Massachusetts Legislature Passes Game-Changing Non-Compete Law

On July 31, the Massachusetts Legislature passed an omnibus economic development bill. Of major significance, the bill contains provisions that *fundamentally* change the way employee noncompetition agreements are regulated in Massachusetts. While the legislation does not abolish noncompetition agreements in the Commonwealth, the legislation substantially limits the terms upon which employers can enter into noncompetition agreements with employees and other workers.

The legislation is now pending signature of the Governor. If signed, the law will take effect on **October 1, 2018**, and apply to all employee noncompetition agreements executed after that date.

Below are the core provisions:

STRUCTURE AND PROCEDURAL REQUIREMENTS
Under the legislation, a noncompetition agreement is **invalid** unless it is in writing and signed by both the employer and the employee, and expressly states that the employee has the right to consult with an attorney.

- *If the noncompetition agreement is presented in connection with the commencement of employment,* the agreement must be provided to the employee with the formal offer of employment or 10 business days before the commencement of the employee's employment, whichever is earlier.
- *If the noncompetition agreement is presented after the commencement of employment,* the agreement must be supported by **additional consideration** independent from the continuation of employment, and notice of the agreement must be provided at least 10 business days before the agreement is to become effective.

In addition, a noncompetition agreement is **invalid** unless it is supported by either "**garden leave**" **pay** or some "**other mutually-agreed upon consideration**." If an employer elects to support a noncompetition agreement with garden leave pay, the garden leave provision must require the employer to continue to pay the former employee, during the restricted period of the noncompetition agreement, with an amount that is "at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination." The legislation, however, is silent with respect to the definition and requirements of "other" consideration. As such, it appears that if an employer elects to support a noncompetition agreement with "other consideration," that consideration may be paid at any time (such as a hiring bonus), at a rate that is more or less than the garden leave pay rate set in the legislation.

LIMITS ON THE SCOPE OF RESTRICTIONS
Under the legislation, the scope of restrictions contained in a noncompetition agreement:

- May not exceed **12 months** from the date of cessation of employment (unless a limited exception applies).
- Must be limited to the geographic areas in which the employee, during the last 2 years of employment, "provided services or had a material presence or influence."
- Must be limited to the specific type of services the employee provided to the employer during the last 2 years of employment.

In addition, a noncompetition agreement is **invalid** unless an employer can demonstrate that no other type of restrictive covenant (e.g., a non-solicitation or non-disclosure agreement) is sufficient to protect the "legitimate business interests" of the employer. Under the legislation, the legitimate business interests of an employer are defined narrowly, and limited to: trade secrets, confidential business information and goodwill.

BAN WITH RESPECT TO CERTAIN TYPES OF EMPLOYEES

Under the legislation, noncompetition agreements are **invalid** and **not enforceable** against the following categories of employees:

- Employees who have been terminated without cause or laid off;
- Employees who are classified as non-exempt under the Fair Labor Standards Act;
- Undergraduate or graduate students who are engaged in short-term employment;
- Employees who are 18 years of age or younger.

RESTRICTIVE COVENANTS THAT ARE NOT REGULATED BY THE LEGISLATION

The above-limitations apply only to so-called "noncompetition agreements," which are defined as agreements "*between an employer and an employee, . . . arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended.*" For purposes of this definition, the term "employee" includes any person "providing service" to an employer, including independent contractors.

The legislation does **not** apply to certain other types of restrictive covenants, identified as the following:

- covenants not to solicit or hire employees of the employer;
- covenants not to solicit or transact business with customers, clients, or vendors of the employer;
- noncompetition agreements made in connection with the sale of a business *if* the party restricted by the noncompetition agreement is a "significant owner" of the seller, and receives "significant consideration" as a result of the sale;
- noncompetition agreements outside of an employment relationship;
- forfeiture agreements (*an agreement that imposes adverse financial consequences on a former employee as a result of the termination of an employment relationship, regardless of whether the employee engages in competitive activities following cessation of the employment relationship*);
- nondisclosure or confidentiality agreements;
- invention assignment agreements;
- noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance; or
- agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

Such agreements, by express provision, not regulated by the new legislation, and remain governed by common law standards.

Please contact Partridge Snow & Hahn LLP if you have any questions about this legislation.

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