

Massachusetts Passes New Non-Compete Law

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On October 1, 2018, a new law went into effect in Massachusetts regarding non-competition agreements. The new law significantly restricts an employer's ability to enforce a non-competition agreement against a former employee or independent contractor, and it imposes several procedural hurdles that must be complied with for a non-competition agreement entered into after October 1 even to be enforceable.

RESTRICTIVE COVENANTS GENERALLY

Non-competition restrictions fall within what are broadly defined as restrictive covenant agreements.

There are **three common types** of restrictions contained in restrictive covenant agreements:

1. Confidentiality/non-disclosure of company information
2. Non-solicitation – of customers and/or employees
3. Non-competition.

While many restrictive covenant agreements contain all three of these common types of restrictions, it is important to note that **the new law only pertains to non-competition agreements**. It has no direct impact on confidentiality agreements or non-solicitation agreements, which continue to be controlled by common law.

For any type of restrictive covenant agreement to be **enforceable**, the employer must:

- Give the employee “consideration,” i.e., something of value for signing the agreement
- The employee must not be signing the agreement under duress, i.e., the employee has time to read the agreement and decide whether to sign it.

Assuming these first two hurdles have been met, common law next requires that the terms of the restrictive covenant agreement be “**reasonable**.” The courts look for reasonableness in the scope of:

- What conduct is prohibited
- The duration for which the conduct is prohibited
- The geographic area where the conduct is restricted.

KEY ASPECTS OF THE NEW NON-COMPETITION LAW

Several key aspects of the new non-competition law are summarized below (given the amount of detail in the new

law, it is beyond the scope of this article to detail all the law's nuances):

- Employers may not enter into non-competition agreements with hourly-paid employees, students who are hired for short-term employment of a finite duration, or any person eighteen years of age or under.
- Employers may enter into non-competition agreements with “independent contractors” and employees alike.
- Employers may not enforce non-competition agreements against any person who was laid off or who was terminated without cause unless the non-competition provisions are agreed to as part of a post-separation severance agreement. The new statute does not define “cause” for purposes of this provision.
- Employers requesting a new-hire employee to sign a non-competition agreement must offer “garden leave” consideration or some “other mutually agreed upon consideration.” Regarding non-competition agreements presented to current employees, the statute only requires fair and reasonable consideration but does not define those terms. Similarly, the statute does not provide any further guidance on what constitutes “other mutually agreed upon consideration” for new hires. The phrase “garden leave” in the new statute is defined as 50 percent of the employee's highest paid yearly wages over the past two years. As to the timing of the “garden leave” payment, the law provides that it is to be paid after the employee leaves the employer's employ, and then only if the employer still wishes to enforce the agreement. It can be paid via lump sum or in payroll installments over the one-year period during which competition is restricted. If an employer chooses not to enforce a previously executed non-competition agreement, it need not pay the garden leave consideration.
- Employers must now tailor the non-competition agreement provisions so they are “reasonable” under the new law.
 - Reasonable in duration. With limited exceptions, under the new law, the longest duration allowed for a non-competition agreement is one year. The duration can be extended to two years where the former employee breached a fiduciary duty to the company or has unlawfully taken company property.
 - Reasonable in scope of prohibited conduct. Under the new law, the restricted conduct must be “no broader than necessary to protect the legitimate business

interests of the employer.” The statute goes on to state that the restriction must be limited to the “specific types of services provided by the employee at any time during the last two years of employment.”

- **Reasonable in geographic restrictions.** Under the new law, the geographic restrictions regarding where a former employee may not compete are limited to the area where, during the past two years of the employee’s employment, he or she provided services or had a “material presence or influence.” The statute does not define the phrase “material presence or influence.”
- Employers must also comply with several new procedural hurdles before a non-competition agreement will be enforceable.
 - First, the agreement must be in writing.
 - Second, it must be signed by both parties.
 - Third, the non-competition agreement must be given to the prospective employee before he or she is formally offered employment or ten days before he or she is to start work, whichever is earlier.
 - Fourth, the company must notify the individual that he or she has the right to consult with an attorney before signing the agreement.

THE TAKEAWAY

Given the significant cost of the “garden leave” payment to enforce most newly entered non-competition agreements, and given the new limitations on what conduct may be prohibited and for how long, it is likely that, going forward that **many employers will simply restrict the disclosure of confidential information and prohibit the solicitation of customers/clients and employees**, without restricting the former employee’s ability to compete, since the new law does not impact those agreements. A well-tailored non-solicitation agreement can prohibit a former employee from accepting or soliciting any business from a current or recently former customer on behalf of himself or herself or others, and it can prohibit him or her from attempting to lure away current employees — usually the two biggest concerns for most employers.

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