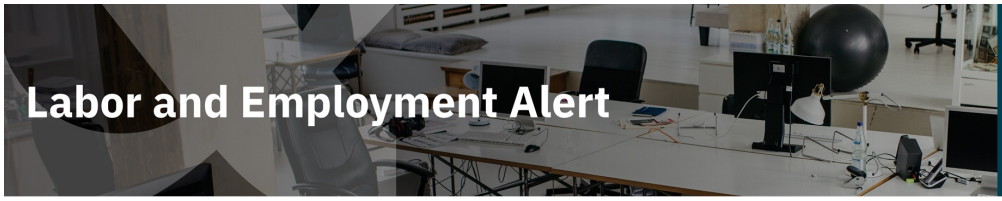

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New Massachusetts Non-Compete Law and its Impact on Connecticut Employers

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Connecticut companies with employees **who work or live in Massachusetts** must be aware of a recent Massachusetts law limiting the scope of noncompetition agreements entered into on or after October 1, 2018.

What if a Connecticut Employer Specifies that Connecticut Law Applies?

The law explicitly provides that a provision mandating the application of a different state law that would avoid application of the statute is not enforceable if the employee is, and has been, a resident of or employed in Massachusetts for at least 30 days before his or her employment ceases. Employers with employees who work or live in Massachusetts must therefore ensure that any noncompetition agreements they enter into with these employees comply with the new law, even if the agreement specifies that Connecticut (or some other state) law governs.

What is a "Noncompetition Agreement" under the New Law?

Under the new law (to be codified at Section 24L of Chapter 149 of the Massachusetts General Laws), a "noncompetition agreement" is defined as an agreement between an employer and employee (or otherwise arising out of an existing or anticipated employment relationship), under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended.

Employers should note that the term "noncompetition agreement" excludes certain types of agreements, including covenants not to solicit or hire employees of the employer; covenants not to solicit or transact business with customers, clients or vendors of the employer; and certain noncompetition agreements

made in connection with the sale of a business entity. The term also excludes confidentiality and nondisclosure agreements; invention assignment agreements; and agreements outside of an employment relationship.

What are Some Other Key Provisions of the New Law?

- The law applies to **both for-profit and not-for-profit entities** and defines "employee" (for purposes of this statute only) to include **independent contractors**.
- A noncompetition agreement must be **in writing and signed by both the employer and the employee**, and must expressly state that **the employee has the right to consult with counsel before signing**.
- To be enforceable, the noncompetition agreement must be provided to the employee within certain timeframes—that is, if the agreement is entered into in connection with the **commencement of employment**, it must be provided to the employee by the earlier of the date of a formal offer of employment or 10 business days before commencement of employment. Agreements entered into **after commencement of employment** (but not in connection with a separation of employment) must be provided at least 10 business days before the agreement is to become effective. The law specifies that these agreements must also be supported by consideration other than continuation of employment.
- Agreements entered into **in connection with a separation from employment** are not "noncompetition agreements" under the terms of the statute, but only if the employee is given **seven business days to rescind acceptance**.
- The **geographic reach in a noncompetition agreement must be reasonable in relation to the interests protected**. A presumption of reasonableness exists if the geographic reach is limited to only those areas in which the employee, during any time during the last two years of employment, provided services or had a material presence or influence.
- The temporal restriction in a noncompetition agreement **may not be more than 12 months from the date of cessation of employment.** There is an exception, however, in the case of an employee who has breached a fiduciary duty to the employer or has unlawfully taken property ("physically or electronically") belonging to the employer. In these cases, the duration may not exceed two years from the date of cessation of employment.
- The agreement must include a **"garden leave" clause**. A garden leave clause requires the employer to pay the employee during the restricted period. The law specifies that garden leave pay must be at least half of the employee's highest annualized base salary within the two years preceding termination or "other mutually agreed upon consideration" that has been specified in the agreement, although the statute does not provide guidance on what is meant by "other mutually agreed upon consideration." If the restricted period is extended beyond 12 months because the employee has breached his/her fiduciary duty to the employer or has unlawfully taken property of the employer, the employer need not pay for garden leave

during any extension of the restricted period.

- The **scope** of the agreement must be **no broader than necessary** to protect the employer's trade secrets; confidential information that would not otherwise qualify as a trade secret; and/or the employer's goodwill, and the agreement must be reasonable in the scope of prohibited activities in relation to the interests protected. The law specifies certain presumptions that will satisfy these requirements.
- Noncompetition agreements are not enforceable against certain types of employees, including employees who are classified as **non-exempt under the Fair Labor Standards Act**; employees who are **18 years of age or younger**; certain **student interns**; and employees who have been **terminated without cause or laid off**.

Takeaways for Connecticut Employers

While noncompetition agreements signed before October 1, 2018 are not affected by this law, Connecticut employers must ensure that noncompetes entered into on and after that date comply for both employees and contractors who work or reside in Massachusetts. Employers who are unsure of their obligations are advised to contact experienced counsel.

For more information, please contact Nancy A. D. Hancock, Margaret A. Bartiromo or any of the attorneys in our Labor, Employment Law & Employee Benefits practice.