DAVIS MALM & D'AGOSTINE P.C.
ATTORNEYS AT LAW

---

**EMPLOYMENT LAW ALERT**
**AUGUST 2018**

---

# MASSACHUSETTS PASSES LEGISLATION ON NON-COMPETE AGREEMENTS

On August 10, 2018, Governor Baker signed into law the Massachusetts Non-Competition Agreement Act. Taking effect on October 1, 2018, the Act imposes significant limitations and requirements on non-competition and forfeiture for competition agreements for employees and independent contractors who reside or work in Massachusetts.

## EXCEPTIONS AND ENFORCEABILITY

The Act applies to non-competes signed at the time of hire or during the course of the employment or independent contractor relationship. It does not apply retroactively to non-competes entered into prior to October 1, 2018 or to:

- non-competition agreements made in connection with cessation of the employment or independent contractor relationship, as long as the agreement expressly allows for rescission within seven days following signature by the worker;
- use of other restrictive covenants such as non-solicitation and non-disclosure agreements; or
- non-competes in connection with the sale of a business.

Non-competition agreements made at the time of hire or during the course of the relationship are unenforceable for:

- non-exempt workers;
- employees and independent contractors who are terminated without cause or laid off;
- employees and independent contractors who are 18 years old or younger; and
- undergraduate or graduate students in internships or other temporary employment.

## SCOPE OF RESTRICTIONS

Under the Act, non-competes must be no broader than necessary to protect the legitimate business interests of the employer, including trade secrets, confidential information and/or goodwill. Specifically, non-competes must be reasonable in duration, geography and scope of activities. In addition, they must be consistent with public policy.

- Non-competes will be presumed necessary when the employer's legitimate business interests cannot be adequately protected by other restrictive covenants.

- The Act prohibits non-competes that exceed a 12-month period following separation, unless the worker has breached a fiduciary duty to the employer or misappropriated property (in which case non-competes are enforceable for up to two years).

- Non-competes are presumptively reasonable with respect to geographical reach if they are limited to the area in which the worker provided services or had a "material presence or influence" at any time during the last two years of employment.

- The scope of activities is presumptively reasonable if the non-compete protects a legitimate business interest and is limited to the specific type of services the worker performed at any time during the last two years of the relationship.

## NON-COMPETES ENTERED AT THE TIME OF HIRE

For a non-compete signed at the time of hire to be enforceable, it must be in writing and signed by both parties. The agreement must explicitly state that the worker has the right to consult with counsel before signing and must be provided either with a formal job offer or ten business days before the first day of work, whichever is earlier.

## NON-COMPETES ENTERED INTO DURING EMPLOYMENT

For a non-compete signed during the course of the employment or independent contractor relationship to be enforceable, as with agreements entered into at time of hire, it must be in writing, signed by both parties, and must expressly state that the worker has the right to consult with counsel before signing. Also, the employer must notify the worker of the non-compete at least ten days before it takes effect. Continued employment is not adequate consideration to support a non-compete. Instead, there must be "fair and reasonable consideration" to the employee or independent contractor.

## GARDEN LEAVE CLAUSE

Non-competition agreements entered into at the time of hire or during the course of employment or independent contractor relationship must be supported by a garden leave clause or other mutually agreed upon consideration, as specified in the agreement. When garden leave payments are provided, the Act specifies that such payments must be paid following separation, for the duration of the non-compete period, at a rate equal to at least fifty percent of the worker's highest annualized base salary within the two-year period immediately prior to separation.

## PREPARING FOR CHANGES TO MASSACHUSETTS LAW

Employers have a short timeframe in which to review and revise their non-competition agreements and related policies. To the extent employers are able to protect their interests through use of restrictive covenants other than non-competes, they would be well-advised to do so. Among other things, it is important for employees to keep in mind that under the Act, non-competes will no longer be enforceable when workers are terminated without cause. Accordingly, to maintain enforceable non-competes, it behooves employers to make sure they have in place carefully crafted "for cause" definitions. Also, because the Act restricts non-competes for independent contractors as well as employees, independent contractor agreements containing non-competes must also be re-examined.

Finally, while the Act applies to non-competes effective on or after October 1, 2018, it is best practice for employers to update existing non-competes in anticipation of a shift in the courts' standards for enforcement of non-competes, consistent with the guidance provided by this new legislation.

## CONTACT

Please contact a member of our Employment Law Practice to discuss the impact of this new law on your company's policies and practices.

---



One Boston Place, Boston, Massachusetts 02108 | phone 617.367.2500 | fax 617.523.6215 | info@davismalm.com.