

August 13, 2018 | Employment & Employee Benefits, Insights

Employment Law Alert: New Massachusetts Non-Competition Law Effective October 1, 2018

By: Rich May, J. Allen Holland

On Friday, August 10, Governor Baker signed new legislation limiting the enforcement of non-competition agreements against employees and independent contractors who reside in Massachusetts. Though Massachusetts courts have long imposed reasonableness limitations on non-competition agreements as recently discussed on our blog, this new legislation is the result of years of debate and numerous proposals.



Under the new law, which will take effect on October 1, employers will only be able to enforce a non-compete by paying a former employee. Payment may be agreed upon by the parties, but the default requirement is 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 – known as "garden leave."

In addition to this expense, employers will also face hurdles in drafting non-compete provisions. For example, on the procedural side, if a non-compete is signed at the commencement of employment, the provision must be presented to the employee at the time of the employment offer or ten days prior to beginning work. If the agreement is signed after employment, consideration of outside continued employment must be provided. Moreover, the legislation codifies substantive reasonableness limits, including limited scope of activity and geography and typically a maximum duration of only one year.

For certain employees, non-competes are entirely unenforceable. These include minors, undergraduate and graduate student employees, and non-exempt employees under the Fair Labor Standards Act. The new legislation also prohibits enforcement against a laid off employee or someone terminated without cause.

While the new legislation reflects the public policy in favor of allowing individuals to work without unreasonable restrictions, certain contractual covenants are specifically excluded from the definition of non-compete—allowing employers to protect their customer, client, and vendor lists from solicitation. A non-compete is therefore appropriate only where no

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less restrictive means are available to protect a legitimate business interest, like an employer's trade secrets, confidential information, or good will.

All employers of Massachusetts residents should review their existing contractual arrangements to ensure compliance with the new law on October 1. For some existing non-competition agreements, re-execution in line with the legislation's procedural requirements may be appropriate. For others, an alternative strategy such as protection using non-solicitation agreements may be advisable.

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 or Jennifer Lang.

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