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It has been just over a month since Massachusetts’ comprehensive noncompetition reform law took effect. We explained the key provisions of the law last summer.

Since then, what have we learned and what questions remain?

1. The New Review Period

The new law requires that applicants be given any covenant not to compete for review by the earlier of (a) the time a formal offer of employment is made; or (b) 10 business days before the commencement of employment.

Under most circumstances, this timeline is doable. However, employers who need to make a quick hire — where the start date is less than 10 business days from the date an offer is made — are left wondering how to satisfy the review period requirement. Many employers in this tight spot distribute the draft non-compete agreement during the interview process and notify applicants that the agreement is contingent upon receipt of a formal employment offer. To ensure that compliance with the law is well documented, many employers are also including language in the agreement itself in which the employee acknowledges timely receipt.

2. Post-Employment Promises

Under the new law, continued employment is no longer enough to support a promise not to compete. So, employers are being extremely diligent to analyze the necessity for and to lock down all non-compete agreements by commencement of employment. However, for those employees who slip through the cracks, or where the necessity for a non-compete agreement arises only post-commencement, some additional “fair and reasonable” consideration for the promise must be provided. The new law does not specify what kind of consideration is “fair and reasonable,” but it is safe to say that a nominal payment will not do the trick. Many employers are considering tangible payments such as sign-on bonuses, equity grants, and the like. Other likely “fair and reasonable” consideration for post-commencement covenants not to compete may include meaningful positive changes in employment status or other terms and conditions of employment. For example, a transfer from provisional to regular employment or eligibility to participate in certain benefit programs may constitute meaningful positive change.

3. Ineligible Employees

The new law also includes a laundry list of individuals who cannot be bound by a non-compete, including overtime-eligible employees, undergraduate or graduate students who are not working full time, anyone under the age of 18, and any employees who are terminated without “cause” or who are laid off. What to do with these folks? For starters, they can still be bound by other types of covenants, including non-solicitation, confidentiality, and assignment of inventions agreements.

In fact, many employers are opting to focus additional attention on the breadth and strength of these other promises, ensuring, for example, that their non-solicitation and confidentiality protections are as robust as is allowable under Massachusetts law. In addition, employers should bear in mind that non-compete agreements...
may still be included in employee severance agreements. So, even if an employee is ineligible for a non-compete at the outset, an employer may bargain for this promise in connection with payment upon that employee’s separation from employment.

Employees who are terminated without “cause” present their own unique challenges, insofar as employers simply cannot predict the circumstances of a new hire’s eventual termination of employment. Given these challenges, it is especially important to ensure that a termination without “cause” or a layoff does not threaten the enforceability of the employer’s various other covenants, such as non-solicitation. Also, without any statutory definition of “cause,” many employers are opting to broadly define the term in their agreements in order to limit the potential for a termination without cause.

4. Garden Leave

Perhaps the most vexing element of the new Massachusetts law is the requirement that employers pay employees bound by non-competes “garden leave” payments equal to 50 percent of their highest annualized base salary over the entire non-compete period. In other words, if an employee earns $50,000 a year, she’d be entitled to $25,000 over the term of a one-year non-compete. For many employers, this is a nonstarter, and it means that only the most high-level employees in the most confidential and sensitive positions are receiving non-compete agreements at the start of or during employment.

Although the law allows an employer and employee to mutually agree upon some other payment or consideration in lieu of a garden leave clause, the law provides absolutely no guidance as to what would be an acceptable replacement. Presumably, nominal consideration would be insufficient. But it is not clear whether some other consideration with a dollar value of less than 50 percent of the employee’s highest annualized base salary would be enough. Employers who negotiate for anything less do so at their own risk, at least until Massachusetts courts have the opportunity to address the issue. For those employers that do not wish to be the “test case,” many are opting to include language in their agreements that allows them to waive the non-compete covenant at any time before termination of employment (i.e., to avoid having to pay garden leave where the concern over competition is less significant than anticipated upon hire or upon execution of the agreement). The new law does contemplate an employer’s waiver of non-compete restrictions, but strictly prohibits employers from unilaterally discontinuing garden leave payments, so any waiver must pre-date termination (or at least be effectuated at the time of a termination for cause).

Although many questions remain, one thing is clear: This is a new frontier for non-competes in Massachusetts. We will continue to monitor this developing area of the law. Employers seeking to ensure compliance on a going-forward basis should consult with counsel. To review the text of the new law, visit: https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter228.

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