

# Memorandum

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## Massachusetts Enacts Non-Compete Agreement Reform

September 6, 2018

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On August 10, 2018, Massachusetts Governor Charlie Baker signed a law significantly changing the landscape for entering into and enforcing non-competition agreements with Massachusetts-based employees (the “Massachusetts Non-Compete Law” or the “Law”). Most notably, the Massachusetts Non-Compete Law limits the term of covered post-employment non-competes to 12 months and requires that an employer pay the former employee at least 50% of his or her base salary during the non-competes period unless the parties otherwise agree. This Alert summarizes key provisions of the law.

- Effective Date: Only non-competes entered into on or after October 1, 2018 are covered. Non-competes entered into prior to this date are not subject to the Law’s requirements.
- Agreements Not Covered by the Law: By its terms, the Law specifically exempts:
  - non-competes made in connection with a separation from employment, if the employee is expressly given 7 business days to rescind acceptance;
  - employee and independent contractor non-solicitation and no-hire agreements;
  - client/customer/vendor non-solicitation and no-service agreements;
  - non-competes made “in connection with” the sale of a business or disposal of an ownership interest in a business or partnership, if the person restricted is a significant owner or member of the business or partnership and receives significant consideration or benefit from the sale or disposal;
  - non-competes entered into outside of an employment relationship;
  - agreements that impose financial consequences, such as a forfeiture of deferred compensation or equity, as a result of the termination of employment (as opposed to those that provide for

forfeiture or other financial consequences for engaging in competition, which expressly are covered);

- non-disclosure, confidentiality agreements, and invention assignment agreements; and
  - agreements by which an employee agrees to not reapply for employment with the same employer after termination of the employee.
- Maximum Length of a Non-Compete: The maximum length for a post-employment non-compete agreement is 12 months. However, if the former employee has breached a fiduciary duty to the employer or has unlawfully taken property of the employer (in either physical or electronic form), the term can be extended to a maximum of two years.
  - “Garden Leave” Pay/Other Agreed Upon Consideration: Unless the parties agree otherwise, the employee is entitled to receive at least 50% of his or her base salary during the restricted period, payable on a pro-rata basis. An employer is not required to pay an employee during any extension of the restricted period beyond 12 months (where such an extension is permitted).
  - New Employees Entering into a Non-Compete Agreement: For new employees, the agreement must be in writing, signed by both the employer and employee, and must state that the employee has the right to consult with counsel. The non-compete agreement must be provided to the employee by the earlier of: (i) the presentation of the formal offer of employment (such as the offer letter or employment agreement); and (ii) 10 business days before the employee begins employment.
  - Existing Employees Entering into a Non-Compete Agreement: For existing employees, continued employment is not sufficient consideration for the non-compete. An existing employee must receive “fair and reasonable consideration.” As with new employees, the agreement must be in writing, signed by both the employer and employee, and must state that the employee has the right to consult with counsel. Notice of the agreement must be provided at least 10 business days before it is effective.
  - Legitimate Business Interests: To be enforceable, the non-compete must not be broader than necessary to protect the “legitimate business interests” of the employer, which are defined as: (i) trade secrets of the employer; (ii) employer confidential information which does not meet the level of a trade secret; or (iii) employer goodwill. Under the Law, a non-compete is presumed necessary where the business interest cannot be adequately protected through an alternative agreement, such as a non-solicit or a confidentiality agreement.
  - Type of Employees Who Cannot Have Non-Compete: Non-compete agreements are not enforceable at all against certain categories of employees, including employees terminated without cause or laid off and employees who are non-exempt from overtime pay requirements under the Fair Labor Standards Act.

- Reformation by a Court: The statute explicitly authorizes a court to reform or revise an otherwise invalid non-compete so as to make it enforceable.
- Choice of Law: If the employee worked in Massachusetts or lived in Massachusetts for the 30 day period prior to the termination of their employment, then the employer cannot have a choice of law provision of another state which seeks to avoid the statute.
- Required Venue: All civil actions relating to employee noncompetition agreements subject to the Law are required to be brought in the county where the employee resides or, if mutually agreed upon by the employer and the employee, the superior court or the business litigation session of the superior court in Suffolk County, Massachusetts.

The new legislation raises questions about how certain provisions will be interpreted and applied. For example:

- Are there documents relating to grants of equity in connection with an employee's employment that are beyond the Law's reach?
- What forms of compensation or benefits during the restricted period, other than the continuation of at least 50% of base salary, will satisfy the Law's provision allowing for "other mutually agreed upon consideration"?
- What additional consideration will be considered "fair and reasonable" when entering into a non-compete with an existing employee?
- Does the Law impact the ability to use pre-termination notice periods?
- How will courts interpret and apply the Law's choice of law provision in light of traditional conflict-of-laws principles, for example either where an employee lives in Massachusetts but performs the substantial amount of his or her duties in another state, or relocates to work in Massachusetts while subject to a non-compete governed by a non-Massachusetts choice-of-law provision?

We will monitor these and other issues that arise and will update this Alert with significant developments.

The text of the Massachusetts Non-Compete Law can be found at Section 21 of Chapter 228 of Massachusetts' Session Laws of 2018. It will be codified at Chapter 149, Section 24L of Massachusetts' General Laws (available at <https://malegislature.gov/Laws/GeneralLaws>). If you have any questions or would like additional information as you consider entering into non-compete agreements with Massachusetts-based employees, please do not hesitate to contact any of the below-referenced members of our Executive Compensation and Employee Benefits or Labor and Employment Practice Groups.

For further information about this legislation, please contact one of the following members of the Firm's Executive Compensation and Employee Benefits or Labor and Employment Practice Groups.

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