

Client Alert

Massachusetts Imposes New Restrictions on Non-Competes

August 27, 2018 – Beginning October 1, 2018, a new Massachusetts law will limit employers use of non-compete clauses in the employment context, including where an employee is terminated without cause or where the employee is non-exempt under the Fair Labor Standards Act. Still available, however, are non-compete clauses entered into before October 1, 2018; those that are entered into as part of the sale of a business; and those that are entered into outside of the employment context.

Also continuing to be available are non-compete clauses executed at the time of an employee's separation if the employee is given seven days to revoke, and non-compete agreements supported by garden leave clauses. This latter category is expected to gain greater prominence given the new law's prohibition on non-compete clauses in the termination without cause situation. To comply with the garden leave rules an employer must pay an employee at least 50% of the employee's highest annualized base salary for the prior two years (or some other "mutually agreed upon consideration") for the applicable non-compete period, which can be no longer than twelve months (although it may be extended for up to two years if the employee breaches a fiduciary duty or unlawfully takes an employer's property).

The new law also does not affect confidentiality restrictions, or non-solicitation covenants concerning employees or clients. In the employment context, we believe that these latter two categories will take on greater importance in this new environment, particularly where an employee voluntarily quits and the employer does not want to pay for an extended time.

To be enforceable, a non-compete clause must be in writing, signed by both parties, and expressly state that an employee has the right to consult with counsel prior to signing the agreement. The agreement must also be reasonable in scope and necessary to protect a legitimate business interest of the employer (e.g., trade secrets, confidential information, or goodwill). Lastly, to the extent a non-compete agreement is found to be invalid or unenforceable, courts will be allowed to revise the agreement to the extent necessary to protect a legitimate business interests of the employer.

If you have any questions regarding the foregoing, noncompetition or restrictive covenants agreements generally, please contact your Morrison Cohen relationship attorney or one of our following Compensation, Benefits & Employment attorneys:

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