

CLIENT ALERT

Massachusetts Cracks Down on Non-Competition Agreements

August 24, 2018

AUTHORS

James C. Dugan | Michael A. Katz | Kristian L. Hinson

On August 10, 2018, Massachusetts enacted a new statute¹ that could significantly limit employers' ability to enforce non-competition agreements against their employees working or residing within the state. The new law, which affects non-competition agreements entered into on or after October 1, 2018, imposes certain requirements for enforceability, the most potentially impactful of which is that employers make U.K.-style "garden leave" payments to former employees (which term also includes for these purposes independent contractors) for the duration of the non-compete restrictions. Other provisions include: (i) a maximum non-compete duration of twelve months (with limited exceptions); (ii) a requirement that any non-compete that is a condition of employment must be provided at the earlier of the time a job offer is made or ten business days before employment is commenced; (iii) a requirement that any non-compete entered into after employment has commenced be provided at least ten business days before it becomes effective and be supported by new consideration independent from continued employment; and (iv) a prohibition on the use of a non-compete with an employee terminated by the employer without "cause" or as a result of a layoff and with certain other classes of employees. Notably, the law permits the "garden leave" requirement to be satisfied either by payments totaling at least fifty percent of the highest annual base salary that the employee received in the two years preceding the end of employment or by "other mutually-agreed upon consideration between the employer and employee."

Potentially limiting the impact of the new law are a number of carve-outs from its provisions. In particular, the law does not apply to: (i) covenants not to solicit or conduct business with the employer's customers, clients, or vendors; (ii) non-competition agreements in connection with a sale of a business entity; or (iii) covenants not to solicit or hire employees of

¹ MASS. GEN. LAWS ch. 149, § 21 (2018).

Massachusetts Cracks Down on Non-Competition Agreements

the employer. As a practical matter, therefore, employers wishing to avoid the more onerous requirements of the new law may forgo non-compete covenants entirely in favor of customer non-solicitation covenants, which can achieve a similar result. In addition, the open-ended nature of the “garden leave” requirement, which can be satisfied by any “mutually-agreed upon consideration,” raises the as-yet unanswered question of whether that requirement could be satisfied by even nominal consideration.

Any non-compete will also still need to comply with other legal requirements, including that it be no broader in scope than necessary to protect a legitimate business interest and that it be reasonable in geographic scope. The new law also contains provisions relating to venue and choice of law and provides that courts can “blue pencil” an overly broad non-compete in order to render it enforceable.

Employers with employees in Massachusetts are encouraged to immediately review and revise their non-compete agreements to conform with the new law and to implement procedures designed to ensure compliance beginning in October.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

James C. Dugan

212 728 8654

jdugan@willkie.com

Michael A. Katz

212 728 8204

mkatz@willkie.com

Kristian L. Hinson

202 303 1254

khinson@willkie.com

Copyright © 2018 Willkie Farr & Gallagher LLP.

This alert is provided by Willkie Farr & Gallagher LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This alert may be considered advertising under applicable state laws.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.