One If By Land, Two If By Sea, Noncompete Reform Is Coming! Midnight Session In Massachusetts Legislature Alters Noncompete Landscape

Insights
8.13.18

After nearly 10 years of start-and-stop efforts on Beacon Hill, Governor Charlie Baker signed "An Act Relative to Economic Development in the Commonwealth" on Friday evening, which includes sweeping changes to the way the Commonwealth treats noncompetition agreements. Among other things, the bill prohibits 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 in any noncompetition agreement entered into on or after October 1, 2018.

Who's Covered?
All employers are covered by the law, but one of the most significant changes is that employers are prohibited from enforcing noncompetition agreements against certain types of employees, including non-exempt employees, college interns, employees under 18, or employees terminated without cause or laid off. In the past, any type of employee could be covered, so long as the agreement sought to protect an employer's legitimate business interests and was otherwise reasonable.

Somewhat paradoxically, the law's definition of "employee" also includes independent contractors.

What's Covered?
The new law applies to "noncompetition agreements" which it defines as "an agreement 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 the employment relationship has ended."

For employers, this definition is noteworthy for the other types of restrictive covenants that are not covered:

- Agreements to not solicit or entice current employees of the employer
- Agreements to not solicit or transact business with customers, clients, or vendors of the employer
- Noncompetition agreements connected to the sale of a business

- Nondisclosure or confidentiality agreements
- Employee invention assignment agreements;
- Noncompetition agreements made in connection with separation from employment with seven business days to rescind acceptance
- No re-hire/re-apply agreements

These popular agreements will continue to be analyzed on a case-by-case basis by Massachusetts Courts.

What's Required?
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.

If an employer intends to request that a current employee sign a noncompetition agreement, continued employment is no longer enough to support the new arrangement. The employer will have to provide some other type of consideration—likely more money. Current employees must also receive notice 10 business days in advance of being required to sign the agreement.

The law also attempts to require "garden leave," the concept that an employer must pay the departing employee during the period of time she or he is prohibited from competing with the employer. 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. More importantly, the law categorizes garden leave payments as "wages" under the Wage Act and therefore employers are subject to automatic treble damages for even technical violations.

Nevertheless, employers have 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.

Is this Reasonable?
Massachusetts courts have always taken a "reasonable" approach to interpreting and enforcing noncompetition agreements. Essentially if the agreement was necessary to protect a legitimate business interest, reasonably limited in duration and scope, and consistent with public policy, a court would enforce it. The new law makes some changes to this analysis, but largely tracks existing case law:

- Legitimate Business Interest is now limited to the following:

- Employer's trade secrets
- Confidential Information
- Employer's Goodwill

- Noncompetition agreements are limited to just 12 months in duration regardless of whether a greater amount of time could be considered reasonable, with one exception. The duration may be increased to two years if the employee has breached a fiduciary duty to the employer, or has unlawfully taken the employer's property.
- A geographic scope covering only the area in which the employee provided services or had a material presence or influence is presumptively reasonable. This does not seem to impact the availability of, or court decisions discussing, whether a larger area may be reasonable.
- Agreements must be consistent with public policy.

Next Steps

The effective date of the law is less than two months away on October 1. Employers who use noncompetition agreements should immediately review and revise their agreements to conform to both the substantive and procedural aspects of this new legislation. Employers should take heed of the law's notice requirements and begin to think about how they will comply with the statute's garden leave and other new provisions.

If you have any questions about this new law, please contact any attorney in the Boston office of Fisher Phillips at 617.722.0044.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Related People

Joshua D. Nadreau
Regional Managing Partner and Vice Chair, Labor Relations Group
617.722.0044

Email

Service Focus

Employee Defection and Trade Secrets