, 2018, Massachusetts enacted a new law entitled an "Act relative to the judicial enforcement of non-competition agreements" (the "Act").



The Act, which is effective on October 1, 2018, makes considerable changes to the way in which Massachusetts courts will enforce non-competition agreements and so employers must understand the principal changes wrought by the Act.

EMPLOYER CONSIDERATIONS

The Act will require employers to re-think the costs and benefits associated with non-competition agreements. Among other things, employers should consider if a non-competition agreement is necessary. For example, if an employer's goal is to protect information relating to customers or vendors, a non-solicitation agreement may be all that is needed and will not require a "garden leave" payment. In addition, certain provisions of the Act are not clear, such as what constitutes "fair and reasonable consideration," and it is certain that there will be litigation over such provisions. Our suggestion is that for most businesses and for most non C-level personnel non-solicitation and/or non-disclosure agreements may be the preferred option.

Although the Act does not expressly apply to existing non-competition agreements, employers may want to review such agreements for compliance with the Act in the event a court applies certain provisions of the Act, e.g., geographic scope, to an agreement that pre-dates the Act.

If a non-compete is necessary, employers should consult with their Rich May attorney to consider the following general legislative changes:

- *Legislative requirement:* The new law takes effect on October 1, 2018.
  - *Possible compliance strategy:* Though the legislation does not impact agreements in existence prior to October 1, employers should still

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review existing non-competition agreements because courts may adopt the law's factors if an existing agreement is challenged.

- *Legislative requirement:* The new law applies to Massachusetts employees and independent contractors.
  - *Possible compliance strategy:* All non-compete agreements after October 1 should comply with the legislation without distinction based on employment status.
- *Legislative requirement:* Non-competes may not be enforced against certain employees, including those terminated without cause.
  - *Possible compliance strategy:* Termination of an employee subject to a non-compete should be supported by documentation for cause.
- *Legislative requirement:* Non-competes may not be enforced against non-exempt employees.
  - *Possible compliance strategy:* Employers should review compliance with the Federal Labor Standards Act to ensure correct classification of exempt versus non-exempt employees.
- *Legislative requirement:* For new hires, any non-compete must be presented to the employee at the earlier of the time of the employment offer or ten days prior to beginning work.
  - *Possible compliance strategy:* Preparation of non-compete agreements might happen during application stage.
- *Legislative requirement:* For current employees, any non-compete requires additional consideration outside of continued employment.
  - *Possible compliance strategy:* Timing of new non-competes might be limited until payment of bonuses or promotion with at least ten days notice.
- *Legislative requirement:* Agreements must be in writing, signed by both the employer and employee.
  - *Possible compliance strategy:* Receiving an agreement signed by the employee is not enough; the employer must sign as well.
- *Legislative requirement:* Agreements must be limited in scope.
  - *Possible compliance strategy:* In general, restricting a former employee's ability to work for a competitor must be related to the former employee's activities, in the same geographic area, for a maximum period of one-year.
- *Legislative requirement:* The new law will generally require payment of at least fifty percent of the employee's highest base salary during the prior two years for the term of the non-compete.
  - *Possible compliance strategy:* Employment agreements should note an

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employee's base salary. The law allows the parties to agree upon other consideration, so compensation during the term of the non-compete should be specifically negotiated.

Rich May attorneys are available to review legal strategies to minimize compliance costs and protect the employer's business interests.

This summary is provided for educational and informational purposes only and is not legal advice. Any specific questions about compliance with the new legislation or revisions to existing agreements should be directed to attorneys J. Allen Holland, James Finnigan, or Jennifer Lang.

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