

Breaking Down the New Massachusetts Noncompete Rules for Employees

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In the four months since the Massachusetts Noncompetition Agreement Act became effective, employers have learned the hard way that implementing the new rules is a lot harder than it seems. In the absence of additional guidance from the state, employers have struggled to address questions like:

- **Payment during the noncompete period.** What constitutes “other mutually-agreed upon consideration,” and what sources can employers apply to satisfy this standard?
- **Grandfathered agreements.** The new rules apply to agreements beginning Oct. 1, 2018. What happens when a previously-existing agreement is amended or modified? What kinds of changes require the employer to conform the existing noncompete agreement to the new rules?
- **Excluded employees.** When does an employer really need a noncompete for an employee? When will other types of agreements suffice to protect the company’s interests (like confidentiality or non-solicitation agreements, to which the new rules do not apply)?
- **Employment separation agreements.** Agreements entered into as part of a separation are exempt from the new rules, but is this important exemption limited to agreements initiated at exit, or does it apply to pre-negotiated separation packages?

Below is a summary of the rule changes and concrete steps human resources departments and compensation committees can take to address these and other issues under the new rules.

Duration

Noncompetes in Massachusetts may not exceed a maximum period of 12 months, but that period may be extended to up to two years if the employee breaches a fiduciary duty to the employer or misappropriates the employer’s property.

Form and timing

All noncompetes (for new or current employees) must be in writing, signed by both parties, and must expressly give the employee the right to consult an attorney before signing. In the case of a current employee, the agreement must be provided to the employee at least 10 business days before the effective date. In the case of a new hire, the agreement must be provided to the candidate by the earlier of a formal offer of employment or 10 business days before the employment start date.

Payment

The law introduces so-called “garden leave,” which mandates payment to the employee during the noncompete period in the amount of at least 50% of the employee’s highest base salary during the prior two years. Employers may substitute “other mutually-agreed upon consideration” for the garden leave, but no guidance has been provided about the form or amount of any alternative consideration. With respect to existing agreements, continued employment no longer qualifies as “fair and reasonable consideration,” so any amendments to existing agreements would have to include appropriate compensation.

Choice of law/venue

Choice of law provisions are unenforceable if the employee has been a resident of Massachusetts or has been employed in Massachusetts for at least 30 days preceding the end of employment. Civil actions to enforce noncompete agreements must be brought in the employee’s county of residence or, if mutually agreed, in Suffolk County (which includes the city of Boston). In any such action, courts have discretion to revise overreaching noncompete agreements in order to protect an employer’s legitimate business interests.

Excluded employees

The law prohibits noncompetes for certain groups of potential low-earning employees, such as employees under age 18, paid or unpaid student interns, or other short-term student employees who are enrolled in school. It also protects employees classified as nonexempt under the Fair Labor Standards Act (*i.e.*, eligible for overtime pay), employees terminated without cause, and employees who have been laid off by the employer.

Excluded agreements

The law does not apply to certain types of agreements, including:

- Noncompete agreements entered into as part of an employment separation where the employee is given at least seven business days to rescind the agreement.
- Other types of restrictive agreements, such as client or employee non-solicitation agreements or confidentiality agreements.
- Noncompete agreements entered into by owners or partners in connection with the sale of a business, where the owner or partner will receive significant consideration from the sale.

Five action items to consider

Human resources teams and compensation committees may want to consider taking the following actions before the new law goes into effect.

1. Consider what other components of the organization’s typical separation package could be substituted for the “garden leave.”
2. Revise any multi-state agreements to ensure they are still valid and enforceable in Massachusetts, or consider creating a Massachusetts-specific version of the agreements.
3. Review onboarding procedures to make sure any noncompete agreements provided at hire comply with the new timing and process requirements.

4. Modify exit procedures to make sure any noncompetes are withdrawn or extended appropriately based on the employee's status and/or the reason for termination.
5. Consider revising all existing agreements to comply with the changes in law and to ensure consistent treatment of employees and ease of administration.

For specific advice or assistance in implementing the new noncompete rules, contact [Sonia Steele](mailto:ssteele@goulstonstorrs.com) at ssteele@goulstonstorrs.com or 617-574-0549.

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