



AUGUST 6, 2018

CLIENT ADVISORY

## CLIENT ADVISORY NON-COMPETITION AGREEMENTS

Shortly after its midnight deadline, the Massachusetts Legislature passed an economic bill which includes provisions dramatically impacting Massachusetts employers who seek protection for confidential and proprietary information through the use of restrictive covenants such as Non-Competition and Non-Solicitation Agreements.

As of this writing, the bill awaits Governor Baker's signature, but he has indicated that he is willing to do so. Employers should plan, therefore, to consider the following provisions when drafting new, Non-Competition Agreements, on or after **October 1, 2018**, the date on which the new law will become effective. The law will not impact Non-competition agreements in place before this date.

**QUESTION:** To whom does the law apply?

**Answer:** ALL employers, including individuals engaged in business as well as corporate entities. The law provides protection to exempt employees and independent contractors, prospective employees and current employees.

**QUESTION:** What does the new law require?

**Answer:** Non-competition agreements must be in writing.

- It must be presented to prospective employees by the earlier of a formal employment offer **OR** ten (10) days before employment begins;
- For current employees, the employee must receive the proposed written agreement at least ten (10) days before the effective date;
- It must contain a provision in which the employer advises the employee to seek advice of counsel; and
- It must be fully executed by both parties to be enforceable.

**QUESTION:** Is continued employment sufficient consideration for current employees to enter into a new Noncompetition Agreement?

**Answer:** The law clarifies an issue which has long been in dispute in Massachusetts. An employer must provide current employees with an additional form of payment or benefit in exchange for the employee's promise not to compete.



**QUESTION:** What are the major changes to the law?

**Answer:** The new law requires so-called **Garden Leave Pay**. During the Restrictive period, the employer must pay the departed employee at least 50% of the employee's highest annualized salary (based on the prior two years' salary). There appears to be some flexibility under this provision which allows the employee and employer to agree on other forms of consideration during this period. Payments during the Garden Leave Period must comport with Massachusetts Wage and Hours.

**NON SOLICIATION AGREEMENTS ARE NOT IMPACTED BY THIS LAW**

After October 1, 2018, non-competition agreements are limited to a twelve (12) month restrictive period. The geographical limitations of the restrictive provision must be reasonable in distance and in reach.

**QUESTION:** How will the non-competition agreements be enforced?

**Answer:** All disputes involving non-competition agreements will be litigated exclusively in either Superior Court or the Business Litigation Session **in the county where the employee resides**, or, by the agreement of the parties, in Suffolk County Superior court. If the agreement is non-conforming, the law provides that a judge may modify the agreement to make it enforceable.

If you have any questions, please contact [Denise I. Murphy](#) or any of our other labor and employment attorneys at Rubin and Rudman LLP.

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