In the early morning hours of August 1, 2018, the Massachusetts House and Senate passed long-awaited non-compete legislation. Assuming that Governor Baker signs the bill into law, the legislation will become prospectively effective October 1, 2018. The Massachusetts Noncompetition Agreement Act (the “Noncompetition Act”) is many years in the making, as Massachusetts legislators have made numerous, but unsuccessful, attempts to enact a law addressing non-competes over the past several years.

The language of the Noncompetition Act does not represent a sea change in how Massachusetts has traditionally approached non-competes, but does now require certain guardrails (many of them based on past judicial precedent). Below are some of the more significant provisions for employers and employees to consider:

- A compromise was reached as to the hotly contested issue of “garden leave” payments, or payments to employees during the restricted period following the end of employment. Under the Noncompetition Act, employers can choose to pay former employees a garden leave payment of at least 50% of the employee’s highest annualized base salary over the preceding two years, on a pro rata basis over the restricted period, or “other mutually-agreed upon consideration,” so long as the “mutually agreed upon consideration” is specified in the non-compete.

  Of note, “mutually agreed upon consideration” is not defined in the law. Such a payment therefore could be an amount significantly less than the defined garden leave payment, and could be provided at any time.

  Employers likely will offer signing bonuses, or other compensation, at the outset of the employment to meet this standard. The only known requirement is that the consideration be explicitly set forth in the non-compete.

- Employers must provide advance notice of the non-compete to employees. For new employees, the non-compete must be provided by the earlier of a formal offer of employment, or ten business days before the commencement of employment. For non-competes entered into after the commencement of employment, the non-compete must be provided to the employee at least 10 business days before it is to become effective. This advance notice requirement places Massachusetts in a very small minority of states.

- Likewise, the Noncompetition Act now places Massachusetts in the small minority of states that require additional consideration, independent of continued employment, for non-competes entered into after the commencement of employment.

- Restricted periods may not exceed 12 months from the date of cessation of employment, absent certain unlawful behavior by the employee that may permit a longer time.

- “Legitimate business interests” are limited to the employer’s trade secrets, confidential information, and the employer’s customer goodwill.
A non-compete will be considered presumptively reasonable as to geographic reach and scope of proscribed activities if it is limited to the geographic areas in which the employee worked or had a “material presence or influence” and is limited to the types of services provided by the employee. For sales employees, this standard makes sense, but what remains uncertain is how the presumption will impact those employees with access to confidential information that is not limited to a specific territory.

Consistent with long-standing practice in Massachusetts, the Noncompetition Act allows courts to “reform or otherwise revise” an overbroad non-compete.

The Noncompetition Act applies to non-compete agreements and forfeiture for competition agreements, but does not apply to customer or employee non-solicit agreements; non-competes entered in connection with the sale of a business; non-disclosure and confidentiality agreements; and non-competes made in connection with separation agreements, if the employee is given seven days to rescind acceptance, among other types of agreements. These carve outs likely will lead to an increase in the use of customer non-solicit agreements and severance packages that include a non-compete.

Non-competes are unenforceable against employees 18 years old or younger; undergraduate or graduate students employed as interns; employees terminated without cause; and employees that are non-exempt under the Fair Labor Standards Act. The non-exempt employee exclusion clearly was intended to protect the sandwich shop workers and camp counselors that have been in the news the past few years, but this hard line rule may unintentionally capture others such as part-time advisors privy to substantial confidential information.

Choice of law provisions designating another state will be ineffective if the employee is, and has been for the past 30 days, a resident of or employed in Massachusetts at the time of termination.

Finally, the Noncompetition Act restricts the use of federal courts to enforce non-competes, which will lead to legal challenges from unduly prejudiced out-of-state employers.

Although the Noncompetition Act applies only to non-competes executed after October 1, 2018, it remains to be seen what impact the legislation will have on judges evaluating non-competes signed before that date. It is likely that even if an older non-compete does not meet every technical requirement of the Noncompetition Act, a judge will still enforce an otherwise reasonable non-compete under existing laws, or perhaps accept the Legislature’s call to reform the restrictions to meet the geographic and time requirements set forth in the new law. As a result, employers need to review old non-compete agreements and decide whether they are sufficiently reasonable to stick to their existing agreements. This is because if the employer wants the employee to sign a new agreement (even if it is less restrictive), it now will have to provide specific additional consideration for that new non-compete.

Tags: Legislation, Massachusetts, Non-Compete Laws, Non-Competes