

Five Steps You Can Take Starting Today to Get Ready for New Noncompete Legislation

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Effective October 1, 2018, employers will face a slew of new restrictions and requirements for noncompete agreements in Massachusetts. The new statute draws no distinction between employees and independent contractors. These changes follow years of legislative negotiations and are part of the recent economic development bill signed earlier this month. In most circumstances, the new law does not require employers to do anything with respect to current agreements or agreements in place prior to October 1, but it makes numerous changes for agreements entered into after that date. Below are some of the most significant changes taking effect.

Duration

Noncompetes in Massachusetts may not exceed a maximum period of 12 months, but that period may be extended to up to 2 years if the employee breaches a fiduciary duty to the employer or misappropriates the employer's property.

Form & 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 at least 10 days before the employment start date, or before a formal offer letter, whichever comes first.

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 2 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 7 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.

Action Items

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

- Consider what other components of the organization's typical separation package could be substituted for the "garden leave."
- 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.
- Review onboarding procedures to make sure any noncompete agreements provided at hire comply with the new timing and process requirements.
- 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.
- Consider revising all existing agreements to comply with the changes in law and to ensure consistent treatment of employees and ease of administration.

If you would like to explore what makes sense for your company, please contact your regular Goulston & Storrs attorney or any member of the firm's Employment Group.

For more information, please contact Sonia Steele at ssteele@goulstonstorrs.com or 1.617.574.0549.

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