What You Need to Know About the New Mass. Noncompete Law

(Editor's Note: This is the second of a two-part column. See part 1 here.)

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As detailed in Part I, certain types of noncompetition agreements are now invalid under the new Massachusetts noncompete law (the Act). This is of course a double-edged sword for employers, who will now benefit from the ability to hire certain employees and independent contractors who were previously "off-limits" due to a restrictive covenant, but also now may be prevented from enforcing valuable restrictions against their current workforce.

It is critical for employers in the northeast to understand which employers and which employees may be affected by the Act. Hint: If you are a Rhode Island employer and have employees *living or working in* Massachusetts, read on!

The analysis requires a short detour into the legal concepts of "choice of law" and "choice of forum". In other words, if there is a dispute, which state's law applies and in which state can the dispute be heard.

A noncompetition lawsuit will usually start with the former employer suing the former employee for breach of contract (the contract being the noncompetition agreement). Less likely is that the employee (or their new employer) strikes first and files a lawsuit against the former employer asking the court to declare that the noncompetition is invalid. After suit is filed, the court – regardless of where it is located – will have to decide which state's law to apply. Generally speaking, the contract will state the law to be applied and the court will usually follow the contract unless the law chosen bears no relation to the parties or issues.

Here is the problem for Rhode Island employers: even those with contracts that state "in the event of a dispute the laws of the State of Rhode Island shall apply", Rhode Island law may not apply. The Act says that a choice of law provision (e.g. Rhode Island law applies) is not effective if, throughout the 30-day period leading up to the termination date, the employee was either (a) a resident of Massachusetts; or (b) employed in Massachusetts. In the event a lawsuit is filed in Massachusetts, a Massachusetts court will likely apply the Act if the employee involved lived or worked in Massachusetts during the specified time. Moreover, while not explicitly required by the Act, judges may apply the Act to other workers with Massachusetts connections. Further, given that the Act may be taken to reflect a general public policy of Massachusetts, judges may also apply the principles of the Act to noncompetes not explicitly covered by Act, such as noncompetes signed prior to October 1, 2018. That brings us to the concept of "choice of forum," i.e. where the lawsuit will be filed. Like choice of law, choice of forum is often contained in a contract, and choice of forum clauses are frequently upheld unless there is no rational relationship to the chosen forum. The Act directs suits to be filed in Massachusetts, even specifying the forum be the county where the employee lives (or Suffolk Superior court by Agreement). Thus, if an employee or their new employer sues for an injunction in Massachusetts prior to the employer filing suit and fits the aforementioned criteria of working or living in Massachusetts, a Massachusetts judge likely will not honor an out-of-state forum chosen.

On the other hand, if the employer enforcing the Agreement files in Rhode Island, a Rhode Island judge will consider the Act when weighing the interests in deciding choice of forum and choice of law. However, the judge would not likely feel restricted by the Act and thus may choose to hear the suit, apply Rhode Island law and uphold an agreement that would otherwise be invalid under the Act. As a result, who files first, the so-called "race to the courthouse" may be critical. Unfortunately for Rhode Island employers, the nefarious employee preparing to work for a competitor could move to Massachusetts before resigning and file prior to the employer

having time to win the race.

The lesson here? Employers in the surrounding states should take the following steps: (1) expressly choose forums and law outside of Massachusetts, preferably with a real relationship to the employment; (2) make sure agreements have strong provisions that are exempt from the restrictions of the Massachusetts law, such as nonsolicitation, confidentiality and nonpoach provisions; and (3) consider filing a complaint outside of Massachusetts immediately when a dispute arises over a noncompete with a connection to Massachusetts, to potentially avoid the Act's unfavorable provisions.

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