Governor Signs Into Law Game-Changing Massachusetts Legislation

By Alicia J. Samolis

On Friday, Governor Charlie Baker signed into law An Act (the "Act") relative to the judicial enforcement of noncompetition agreements that *fundamentally* changes the way noncompetition agreements are regulated in Massachusetts. The Act severely limits the use of agreements signed after October 1, 2018 which restrict an employee's or independent contractor's ability to work for a competitor after their working engagement ends. Employers in Massachusetts and its neighboring states need to understand the specifics of the Act and take appropriate action to preserve goodwill and protect confidential information.

Agreements to Which the Law Applies

The Act limits the ability of companies to enter into *covered* "noncompetition agreements" with employees *or* independent contractors (for ease of reference, employees and independent contractors are referred to here as "workers," but it should be emphasized that the Act expressly applies to agreements involving employees and independent contractors). For purposes of the Act, a *covered* noncompetition agreement is defined as any agreement "between an employer and [a worker], . . . arising out of an existing or anticipated [working] relationship, under which the [worker] or expected [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," and expressly includes so-called "forfeiture for competition agreements" – agreements that impose adverse financial consequences on separated employees, if those employee engage in competitive activities. Covered noncompetition agreements are subject to strict limitations, as described below.

The Act does not apply to certain *non-covered* noncompetition agreements, such as: (a) 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; (b) noncompetition agreements outside of an employment or independent contractor relationship; (c) 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 (such as severance agreements); or (d) any agreement signed prior to October 1, 2018. The non-covered noncompetition agreements are unrestricted by the Act, and remain regulated under common law standards.

In addition, the Act, by express exemptions, does *not* cover: (a) agreements not to solicit or do business with customers or vendors of the employer ("Non-Solicitation Agreements"); (b) covenants not to solicit for hiring or actually hire employees of the employer ("Non-Poach Agreements"); or (c) confidentiality/invention assignment agreements. Thus, the Act has also not changed the law with respect to those exempted agreements.

It is possible that the Act may be interpreted to cover Non-Solicitation or Non-Poach Agreements that extend beyond the basic protections previously mentioned. For example, it is not clear whether a piece of a Non-Solicitation Agreement restricting the solicitation of customers, (as well as potential customers, past customers, or referral sources), or the parts of a Non-Poach Agreement which went beyond restricting hiring, or soliciting of employees and included restricting indirect poaching or poaching of former employees would be subject to the stringent statutory requirements.

Prohibited Agreements

Under the Act, covered noncompetition agreements are **invalid** and **not enforceable** against the following categories of workers:

o Workers who have been laid off or terminated without cause;

o Workers who are classified as non-exempt under the Fair Labor Standards Act;

o Undergraduate or graduate students who are engaged in short-term engagement; and

o Workers who are 18 years of age or younger.

Structure and Procedural Requirements

In order for a covered noncompetition agreement to be enforceable under the Act, it must meet the following structural and procedural requirements:

o The agreement must be in writing and signed by both the employer and the employee, and expressly state that the employee has the right to consult with an attorney.

o If the 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 agreement is presented after the commencement of employment, notice of the agreement must be provided at least 10 business days before the agreement is to become effective.

o The agreement is invalid unless it is supported by either "garden leave" pay *or* some "other mutually-agreed upon consideration." It is clear that **continued employment is not enough to be sufficient consideration** (and that even at hiring, additional consideration may be needed, although the same is not fully clear). The Act, however, is silent with respect to the exact 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, as a hiring bonus), at a rate that is more or less than the garden leave pay rate set in the Act. 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 two years preceding the employee's termination."

o The applicable portion of the agreement subject to the Act may not exceed **12 months** from the date of cessation of employment (unless a limited exception applies).

o The restriction must be limited to the geographic areas in which the employee, during the last two years of employment, "provided services or had a material presence or influence."

o The restriction must be limited to the specific type of services the employee provided to the employer during the last two years of employment.

o In addition, an 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 Act, the legitimate business interests of an employer are defined narrowly, and limited to: trade secrets, confidential business information and goodwill.

Additional Implications

The Act has an interesting choice of law and choice of forum provisions. The Act states that a choice of law provision in such a covered agreement will not be effective if the employee was either (a) a resident of Massachusetts at the time of his or her termination of employment and the thirty day period preceding his or her termination of employment or (b) employed in Massachusetts at the time of his or her termination of employment and the thirty day period preceding his or her termination of employment. It further provides that

lawsuits filed in Massachusetts be brought in the county court where the employee resides or, if agreed upon, the Suffolk county state superior court.

Given these provisions, if an action is filed in Massachusetts, and the employee lives in Massachusetts, a Massachusetts judge will likely apply the statute – even if the work and employer are based outside of Massachusetts. However, judges presiding over actions filed outside the state – particularly where the agreement contains out-of-state choice of law and choice of forum clauses, and where there is a logical connection with the state chosen – may choose not to apply the statute, depending on the choice of law principals of the state in which the action is filed. Thus, it may be worthwhile for some employers to expressly choose forums outside of Massachusetts for their noncompete agreements. Additional steps employers should consider are (1) making sure employees and independent contractors have signed noncompetition agreements prior to October 1st 2018; and (2) making sure agreements have strong provisions that are exempt from the restrictions, such as nonsolicitation, confidentiality and nonpoach provisions.

Please contact Alicia J. Samolis at Partridge Snow & Hahn LLP if you have any questions about this Act.

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