Once More Unto the Breach: Massachusetts Inching Closer to Noncompete Reform

Insights
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It finally happened. After years of debate on Beacon Hill, Massachusetts law makers agreed to reform the Commonwealth's treatment of noncompetition agreements as part of a number of bills passed in the waning hours of the 2018 legislative session. Among other things, the bill precludes enforcement of noncompetition agreements against non-exempt employees, limits their length to just 12 months, and precludes the use of "continued employment" as acceptable consideration. If signed by the Governor, the bill will apply to agreements entered into on or after October 1, 2018. We previously reported on an earlier version of this bill here.

Notably absent from the bills definition of "noncompetition agreements" are several types of agreements used by employers, including agreements prohibiting the solicitation of employees, agreements prohibiting the solicitation of current customers, clients, and vendors, confidentiality agreements, and noncompetition agreements made at the end of an employee's employment if the employee receives seven business days to rescind the agreement. Agreements exempted from the bill's coverage will continue to be evaluated by the courts on an individualized basis.

The term "employee" will encompass independent contractors, but any noncompetition agreement is unenforceable against non-exempt employees, college interns, employees under 18, or employees terminated without cause or laid off. All noncompetition agreements must now be in writing, signed by both the employee and the employer, and expressly state that the employee has the right to confer with counsel prior to signing. Employers are required to provide the noncompetition agreement at the time of a formal offer or 10 business days before the start of employment, whichever is earlier.

In a significant change, continued employment is no longer sufficient consideration for agreements entered into after the commencement of employment. This clarifies a perceived split in court authority on the issue. In addition to providing additional consideration for mid-employment noncompetition agreements, employers must also provide notice of the proposed agreement at least 10 business days before its effective date.

The bill attempts to require "garden leave," defined as payments made during the restricted period, but after the end of the employment relationship. Garden leave payments must be paid on a pro-rata basis and equal at least 50% of the employee's highest base salary paid within the prior two years. The bill categorizes garden leave payments as "wages" under the Wage Act, and therefore employers are subject to the draconian penalty of treble damages for even technical violations

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Nevertheless, the bill gives the parties the option of paying "other mutually-agreed consideration" in place of garden leave. Prior versions of the bill provided that this other consideration had to equal or exceed the garden leave, but that language was removed. This would appear to make the garden leave requirement somewhat less onerous in that the parties may agree to something of lesser value in its place, such as a signing bonus.

In terms of enforcement, courts are now authorized by statute to revise or "blue pencil" a nonconforming agreement to protect legitimate business interests. This endorses the approach that Massachusetts courts were already taking. An employer will also be unable to enforce a choice of law provision if the employee has lived or worked in Massachusetts for at least 30 days prior to termination.

Finally, agreements covering the geographic area where the employee actually provided services are presumptively reasonable and the noncompetition period is limited to 12 months unless employee has breached a duty to the employer or misappropriated the employer's property. In those limited instances, the period may be enlarged to two years.

While it remains unclear whether Governor Baker will sign the bill as-is or return it to the legislature for amendment, it is clear that the legislators have finally found a compromise and Massachusetts employers should be prepared for significant change.

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