

EMPLOYMENT SERVICES ALERT

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Competing in the Commonwealth: New Non-Compete Law Brings Big Changes to Massachusetts

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Massachusetts has passed legislation that significantly limits the enforceability of non-competition agreements. The Massachusetts Noncompetition Agreement Act (“the Act”) will take effect on October 1, 2018, and will apply to any non-competes entered into on or after that date. If you have employees in Massachusetts, it is time to revisit the language in your non-compete agreements to ensure compliance with the Act.

Under the new law, a non-compete will only be valid and enforceable if it meets certain requirements. First, non-competes are limited to a maximum duration of 12 months post-employment, with some limited exceptions. Furthermore, if the employee is a new hire, the non-compete must be presented either with an offer letter, or 10 business days prior to the employee’s start date, whichever is earlier. If an employer wants a current employee to sign a non-compete, the employer must provide the non-compete to the employee at least 10 business days before the effective date of the agreement. Additionally, for both current employees and new hires, the employee and the employer must sign the agreement, and the agreement must inform the employee of his or her right to consult legal counsel before signing it. In the case of a current employee, the employer must offer “fair and reasonable” consideration beyond continued employment for the agreement to be valid.

Notably, the Act requires that employers offer “garden leave” pay for the length of the restricted period of at least 50% of the employee’s highest base salary during the prior two years. Therefore, employers will have to pay up if they want to enforce non-compete agreements. The garden leave requirement can be avoided if the agreement specifies “other mutually-agreed upon consideration.” However, the Act does not define what constitutes sufficient “consideration” and, thus, leaves open the meaning of what parties can agree to in lieu of garden leave pay. In drafting non-competes, employers must think about whether they want to include garden leave or some other form of mutually agreed-upon consideration.

The Act’s restrictions apply to both employees and independent contractors. However, employers cannot require all employees to sign non-competes. The Act specifically prohibits non-competes for certain categories of employees, including: (1) Employees classified as nonexempt under the Fair Labor Standards Act; (2) undergraduate and graduate students working part-time; (3) employees 18-years-old or younger; and (4) employees who are terminated without cause or laid off. The Act does not define what it means to be terminated for cause, so employers should consider defining the term “cause” in their non-competition agreements to avoid ambiguity.

Some aspects of the Act are consistent with existing common law in Massachusetts. For instance, the Act requires that a non-compete agreement be no broader than necessary to protect the employer’s legitimate business interests and must be consonant with public policy. The Act further provides that a geographic

scope that is limited to the areas in which the employee provided services or had a material presence or influence within the last two years of his or her employment will be deemed presumptively valid. Additionally, the Act specifically recognizes a court's discretion to "reform or otherwise revise" an overbroad or otherwise unenforceable non-compete covenant.

If you are an employer with non-competes for Massachusetts employees, you should consult with a qualified employment attorney to ensure that any agreements entered into on or after October 1, 2018, comply with the Act. Employers may still seek to enforce non-compete agreements entered into before the Act takes effect. However, if a dispute arises over a non-compete that was signed before the effective date of the Act, expect employees to raise public policy arguments against enforcement of restrictions that pre-date the new law. The Employment Services Group at Roetzel & Andress will ensure that your agreements conform with the Act's requirements and limit the potential that your non-competes will be declared void and unenforceable.

If you have any questions about this topic or need assistance, please contact one of the listed Roetzel attorneys.

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