Labor and Employment Alert: Massachusetts Dramatically Rewrites Non-Competition Law

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Natalie M. McLaughlin

Michael C. Griffaton

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After nearly a decade of work, On August 1, 2018, the Massachusetts Legislature enacted a far-reaching law that imposes substantive and procedural requirements for noncompetition agreements and prohibits their use for several classes of employees (notably, employees who are classified as non-exempt). The law becomes effective and applies to agreements entered into on and after October 1, 2018.

Noncompetition Agreements

The new law defines a "noncompetition agreement" as an agreement between an employer and an employee (including an independent contractor) or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees not to engage in certain specified activities competitive with his or her employer after the employment relationship has ended. Noncompetition agreements include forfeiture for competition agreements by which a former employee is financially penalized if he or she engages in competitive activities.

Several types of agreement are expressly excluded from this definition (meaning that their interpretation is left to the state's common law), including:

- covenants not to solicit or hire the employer's employees;
- covenants not to solicit or transact business with the employer's customers, clients, or vendors;
- noncompetition agreements made in connection with the sale of a business
- noncompetition agreements outside of an employment relationship;
- nondisclosure or confidentiality agreements;
- noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; and

- no-rehire agreements.

Procedural Requirements

If the agreement is entered into when employment begins, it must be in writing, signed by both the employer and employee, and expressly state the employee has the right to consult with counsel before signing. Further, the employee must be given the agreement by the earlier of a formal offer of employment or 10 business days before employment begins.

If the agreement is entered into after employment begins but not in connection with separation from employment, it must be supported by fair and reasonable consideration independent from the continuation of employment. The employee must be provided notice of the agreement at least 10 business days before it becomes effective. Also, the agreement must be in writing, signed by both the employer and employee, and expressly state that the employee has the right to consult with counsel before signing.

Substantive Requirements

Reasonable Restrictions

To be valid, the noncompetition agreement must be no broader than necessary to protect: (1) the employer's trade secrets; (2) the employer's confidential information that otherwise would not qualify as a trade secret; or (3) the employer's goodwill. A noncompetition agreement may be "presumed necessary" where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant such as a non-solicitation, non-disclosure, or confidentiality agreement.

An agreement may not exceed 12 months. However, if the employee has breached a fiduciary duty or has unlawfully taken employer property, then the duration may extend to two years from the date employment ends.

The agreement must be reasonable in geographic reach. A geographic reach that is limited to only 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 "is presumptively reasonable."

The agreement must be reasonable in the scope of proscribed activities. A restriction on activities that 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 "is presumptively reasonable."

Finally, the agreement must be consonant with public policy.

Garden Leave Requirement

Massachusetts is the first state to require a "garden leave" provision in noncompetition agreements. To be valid, an agreement must include a garden leave clause or other mutually-agreed upon consideration. To constitute a garden leave clause, the agreement must: (1) provide for the payment on a pro-rata basis during the entirety of the noncompete period, of at least 50% of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination; and (2) except if

an employee breaches the agreement, not permit an employer to unilaterally discontinue, fail, or refuse to make the payments (an employer is not required to make payments during any period that is extended because of the employee's wrongful acts). Importantly, these payments are made pursuant to the Massachusetts Wage Payment Law, which imposes treble damages for violations.

Prohibited Noncompetition Agreements

Noncompetition agreements are unenforceable against: (1) employees classified as nonexempt under the Fair Labor Standards Act; (2) undergraduate or graduate students that partake in an internship or otherwise enter a short-term employment relationship with an employer; (3) employees that have been terminated without cause or laid off; and (4) employees age 18 or younger.

Reformation

The law expressly permits a court to reform or otherwise revise an agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests.

Conclusion

The Massachusetts' law represents a dramatic shift in determining what makes a noncompete agreement valid and enforceable. Employers should review agreements entered into after October 1 to ensure they comply with the new requirements. Contact your Vorys lawyer if you have questions about restrictive covenants in general or about complying with the new Massachusetts law.