

Massachusetts Adds More Limits To Non-Competition Agreements

Labor & Employment Law Update

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If you are an employer with employees or independent contractors in Massachusetts, it is about to get much more burdensome to protect your customer contacts and trade secrets. In sweeping legislation affecting all employers with employees or independent contractors in the Commonwealth, Massachusetts has altered the meaning, validity and enforceability of non-competition agreements.

The new law, which goes into effect October 1, 2018, requires that any non-competition agreement affecting employees or independent contractors in Massachusetts meet eight minimum requirements in order to be valid and enforceable:

1. If entered prior to employment, it must: be in writing; state that the employee has the right to consult with an attorney; and be provided to the employee at least 10 business days prior to employment.
2. If entered after employment but not as part of a separation, in addition to the requirements above, it must: be supported by consideration independent of continued employment; and the employee must have ten 10 days' notice before it is effective.
3. It must be necessary to protect one of the following legitimate business interests of the employer: trade secrets; confidential information; or goodwill.
4. The term of the non-competition cannot be for more than one year after employment has ended.
5. The geographic scope must be "reasonable in relation to the interests protected," a benchmark for which the legislature says would be a geographic area where the employee provided services in the past two years.
6. The scope of services precluded in the agreement must be "reasonable," which the legislature again says is a benchmark for which would be a restriction on activities the employee performed in the past two years.
7. The agreement must contain a "garden leave" clause or other similar consideration, which requires the employer to pay the employee 50% pro-rata of his/her annual salary during the entire restricted period.

8. It must be “consonant” with public policy.

The new law also makes non-competition agreements completely unenforceable against certain classes of employees – namely, students with internships or short-term employment, employees terminated without cause or laid off, non-exempt employees under the Fair Labor Standards Act and any employee under the age of 18 years old.

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