



Massachusetts Legislature Passes Bill Limiting Non-Competition Agreements

On July 31, 2018, the Massachusetts legislature adopted long awaited legislation (the "Non-Compete Legislation") that would restrict the use of noncompetition agreements by for-profit business entities. If signed by Governor Charlie Baker, the new legislation would become effective on October 1, 2018, and would be applicable to noncompetition agreements entered into on or after that date.

The Non-Compete Legislation would apply to agreements between an employer and employee under which the employee agrees not to engage in competition with his or her employer after his or her termination, but would not restrict employers' ability to impose restrictions on employees' activities while they remain employed. Further, the new law would not apply to certain types of restrictive agreements or covenants, including:

- (1) agreements entered into in connection with a sale of the business or all or substantially all of its assets;
- (2) agreements entered into in connection with termination of employment, if the terminated employee has seven days to rescind his or her acceptance; and
- (3) covenants not to solicit customers, vendors or suppliers of the business or hire or solicit employees.

Bill Regulates Terms and Conditions

If signed into law, the Non-Compete Legislation would limit restrictions on competition to one year following termination, except in certain very limited circumstances. The employer must have a legitimate business interest in protecting its trade secrets, good will or confidential information, and the restrictions must be reasonable both in geographic reach and the activities proscribed. Noncompetition agreements that restrict geographic areas or activities in which the employee has worked within two years prior to termination would be presumptively reasonable.

The new law would also require that employers pay employees during the restricted period, either in the form of "garden leave" – 50% of the employee's highest annualized salary over the two years prior to termination – or other mutually agreed-upon consideration that may be a lesser amount than what the employee would receive as "garden leave". Noncompetition agreements would need to be signed by both employer and employee and include a statement that the employee is entitled to consult counsel prior to signing.





In order for a noncompetition agreement to be effective, it would need to be provided to the employee either at the time the formal offer is made or at least ten days prior to the employee beginning work. A noncompetition agreement could only be effective after that if it was accompanied by fair and reasonable compensation independent of continuation of employment.

Under the new law, noncompetition agreements would not be enforceable against certain types of employees, including employees who are terminated without cause or laid off, undergraduate or graduate students, employees age 18 or younger, or nonexempt employees under the Fair Labor Standards Act.

Governor Baker Expected to Sign Bill into Law

The bill has now passed to Governor Baker for his review. Given his role in negotiation of these issues over the course of his first term as Governor, many commentators expect that he will be supportive of the bill.

We will continue to monitor developments related to the Non-Compete Legislation and keep you apprised of any substantial new developments. In the interim, please contact the authors or another member of your Hemenway & Barnes team with any questions you may have.

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