



UPDATE Noncompete

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All Eyes Set on Proposed Massachusetts Noncompete Law

States on Alert As First-in-Nation Law Presents Dramatic Changes to Noncompetition Agreements in Massachusetts

The proposed "Noncompetition Agreement Act," currently being considered by the Massachusetts Legislature, promises the most dramatic changes in the history of the law governing the enforcement of noncompetition agreements or "noncompetes" in Massachusetts. It may well serve as a model for other states interested in setting limits on the enforceability of noncompetes. The proposed law limits the universe of employees for whom noncompetes are enforceable, establishes new rules governing the signing and enforceability of noncompetes, and imposes harsh penalties on employers who do not comply with the new rules. If the proposed act becomes law, employers will have to reconsider their policies governing which employees are required to sign noncompetes, the process by which employees sign noncompetes, the content of noncompetes, and the enforcement of noncompetes through litigation.

The proposed Noncompetition Agreement Act applies not only to employees who work in Massachusetts but also to employees who work outside of Massachusetts and reside in the Commonwealth for at least thirty days. It dramatically narrows the scope of employees who may be subject to noncompetition restrictions in agreements signed after the effective date of the law. Under the proposed law, noncompetes are invalid and unenforceable as applied to employees earning less than \$75,000 annually. Each year, the floor increases by \$1,500. Thus, it prohibits employers from enforcing noncompetes against a substantial majority of employees who work or reside in Massachusetts.

The proposed law impacts when employers may require employees to sign noncompetes. Under the proposed law, employers must, "to the extent reasonably feasible," provide a prospective new employee with the noncompete and a notice that the noncompete is a condition of employment either (1) at least seven business days before the commencement of employment or (2) in a written employment offer, whichever is earlier. The proposed law also provides that if employers make an employment offer orally, they must either inform prospective employees at the time the offer is made that signing a noncompete is a condition of employment or provide them with written notification of the noncompete requirement before they tender their resignation from their then-current employer. Failure to comply with these rules invalidates the noncompete.

The proposed law requires that the employer provide the employee with "reasonably adequate consideration" for signing the noncompete if the noncompete is signed after the employee begins employment. The proposed law does not define "reasonably adequate consideration." The proposed new law explicitly provides that consideration for a noncompete signed after the

commencement of employment "does not include the continuation of employment."

The proposed law codifies the existing rule that noncompetes are enforceable only if and to the extent that they protect legitimate business interests, including trade secrets, other confidential business information, and employer goodwill. It also codifies the rule that noncompetes are enforceable only if and to the extent that they are reasonable in duration, geographic reach, and scope of prohibited activities; however, the proposed law prohibits enforcing an agreement that restricts competition for longer than one year.

The proposed law codifies the existing rule that permits judges to "reform" noncompetes that are not reasonable in duration, geographic reach, or scope in order to make them reasonable. The proposed new law, however, deviates drastically from existing law in that it also permits a judge to "decline to enforce some or all of the restrictions in an otherwise valid and enforceable employee noncompetition agreement (1) in extraordinary circumstances; (2) w otherwise necessary to prevent injustice or an unduly harsh result; or (3) based on any other common law or statutory legal or equitable defense or doctrine, or other equitable factors that would militate against enforcement." The proposed law defines none of the key terms in this provision.

The proposed law imposes the harsh new penalties on employers that sue or threaten to sue to enforce noncompetes, even employers that win suits to enforce noncompetes. Most importantly, the proposed Noncompetition Agreement Act requires that the employer pay the employee's legal fees in three situations, even if those fees are originally being paid by someone other than the employee (e.g., the employee's new employer). First, under the proposed act, the employer must reimburse the employee's legal fees if the court refuses to enforce a "material restriction" in a noncompete. Second, the employer must reimburse the employee's legal fees even w the employer prevails in the litigation if the court "reforms a restriction in material respect." Third, under the proposed act, an employer must pay the employee's legal fees if a judge finds that the employer acted in "bad faith" in connection with the enforcement of the noncompete. "Bad faith" is not defined in the proposed act.

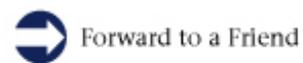
The legal fees penalty imposed on employers applies regardless of whether the employer or the employee initiates a lawsuit over the enforcement of the noncompete. Under the proposed law, if employees file suit asking the court to decide whether a noncompete is enforceable, and the court either refuses to enforce or reforms the noncompete in some material respect, the proposed law requires that the employers pay the employees' legal fees if, before filing the suit, those employees informed the employer of the steps they would take to protect the employers' legitimate business interests in their new job.

The proposed act provides that a court *may* enforce a contractual provision in a noncompete, requiring the employee to pay the employer's legal fees in connection with a suit to enforce the agreement only if the court enforces the agreement "without substantial modification" and finds that the employee acted in bad faith. Again, "bad faith" is not defined.

In the end, if the Noncompetition Agreement Act is adopted as currently written, the law will dramatically alter the contours of the law governing the enforcement of noncompetes in Massachusetts. Employers should keep a close eye on the progress of the legislation and be prepared to make swift and sweeping changes in their policies if the legislation becomes law.

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