Are You Ready To Steal Employees From Your Mass. Competitors

(Editor's note: This is the first of a two-part column. See part 2 here.)

By Alicia J. Samolis

Massachusetts has recently enacted a law that will render some restrictive covenants unenforceable.

The law starts by broadly defining noncompetition agreements as any agreement between a company and a worker in which the worker "agrees that he or she will not engage in certain specified activities competitive with his or her employer after the [working] relationship has ended." The law applies to agreements with independent contractors and employees.

It does not affect agreements to refrain from competition during the working relationship and does not affect agreements signed prior to Oct. 1, 2018.

The law also does not apply to the following:

• Agreements not to solicit or do business with customers or vendors of the employer.

• Covenants not to solicit for hiring or hire employees of the employer.

• Confidentiality/invention assignment agreements.

• Noncompetition agreements made in connection with the sale of a business if worker is a "significant owner" of the seller and receives "significant consideration" because of the sale.

• Noncompetition agreements made in connection with the end of employment if there is a seven-day rescission period.

The main type of agreement the law does cover is the classic noncompete prohibiting an employee from working for a competitor for a period following the termination of their engagement.

The requirements an employer must meet to make a noncompete agreement enforceable are so stringent that many Massachusetts companies will not even try to comply and rather will rely on nonsolicitation, nonpoach and confidentiality provisions. However, because inclusion of the unenforceable provisions is not prohibited by the law and does not invalidate the rest of the agreement, employers are likely to still include the provisions, as the same may still discourage uniformed employees from engaging in competitive activities.

Potential employers can identify if the noncompete could be enforced against an applicant by asking the following questions:

• Did the worker resign or was he/she terminated with cause?

• Is the worker exempt under the Fair Labor Standards Act?

• Is the worker over the age of 18 and not a student in a short-term engagement (such as an intern)?

• Was the agreement offered at the beginning of the engagement or was there either additional consideration paid for signing the agreement or "garden pay" (payment during the noncompete period)?

• Is the agreement in writing, signed by both the employer and the employee, and expressly states the employee has the right to consult with an attorney?

• Was the worker provided 10 days' notice of the agreement?

• Will the new employment occur within the 12-month period following the worker's termination of employment?

• Will the worker be providing services for your company in geographic areas in which the worker "provided services or had a material presence or influence" during the last two years of their prior employment?

• Will the worker be providing services of the type previously provided by the worker to their prior employer during the last two years of his/her employment?

If the answer to any of the above questions is "no," then the covered noncompete provision is invalid under the new law.

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