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Non-Compete Legislation In Massachusetts: Yes Or No?

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As the current legislative session in Massachusetts winds to a close, legislation regulating non-competition agreements is again in the legislative oven. Whether it will be baked before the session wraps up remains to be seen.

Should it be enacted and signed by Governor Baker, here is what employers should expect.

1. To be enforceable, non-competition agreements entered into prior to employment must be (a) in writing, (b) signed by both the employer and the employee, (c) expressly state that the employee has the right to consult with counsel, and (d) is provided to the employee before a formal offer of employment is extended or 10 days before the employee commences employment.
2. To be enforceable, non-competition agreements entered into subsequent to employment - but not in connection with separation from employment – (a) the agreement must be supported by fair and reasonable consideration independent from continuing employment, (b) notice of the agreement was provided at least 10 days in advance of its effective date, (c) the agreement must be in writing, (d) the agreement must be signed by both the employer and the employee, and (e) the agreement must expressly state that the employee has the right to consult with counsel prior to signing.
3. The agreement may be no broader than necessary to protect one or more of the following business interests of the employer: (a) the employer's trade secrets, (b) the employer's confidential information that is not a trade secret, (c) the employer's good will, provided that another restrictive covenant, such as a non-solicitation agreement, cannot adequately protect the employer's interest.
4. The agreement may not extend beyond one year after an employee's employment terminates.
5. The agreement may extend to two years if the employee has breached his or her fiduciary duty to the employer or has unlawfully pilfered the employer's property.
6. The agreement must be reasonable in geographic reach.
7. A geographic reach limited to areas in which the employee, within the past two years, provided services or had a material presence is presumptively reasonable.
8. The agreement must be reasonable in the scope of proscribed activities in relation to the interests protected.
9. A proscription on activities that protects a legitimate business interest which is limited to the specific services provided by the employee within the past two years is presumptively reasonable.
10. The agreement must contain a garden leave provision or other mutually-agreed upon consideration.
11. The garden leave clause must provide payment of at least 50% of the employee's highest annualized base salary within the two years preceding the termination of the employee's employment.

12. Agreements with non-exempt employees, student interns, employees terminated without cause or by layoff, and employees under the age of 18 are prohibited.
13. A court may blue pencil the agreement.
14. Choice of law provisions in the non-competition agreement are invalid unless the employee is a resident of or employed in the Commonwealth at the time his or her employment was terminated, or worked for the employer for at least 30 days prior to the cessation of the employee's employment.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author.

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