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HRMA Perspectives publishes "The Supreme Judicial Court and the New Law Imposing Restrictions on Non-Compete Agreements in Massachusetts"

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Earlier this summer, Governor Baker signed into law a long-awaited bill restricting the use of non-competition agreements. This bill took effect on October 1, 2018, and will apply to agreements entered on or after that date. Additionally, in *Oxford Global Resources, LLC v. Hernandez* ("*Oxford*"), the Massachusetts Supreme Judicial Court ("SJC") limited the use of choice of law provisions in non-competition agreements with out-of-state employees. Both the recently-enacted law and the SJC decision significantly impact Massachusetts employers.

AGREEMENTS INCLUDED AND EXCLUDED

While the new Massachusetts law (M.G.L. c. 149 § 24L) applies to traditional non-competition agreements (those which prohibit specified competitive activities after employment has ended), and "forfeiture for competition" agreements (those which impose adverse financial consequences if a former employee engages in competitive activities), the law does not apply to the following covenants and agreements:

1. covenants not to solicit or hire employees of the employer,
2. covenants not to solicit or transact business with customers, clients or vendors of the employer,
3. agreements made in connection with the sale of a business entity,
4. agreements outside employment relationship,
5. forfeiture agreements,
6. nondisclosure or confidentiality agreements,
7. invention assignment agreements,
8. garden leave clauses,
9. agreements made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance, and
10. agreements by which an employee agrees not to reapply for employment to the same employer after the employee's termination.

EMPLOYEES INCLUDED AND EXCLUDED

The new law applies to non-competition agreements between employers and employees, and includes independent contractors as "employees." In addition, non-competition agreements will be unenforceable against:

1. employees who are terminated without cause or laid off,
2. undergraduate or graduate students engaged in short-term employment,
3. employees age 18 or younger, and
4. employees who are classified as non-exempt under the Fair Labor Standards Act.

CHOICE OF LAW PROVISIONS

Notably, under the new law, choice of law provisions that would have the effect of avoiding the requirements of the law will be unenforceable if the employee is, and has been for at least 30 days immediately prior to termination, a resident of or employed in Massachusetts.

In addition to the law's clear restriction on choice of law provisions, in *Oxford,* the SJC recently refused to enforce a Massachusetts choice of law provision contained in a non-competition, non-solicitation, and confidentiality agreement between a Massachusetts-based employer and a California-based employee. The Court held that the clause was unenforceable because California had a materially greater interest in the dispute (given that the employee executed and allegedly breached the agreement in California) and the application of Massachusetts law to the agreement would be contrary to California's fundamental policy "in favor of open competition and employee mobility."

AGREEMENT REQUIREMENTS

To be valid and enforceable under the new law, non-competition agreements must:

1. Be in Writing and Signed by Both the Employer and Employee.
2. Be Consonant With Public Policy.
3. Be No Broader Than Necessary to Protect Legitimate Business Interests: Agreements must be "no broader than necessary to protect the legitimate business interests of the employer," and may be presumed "necessary" if the employer's business interest cannot be adequately protected through another agreement, such as a non-solicitation agreement, a non-disclosure agreement, or a confidentiality agreement. These legitimate business interests are specifically identified in the law as the employer's trade secrets, confidential information, and goodwill.
4. Be Reasonable in Scope of Proscribed Activities: These provisions will be presumed reasonable if the restriction "protects a legitimate business interest and is limited to only the specific types of services provided by the employee during the last two years of employment."
5. Be Reasonable in Geographic Reach: These provisions will be presumed reasonable if they are limited to only the geographic areas in which the employee provided services or had "a material presence or influence" during the last two years of employment.
6. Be Limited in Restriction Time Period: The stated restriction period cannot exceed one year from the date of the end of employment, unless the employee has breached his/her fiduciary duty to the employer, or has unlawfully taken property belonging to the employer, in which case the restricted period may not be more than two years from the end of employment.
7. Contain a Garden Leave Clause: Agreements must include either a "garden leave" clause providing pay for the employee during the entire restricted period of at least 50% of the employee's highest annualized base salary

over the prior two years, or "other mutually-agreed upon consideration" specified in the agreement. Importantly, the law does not define the "other mutually-agreed upon consideration," and therefore provides employers with flexibility to instead agree to a different amount with the employee.

8. If Made at the Commencement of Employment: (1) include language that the employee has the right to consult with counsel prior to signing, and (2) Be provided to the employee before a formal offer of employment is made or 10 business days before the commencement of the employee's employment, whichever comes first.

9. If Made After the Commencement of Employment: (1) Be supported by fair and reasonable consideration independent of the continuation of employment, (2) State that the employee has the right to consult with counsel prior to signing, and (3) Be provided to the employee at least 10 business days before the agreement is to be effective.

REMEDIES AND APPROPRIATE VENUE

The new law allows a court to deem an entire agreement null and void, or to reform or revise an agreement so as to render it a valid agreement to the extent necessary to protect the employer's legitimate business interests. Should a court deem a provision null and void, the remainder of the contract can remain valid.

The law further provides that if the parties agree to bring the action in Suffolk County, the Superior Court shall have exclusive jurisdiction over the action. No such jurisdictional limitation is noted if a case is filed in a county other than Suffolk County.

CONCLUSION

Employers should review their current non-competition agreements to ensure that they are reasonable both in time and space, that they are in place to protect legitimate business interests, and that the choice of law provisions are adequately justified. In light of *Oxford*, multistate employers based in Massachusetts should review their non-competition agreements with out-of-state employees and also review the laws and policies relating to non-competition agreements of the state in which those employees live and work. Massachusetts employers with employees who live or work in California should be aware that their non-competition agreements with California employees may be subject to California law notwithstanding any Massachusetts choice of law clauses.

As there is much in the new law that is ripe for clarification, employers should expect litigation to follow which will interpret, and potentially expand on, some of the undefined provisions of the law.

