

# Practical Advice for Complying with the Massachusetts Non- Compete Law

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**GOODWIN**

# Massachusetts Noncompetition Agreement Act

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- **KEY POINTS**

- The law is **not retroactive**; it does not apply to noncompetition agreements entered into before **October 1, 2018**.
- An employee must be given a noncompetition agreement at least **10 business days** before the first day of employment or at the time of a formal offer, whichever is sooner.
- Existing employees who are presented with a new or amended noncompetition agreement must be provided with “**fair and reasonable consideration**”; continued employment is not sufficient.
- Noncompetition restrictions are limited to **one year** after employment ends; up to **two years** if there is a breach of fiduciary duty or misappropriation of company property.
- Noncompetition restrictions may not be enforced against employees who are terminated “**without cause**” or laid off; “cause” is not defined in the Act.

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- **KEY POINTS (continued)**

- Employers must provide “**garden leave payments**” or “**other mutually-agreed upon consideration**” to enforce a noncompetition agreement.
- Employers may **waive** post-termination noncompetition restrictions and avoid the garden leave payments, but the waiver must be timely.
- The same standards apply to agreements with independent contractors.
- Noncompetition agreements may not be enforced against **non-exempt** employees or interns.
- **Nonsolicitation agreements** and some **sale of business** noncompetition agreements are outside of the statute.
- **Choice of law** must be **MA** for Massachusetts employees and residents.

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- Covered Agreements:
  - “Noncompetition agreements” are defined as agreements between an employer and an **employee** or **independent contractor** under which the individual agrees that he or she **will not engage in certain competitive activities after the relationship has ended.**
  - The Act applies to agreements prohibiting competition regardless of whether the remedies for a breach consist of injunctive relief, damages, and/or forfeiture of amounts otherwise due.

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- Excluded Agreements:
  - Agreements **not to solicit or hire employees** of the employer
  - Agreements **not to solicit or transact business** with the employer's **customers, clients, or vendors**
  - Nondisclosure and invention assignment agreements
  - Noncompetition agreements made in connection with the termination of employment, where the employee and the employer mutually agree to noncompetition obligations and the employee is given **seven business days to revoke after signing**
  - Noncompetition agreements in connection with the sale of a business, where the restricted party is a “**significant owner, member or partner of the business entity**” and will receive “**significant consideration**” in connection with the sale
  - Noncompetition agreements **outside of an employment relationship**

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- Persons Who Cannot be Subject to a Noncompetition Agreement:
  - **Non-exempt** employees
  - Most **students and interns**
  - Employees terminated **without cause**
  - Employees who are **laid off** from employment
  - Employees who are **age 18** and under

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- Requirements for Post-October 1, 2018 Noncompete Agreements:
  - Must be provided on the earlier of the date of the formal offer of employment or **10 business days** before the commencement of employment (new employees) or **10 business days** before the effective date (existing employees)
  - Must be **in writing signed by employer and employee**
  - Must include a statement that the employee has the **right to consult with counsel** prior to signing

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- Requirements for Post-October 1, 2018 Noncompete Agreements (continued):
  - Must limit restricted period to **one year or less** from termination of employment (up to two years if employee breaches fiduciary duty or unlawfully takes employer property)
  - Must include a **garden leave clause** or “**other mutually-agreed upon consideration** [that is] specified in the noncompetition agreement”
  - Must be “reasonable in **geographic reach**”
  - Must be “reasonable in the **scope of proscribed activities** in relation to the interests protected”



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- Garden Leave Clause:
  - Must provide for paying the employee at the rate of at least 50% of his or her highest annual base salary rate in the last two years of employment.
  - Employers can **avoid** garden leave payments by **waiving** the post-employment restrictions of the noncompetition agreement; best practice is to do so **before** employment terminates. Employees should be contractually obligated to provide notice of resignation, so that the employer can determine whether to waive the post-employment restrictions.
  - Assuming **no waiver** of the post-employment restrictions by the employer, the employer **may not unilaterally discontinue** or otherwise fail to make garden leave payments absent an employee breach.

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- “Other Mutually – Agreed Upon Consideration”
  - Undefined
  - Approaches to consider
    - Equity (option grants, accelerated vesting, extended exercise period)
    - Cash (some variant from garden leave pay)
  - Must be determined in advance
  - Documentation to show mutual agreement

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- Standard That Must be Satisfied:
  - Agreement must “be no broader than necessary” to support employer’s interests in protecting one or more of the following:
    - trade secrets,
    - other confidential information, and/or
    - goodwill

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- Reasonable in Geographic Reach:
  - Reasonableness determined based on “interests protected”

A geographic reach that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence is **presumptively reasonable**.

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- Reasonable in Scope of Proscribed Activities:
  - Reasonableness determined based on “interests protected”

Restriction 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**

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- Other Statutory Provisions
  - *Judicial Modification.* A court may in its discretion revise an overbroad noncompetition agreement to render it enforceable.
  - *Choice of Law.* An employer may not avoid the law by selecting a different state law to govern an agreement with an employee who has resided or worked in Massachusetts for at least the 30-day period immediately preceding the termination of employment.
  - *Choice of Forum.* A noncompetition agreement could provide that any lawsuit about the agreement be brought in Suffolk County. If not so agreed, the location will be in the county where the employee resides.

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- Action Items for Employers:
  - Determine **whether** to use noncompetition agreements and if so, **with whom**
  - Update all templates going forward:
    - for Massachusetts employees and residents; and
    - choice of law for non-Massachusetts employees and residents
  - Assess whether to draft for presumptive reasonableness
  - Update severance agreements to include a seven business day consideration period if a noncompetition agreement is included
  - Consider forfeiture for competition through ERISA plans