

Practical Advice for Complying with the Massachusetts Non- Compete Law

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Massachusetts Noncompetition Agreement Act

• 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.

Massachusetts Noncompetition Agreement Act

- 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