Employment Law Corner
Monthly Report

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October Updates

Key Updates to MA Non-Compete Agreements and Ways to Protect Your Business

Way back in 2018, Massachusetts enacted a law limiting the use of non-compete agreements, the Massachusetts Noncompetition Agreement Act (MNAA). The law followed the trend nationwide of courts rejecting non-competes for various reasons: too long, too broad, too restrictive. Finally, we have a District court case which gives us a glimpse (and not much more) into how the law will be interpreted.

The Law: the MNAA:
There are eight requirements for non-competition agreements set out by the MNAA:

(i) AS PART OF AN OFFER: In writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing. The agreement must be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee's employment.

(ii) SEPARATE AGREEMENT: Not at offer and not in connection with the separation from employment, it must be supported by fair and reasonable consideration independent from the continuation of employment, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

(iii) NOT TOO BROAD: The agreement must be no broader than necessary to protect one or more of the following legitimate business interests of the employer: (A) the employer's trade secrets, as that term is defined in section 1 of chapter 93L; (B) the employer's confidential information that otherwise would not qualify as a trade secret; or (C) the employer's goodwill.

(iv) NOT TOO LONG: In no event may the stated restricted period exceed 12 months from the date of cessation of employment, unless the employee has breached his or her fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration may not exceed 2 years from the date of cessation of employment.

(v) NOT TOO FAR: The agreement must be reasonable in geographic reach;

(vi) LIMITED SCOPE: The agreement must be reasonable in the scope of proscribed activities in relation to the interests protected. A restriction on

activities that protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last 2 years of employment is presumptively reasonable.

(vii) CONSIDERATION: A garden leave clause or other mutually-agreed upon consideration between the employer and the employee is required, provided that such consideration is specified in the noncompetition agreement. Garden leave is specified in the act but consideration is not.

(viii) PUBLIC POLICY: The agreement must be consonant with public policy.

The Case:
The case at hand involved a company bringing suit against a competitor, alleging the competitor persuaded current and former employees of the company to misappropriate trade secrets and confidential information to the competitor in violation of their non-disclosure and non-compete agreements. The competitor hired the suspected employees upon their departure from the company, and those former employees were accused of using, and continuing to use the company's trade secrets and confidential data to attract new customers and poach the company's existing clients and business opportunities.

One noncompete agreement was found to be governed by the MNAA. The non-compete in question violated two of the requirements: it did not expressly state the employee had the *right to consult an attorney prior to signing*, and it *did not contain a garden leave clause or another mutually agreed upon form of consideration.*

What this means:
The District Court ruling demonstrates that the MNAA is to be interpreted strictly, as the court voided an agreement for violating two of the eight requirements. This means, if you want your non-compete to be enforceable, it is important to make sure you are familiar with all eight of the MNAA requirements and you explicitly address each one in your non-compete agreements.

The Future of Noncompete Agreements and How to Protect Your Business:
Noncompete agreements have, and continue to be, in disfavor in the eyes of courts across the country. Judges do not like restricting someone's ability to earn. Fortunately, there are better ways to protect your business and trade secrets. We have drafted many Non-Solicitation and Confidentiality Agreements for many employers that protect business interests. We can help ensure that these agreements are enforceable.

HOW? After providing us with a copy of your current Agreement, this service kicks off with a telephone call to discuss the law and allows us to assess your organization's protectable interests, determine the appropriate restrictions, and the scope of the Agreement. We will then update your Non-Solicitation, Non-Disclosure and Confidentiality Agreement to comply with applicable state law.

WE CAN HELP: The limits of non-competition agreements are not the end of protecting your business.

Contact Us

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