September 26, 2018

New Massachusetts Noncompetition Law Effective October 1

After many years of reform efforts, on August 10, 2018, Massachusetts Governor Charlie Baker signed into law the Massachusetts Noncompetition Agreement Act. The Act, which applies to noncompetition agreements entered into on or after October 1, 2018, significantly changes noncompetition practice in Massachusetts and requires prompt action by employers. The key provisions are summarized below.

Covered Agreements

At the outset it is important to note what is *not* covered by the Act. The following agreements are not considered to be noncompetition agreements:

- Covenants not to solicit or hire employees of the employer or solicit or transact business with the employer's customer or clients
- Noncompetition agreements in the context of the sale of a business
- Noncompetition agreements not in connection with an employment relationship
- Forfeiture agreements (but not forfeiture for competition agreements, which *are* subject to the Act)
- Nondisclosure, confidentiality and invention assignment agreements
- Noncompetition agreements in connection with the cessation of or separation from employment (as long as the employee is given seven days to rescind acceptance)

Note also that the Act applies to both employees and independent contractors.

Notice

To address the common situation where an employee is presented with a restrictive covenant only after he or she arrives at the new employer's worksite, the Act requires that a noncompetition agreement entered into at the commencement of employment must be provided to the employee either with the formal offer of employment or at least 10 business days before the start of employment, whichever is earlier. If the agreement is entered into after employment begins, the agreement must be supported by "fair and reasonable" consideration other than continued employment and be provided to the employee at least 10 business days before it is effective. Whether offered before or after employment begins, the agreement must be signed by both the employee and employer and must advise the employee of the right to consult legal counsel before signing.

Scope of Restrictions

The Act codifies certain aspects of existing Massachusetts law concerning noncompetition agreements while at the same time creating presumptively reasonable limitations. As has long been the case, a noncompetition agreement may not be broader than necessary to protect the employer's trade secrets, confidential information or goodwill. However, the restricted period cannot exceed 12 months from termination, unless the employee has breached a fiduciary duty owed to the employer

or taken property belonging to the employer, in which case the duration may be enlarged to two years. Similarly, a noncompetition clause must be geographically reasonable. Reasonableness is presumed for locations where the employee provided services or had a material presence or influence in the two years prior to termination. Further, the scope of proscribed activities must be reasonably limited, which is presumed where the clause is limited to the "specific types of services provided by the employee" during the last two years of employment.

Garden Leave

The most unique aspect of the Act is the requirement that the employer pay the departing employee "garden leave" during the restricted period of "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 Act provides that employers may alternatively provide the employee with "other mutually agreed-upon consideration," but it remains to be seen how the courts will determine what might be sufficient alternate consideration.

Ineligible Employees

The Act provides that noncompetition agreements are not enforceable against employees classified as non-exempt under the Fair Labor Standards Act, graduate and undergraduate students participating in internships, employees under the age of 18, and employees who are terminated "without cause" or who are laid off. The Act is silent on the definition of "cause," and this provision seems destined for challenge in the courts.

Choice of Law and Venue

To circumvent efforts to apply other states' laws, the Act purports to invalidate any choice of law provision that would apply the law of a state other than Massachusetts, if the employee, for at least 30 days prior to termination of employment, resided or worked in Massachusetts. The Act also requires litigation relating to noncompetition agreements to be brought in the Superior Court for the county where the employee resides, or in Suffolk Superior Court in Boston if mutually agreed by the parties.

Actions to Take

As should be apparent, the Act contains substantial traps for the unwary. Prior to October 1, employers should carefully review their existing noncompetition agreements and related policies and consider what revisions, if any, need to be made to ensure the enforceability of future agreements.

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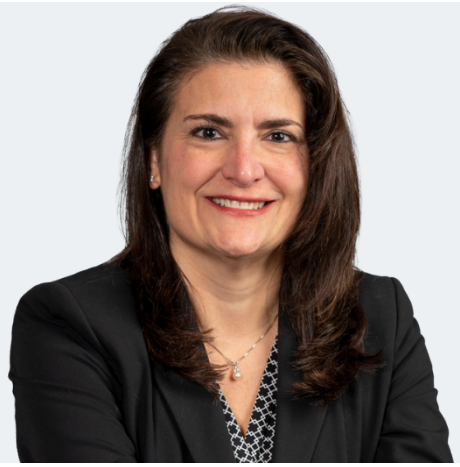

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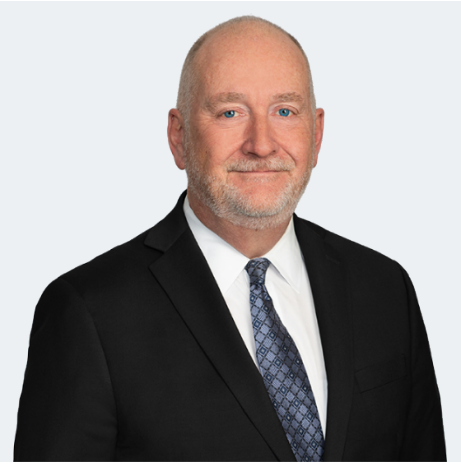

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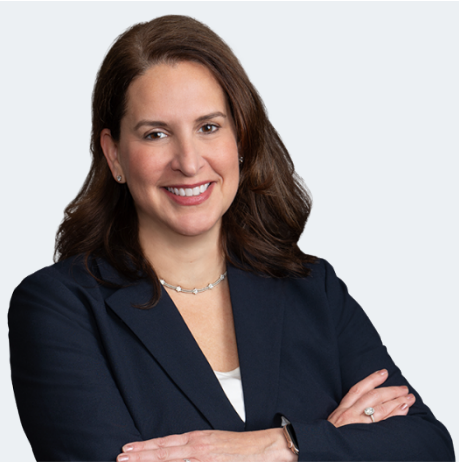

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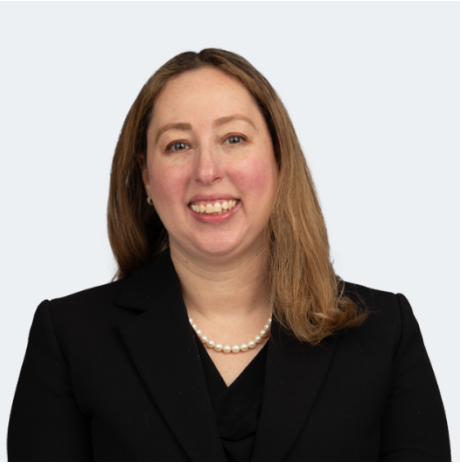

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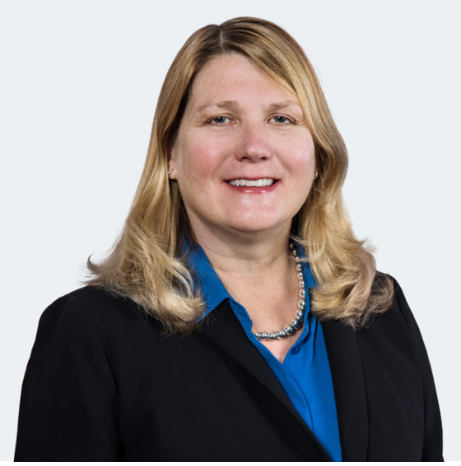

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