MANCHEL BRENNAN
COUNSELLORS AT LAW

EMPLOYMENT LAW ALERT
MASSACHUSETTS ENACTS NONCOMPETITION AGREEMENT ACT
(AUGUST 13, 2018)

On August 10, 2018, Governor Baker signed legislation that materially changes the law in Massachusetts regarding noncompetition agreements. The statute, known as the Massachusetts Noncompetition Agreement Act (the "Act"), goes into effect with respect to noncompetition agreements entered into on or after **October 1, 2018**, and sets forth strict requirements which must be met in order to create an enforceable noncompetition agreement.

To what types of agreements does the Act apply? The Act applies to any "agreement between an employer and an employee, or otherwise arising out of an existing or an anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee's employer after the employment relationship has ended."

The Act does ***not*** apply to:

- a covenant not to solicit or hire employees of the employer;
- a covenant not to solicit or transact business with customers, clients or vendors of the employer;
- an agreement made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity, partnership or division or subsidiary of a business entity or partnership, when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale or disposal;
- an agreement outside of an employment relationship;
- a forfeiture agreement;
- a nondisclosure or confidentiality agreement;
- an invention assignment agreement;
- a "garden leave clause," defined as a provision within a noncompetition agreement by which the employer agrees to "pay" the employee during the restricted period and which shall become effective upon termination of employment unless: (i) the restriction is waived by the employer; or (ii) the employee has been terminated "without cause" or is laid off, in which case the noncompetition provision shall not be enforceable (the Act does not define the amount of "pay" required or "without cause");
- an agreement made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; or
- an agreement by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

Are there employees who can no longer be restricted by a noncompetition agreement? Noncompetition agreements entered into after October 1, 2018 will not be enforceable against:

- any non-exempt employee;
- any employee who is terminated "without cause" or is "laid off" (except that the employee could agree to a noncompetition provision in a severance agreement, provided the employee is given 7 business days to rescind his/her acceptance);
- undergraduate or graduate students who partake in internships or other short-term employment relationships while enrolled in a full-time or part-time undergraduate or graduate educational institution; or
- any employee who is 18 years old or younger.

To whom does the Act apply? Notably, the Act expressly covers ***independent contractors*** in addition to employees. Therefore, any noncompetition agreements entered into with independent contractors after October 1, 2018 must also comply with the Act. Also, the Act contains a unique provision which would generally render unenforceable any designation of another state's law as the governing law for the noncompetition agreement, if the employee is a ***resident of or employed in*** Massachusetts at the time of cessation of employment or during the 30 days prior thereto.

How does an employer create an enforceable noncompetition agreement after October 1, 2018?

- Noncompetition agreements with ***new employees*** must: be in writing; be signed by the employer and the employee; expressly state that the employee has the right to consult with counsel prior to signing; and 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.

- Noncompetition agreements with ***existing employees*** must: be in writing; be signed by the employer and the employee; expressly state that the employee has the right to consult with counsel prior to signing; be supported by "fair and reasonable consideration" independent from the continuation of employment (the Act does not define "fair and reasonable consideration"); and provide advance notice of the agreement not less than 10 business days before the effective date of the agreement.

- Noncompetition agreements must be "no broader than necessary" to protect one or more of the following legitimate business interests of the employer: the employer's trade secrets, as defined in the Massachusetts Trade Secrets Act; the employer's confidential information that otherwise would not qualify as a trade secret; or the employer's goodwill.

- The stated restricted period within the noncompetition agreement cannot exceed ***1 year from the date of cessation of employment*** (which restricted period can be extended to 2 years if the employee has breached the employee's fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer).

- The agreement must be reasonable in geographic reach and in the scope of proscribed activities in relation to the interests protected.

- The agreement must include a "garden leave clause" with pay of at least 50% of the employee's highest annualized based salary paid during the last 2 years of employment or other "mutually-agreed upon consideration" (the Act does not define "mutually-agreed upon consideration") between the employer and the employee.

What do employers do now? All employers with employees ***working and/or living*** in Massachusetts should review their agreements which contain post-employment restrictions in order to assess whether any changes need to be made in order to achieve compliance with the Act and/or to consider the use of agreements which do not contain a noncompetition restriction (but may contain other restrictions such as prohibitions on soliciting or doing business with customers and/or soliciting employees) so as to bring the agreements outside of the purview of the Act. Revised agreements will need to be used on or after **October 1, 2018**.

We anticipate disputes and litigation regarding the enforceability of provisions of and/or the meaning of the defined and undefined terms used in the Act. By way of just a few examples, the Act: does not define "without cause," "fair and reasonable consideration," or "mutually-agreed upon consideration;" appears to exclude coverage of any "garden leave clause" at the same time that it mandates that any noncompetition agreement must contain a "garden leave clause" in order to be enforceable under the Act; and requires 50% of the individual's base salary to be paid during the garden leave to create an enforceable agreement, but independent contractors generally do not earn a "base salary."

The above information provides only highlights of the Act, therefore, please consult with legal counsel for a more comprehensive review and assessment.