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Massachusetts Passes Non-Compete Reform Law

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On August 10, 2018, Massachusetts Governor Charlie Baker signed into law a bill making significant reforms to Massachusetts' law regarding non-compete agreements, as well as adopting the Uniform Trade Secrets Act ("UTSA") (joining 48 other states as well as DC in adopting the UTSA at least in part, and leaving New York as the lone state to not have adopted any version of the UTSA). The reform comes at the tail end of the 2018 legislative session and after several years of failed attempts at passing non-compete reform. Although Massachusetts lawyers should read the legislation in full and consult with counsel to prepare for the laws to take effect on October 1, 2018, the following post provides a summary of notable provisions in the non-compete legislation.

- **Coverage and Scope**

The new non-compete law applies to traditional non-compete agreements, but does not apply to other varieties of restrictive covenants, such as non-disclosure agreements, non-solicitation agreements, certain agreements applying to the sale of a business, and invention assignment agreements. **Moreover, and particularly notably, the new law does not apply to "non-compete agreements entered in connection with an employee's separation, provided the employee has 7 days to rescind acceptance."**

The law will cover non-compete agreements entered into with Massachusetts residents and Massachusetts employees on or after October 1, 2018 (but not retroactively), including independent contractors. Employers cannot evade application of the law to its employees or independent contractors by use of choice of law provisions that would require application of a different state's law. This is particularly important for employers who may have a principal place of business outside of Massachusetts and may wish to apply laws of that jurisdiction to its non-compete agreements, or for employers who may employ individuals who are Massachusetts residents but work in another state.

- **Enforceability of Non-Compete Agreements**

The law prohibits employers from entering non-compete agreements with the following categories of individuals: employees classified as non-exempt/overtime eligible under the Fair Labor Standards Act; employees who are under the age of 18; undergraduate or graduate students working as interns or in other short-term employment; and, notably, employees who are or terminated "without cause" or laid off. Because the term "without cause" is not defined, it seems likely that any contracts containing non-compete provisions will now include a definition of termination "for cause."

While employers may continue to enter into non-compete agreements with individuals who do not fall within the above-described categories, the new law establishes several minimum requirements in order for those agreements to be considered valid and enforceable. In terms of contents and procedure, the non-compete agreement:

- Must be in writing;
- Must be signed by the employee *and* employer;
- Must include provisions which expressly state that the employee has a right to counsel prior to signing;
- Must be provided to the employee at least ten days prior to the date of hire (or at least ten days prior to the effective date of the agreement, if entered into after the date of hire);
- Must not exceed 12 months in duration, unless the employee has breached a fiduciary duty or has unlawfully taken the employer's physical or electronic property, which could extend the duration to a maximum of 24 months;
- Must include a "garden leave" provision, which would require the employer to pay the employee at least 50% of the employee's highest annualized base salary in the past two years, *or* "other mutually agreed upon consideration" (which is not defined the law); and
- If signed *after* employment has commenced, the employer must provide "fair and reasonable consideration," which must be more than an offer of continued employment alone.

The law also affirms and attempts to clarify additional prerequisites that are currently established in common law principles, including requirements that the non-compete be reasonable in scope. For instance, where a non-compete contains a geographic reach "that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence," it is to be treated as presumptively reasonable. Moreover, the scope of prohibited activities must also be reasonable, and should be assessed based on the employee's services over the prior 24 months. Finally, the non-compete must be no broader than necessary to protect the legitimate business interest of the employer, and must be consonant with public policy.

To enforce a non-compete, the action must be initiated in the county of the employee's residency, or in Suffolk County state court if mutually agreed upon by the parties. If a court determines that a non-compete covenant part of a larger agreement is unenforceable, such a determination will not void the other provisions of the agreement. In addition, the law permits courts to "reform or otherwise revise" invalid non-compete agreements in order to make the offending provision(s) enforceable. Courts are also granted the ability to impose non-compete restrictions as a remedy for a breach of contract, or statutory or common law duties.

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With less than two months until the law goes into effect, employers should promptly consult with counsel to discuss the impact of the new legislation and to prepare compliant language and forms for future non-compete agreements.

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