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MASSACHUSETTS HAS A NEW NON-COMPETE LAW.
IS YOUR COMPANY READY TO COMPLY?

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On Monday, October 1, 2018, a new law governing non-compete agreements goes into effect in Massachusetts. This article provides an overview of the new law and steps employers should take to comply. It also considers two potential consequences of the law, important to both employers and employees. First, the law could make it harder for employers to enforce older agreements. Second, the statute is likely to increase non-compete litigation over agreements designed to comply with the new law. Finally, the article provides recommendations to businesses on complying with the new law or using alternative methods to protect their interests.

A. What you need to know about the new Massachusetts Non-compete Law.

Massachusetts courts have long enforced non-compete agreements to the extent they are fair and reasonable restraints designed to protect an employer's legitimate business interests. The new statute codifies what is considered "fair and reasonable" by considering the time, scope, and interests to be protected. It also defines the employees subject to non-compete agreements and consideration to be

paid to them. The time restrictions of non-compete agreements are now definite. A non-compete agreement is limited to a maximum one-year non-compete period, subject to limited exceptions. To be enforceable, the agreement can cover only the area reasonably necessary to protect the employer's interests. The statute presumes an agreement's enforceability if its geographic restrictions are limited to the areas that the employee worked or had a "material presence or influence." Finally, the non-compete must be "no broader than necessary to protect the legitimate business interests of the employer" defined as the employer's trade secrets, employer's goodwill or the employer's confidential information that otherwise would not qualify as a trade secret. Under the statute, a non-compete agreement may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant such as a non-solicitation agreement, a non-disclosure agreement or a confidentiality agreement.

The new law addresses which employees can be subject to non-compete restrictions. It bans non-compete agreements with nonexempt employees, most students and minors. The law applies to employees as well as independent contractors. Even otherwise valid non-compete agreements cannot be enforced against employees who are laid off or terminated without cause.

Perhaps the most significant change in existing law is the requirement that employers pay departing employees so-called "garden leave" severance payments

if they want to enforce the agreement. Under the garden leave provision, employers must pay the former employee at least half of the employee's highest base salary during the prior two (2) years for the length of the restricted period or pay "other mutually-agreed upon consideration" which must be spelled out in the agreement. Entering into and enforcing non-compete agreements has become a more expensive proposition for employers.

Under the new law, employers can no longer wait until a new employee's first day on the job to introduce a non-compete agreement as a condition of employment. The act requires employers to give new employees the agreement with their job offers and at least ten days before the first day of employment. This is designed to protect employees who leave a prior job and then feel compelled to accept the terms of a non-compete agreement given to them.

Employers must also provide fair and reasonable consideration to existing employees entering into non-compete agreements during their employment. Continued employment is no longer sufficient as consideration to limit an employee's ability to compete.

The statute does not apply to all types of non-compete agreements. It doesn't cover non-compete agreements entered into in connection with the sale of a business, non-solicitation agreements, non-disclosure agreements, or separation agreements supported by adequate compensation.

Non-compete agreements under the new law will be given more and closer scrutiny to ensure they are narrowly tailored to protect legitimate statutorily-defined business interests from former employees who have been adequately notified of and compensated for agreeing to reasonable restrictions on their ability to compete.

B. How does the new law effect older non-compete agreements.

While the law expressly governs agreements made on or after October 1, 2018, the provisions of the law are likely to affect any effort to enforce older non-compete agreements. Judges are likely to use the limitations and presumptions expressed in the new law as a yard-stick for assessing the reasonableness of prior agreements. Lawyers will argue that the statute creates "public policy" that judges cannot ignore when deciding whether to grant injunctive relief to enforce an older non-compete agreement. Over time, judicial interpretations of the new statute will be adopted in cases involving older agreements and those that don't comply with the new standards could be found unreasonable and therefore unenforceable.

C. Likely areas of disagreement in future non-compete litigation under the Act.

While defining non-compete agreements and their enforceability, the statute will not end non-compete litigation. The statute creates issues ripe for litigation. For example, disputes about the reasonableness of consideration paid to the employee, adequacy of notice, the reasons for termination and whether the former employee had a material presence or influence over the restricted geographic area

provide resourceful and experienced attorneys with new reasons to enforce or deny enforcement of non-compete agreements. Presumptions in the new law also provide further grounds to prosecute or defend against these agreements. For example, litigants are sure to dispute whether the legitimate business interest at issue could have been protected through alternative, less restrictive means. Even though the new statute provides guidance and definitions for non-compete agreements, many provisions in the new law will require further refinement and judicial application.

D. What can you do to protect your company's important interests?

Employers must reconsider their non-compete strategy keeping the new statute in mind. They must draft new non-compete agreements for Massachusetts employees and independent contractors that satisfy the requirements of the new law. New agreements must include, among other things, notice provisions, consideration being paid to the employee, no more than a one-year (or in limited circumstances two-year) non-compete period, a geographic scope reflecting the employee's work area, the prohibited activities, the business interests being protected, provisions on garden leave pay and choice of law. Employers should review existing non-compete agreements to assess them against the new norms created by the statute and, where advisable, make revisions and amendments to maximize the likelihood of enforcement. Limiting the use of non-compete agreements to key employees or using alternative agreements not subject to the new statute, such as non-solicitation agreements or confidentiality agreements,

should also be considered as a means of furthering and protecting the business interests at stake.

The process of creating new agreements and reviewing past agreements should also prompt updated personnel and human resources practices and policies for hiring and bringing on new employees.

Massachusetts companies cannot rely on "business as usual" as their approach to non-compete agreements. Old agreements cannot become the templates for new agreements. Ignoring the changes of the new statute will harm the ability of any business to protect its important business interests. Employers should consult with counsel to discuss the new law, ensure compliance and minimize the legal and business risks to their company.