SWEEPING CHANGES TO NONCOMPETITION AGREEMENTS IN MASSACHUSETTS

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Massachusetts has enacted a new law, the Noncompetition Agreement Act (the "Act"), which imposes a significant number of new requirements that employers will have to fulfill in order to enforce noncompetition agreements against former employees. The Act, which takes effect on October 1, 2018, will apply to all post-employment noncompetition agreements between an employer and employee who resides or works in Massachusetts, as well as to certain other employment-related agreements, such as "forfeiture for competition agreements." However, the Act's requirements will not apply to any existing noncompetition agreements that were entered into prior to the Act's effective date. In addition, the Act excludes the following types of restrictive covenant agreements from coverage: (1) noncompetition agreements made in connection with the sale of a business, (2) noncompetition agreements made in connection with the cessation or separation of employment (provided the employee is given at least seven days to rescind his/her acceptance of such an agreement), (3) employee non-solicitation covenants, (4) customer/client/vendor non-solicitation covenants, and (5) non-disclosure of confidential information agreements.

COVERAGE

The Act applies to all employers who have employees who are residents of, or are employed in, Massachusetts for at least 30 days prior to the employee's termination date. Notably, the Act also includes independent contractors in its definition of "employees." On the other hand, certain employees are excluded from the Act's coverage depending on their employment circumstances. For example, the Act prohibits employers from enforcing noncompetition agreements against the following types of workers: (1) nonexempt employees as defined under the Fair Labor Standards Act, (2) undergraduates and graduate students who are not working full time, (3) employees who are terminated without cause (although cause is not defined in the Act) or laid off, and (4) employees age 18 or younger.

ENFORCEABILITY REQUIREMENTS

Under the Act, employers will have to fulfill a number of steps in preparing noncompetition agreements entered into on or after October 1, 2018, in order for such agreements to be enforceable.

As an initial matter, noncompetition agreements must be in writing and signed by both the employer and

employee. The new law also requires that the agreement expressly state that the employee has the right to consult with counsel prior to signing. Employers then have to present the agreement to the employee (1) if entered into at the commencement of employment, by the earlier of the formal job offer or ten (10) business days before employment begins; or (2) if entered into during employment, at least ten (10) business days prior to the agreement becoming effective. In the case where a noncompetition agreement is entered into during employment, the employer must provide "fair and reasonable consideration," independent from continued employment.

The agreement—regardless of when it is entered into—needs to be narrowly tailored and no broader than necessary to protect one or more of the employer's legitimate business interests. These interests are limited to: (1) trade secrets, (2) confidential information, and (3) good will. In terms of duration, the Act mandates that the restricted period must not exceed 12 months, unless the employee has breached his or her fiduciary duty to the employer or has unlawfully taken the employer's property. In those limited situations, the Act allows the restricted period to be extended to 24 months from the cessation of employment.

The geographic reach and business scope of the agreement is required to be reasonable. Specifically, the Act deems presumptively reasonable: (1) a geographic reach limited to the areas in which the employee provided services or had a material presence or influence during the last two years of employment, and (2) a business scope that imposes a restriction on activities that is limited to only the specific types of services provided by the employee at any time during the last two years of employment. Employers seeking to enforce a noncompetition agreement covering a broader geographic area will likely be expected to provide support justifying the expanded territory. Lastly, the noncompetition agreement must be consonant with public policy.

Arguably, the most important change under the Act relates to the issue of consideration. According to the Act, a noncompetition agreement must be supported by a garden leave clause or "other mutually-agreed upon consideration." Garden leave refers to the period of time when the employee neither provides services to the employer nor commences employment with a new employer, all in exchange for some form of compensation. The Act mandates that the garden leave clause in a noncompetition agreement must provide for payment of 50% of the employee's highest annualized base salary over the past two years preceding termination, on a pro rata basis, during the restricted period. For those employers who prefer to use the "other mutually-agreed upon consideration" option, the Act does not define or offer any guidance on what would satisfy this standard. Thus, it would appear that the Act would allow employers to provide some alternative form of consideration, such as a signing or retention bonus, equity grant, or salary raise, in lieu of providing garden leave post-employment payments. However, in light of the lack of examples of what constitutes "other mutually-agreed upon consideration," it will ultimately be up to the courts to determine the form and timing of consideration that will be deemed valid as fair and reasonable consideration.

INTERPRETATION

The Act permits courts to reform or otherwise revise a noncompetition agreement in order to render it valid and

enforceable. Moreover, if a noncompete covenant is deemed null and void, the flawed covenant will be severed from the agreement, and the remaining provisions of the agreement will remain in full force and effect, provided the agreement contains severability language.

CHOICE OF LAW/VENUE

Under the Act, Massachusetts law must be applied to agreements for Massachusetts residents and workers. As a result, any agreements that employ a choice-of-law provision that applies the law of any state other than Massachusetts for such employees will be found unenforceable. All disputes regarding noncompetition agreements must be brought in the employee's county of residence or, if mutually agreed upon by the employer and employee, in Suffolk County.

TRADE SECRETS LAW

In addition to the Act, a comprehensive law regarding trade secrets - which adopts the Uniform Trade Secrets Act ("UTSA") - will also go into effect on October 1, 2018. The UTSA is largely consistent with existing Massachusetts law, but it provides some additional protections not provided by the former common law regime currently utilized in Massachusetts, such as the potential for treble damages for willful and malicious misappropriation of trade secrets and the potential for an injunction for threatened misappropriation.

RECOMMENDED NEXT STEPS

Employers should consider how the Act will affect their current policies and practices and begin to implement necessary changes.

To that end, we recommend that employers review and, if necessary, revise their noncompetition agreements that are being provided to employees on or after October 1, 2018, to ensure all such agreements fully comply with the Act. These agreements should be carefully drafted and tailored to the procedural and substantive requirements contained in the Act, such that, among other things, the agreement identifies with particularity the consideration that will support the noncompetition covenant.

While certain questions still remain about various aspects of the Act, there is no doubt that the statute will necessitate changes for virtually all employers in Massachusetts.

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