

[Podcast]: New Non-Compete Law in Massachusetts

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In this episode of The Proskauer Brief, senior counsel [Harris Mufson](#) and associate [Samantha Regenbogen](#) discuss significant reforms to Massachusetts law that will apply to non-competition agreements as well as adopting the Uniform Trade Secrets Act (UTSA). The law will cover non-compete agreements entered into with Massachusetts residents and Massachusetts employees on or after October 1, 2018 (but not retroactively), including independent contractors. With less than two months until the law goes into effect, employers should promptly consult with counsel to discuss the impact of the new legislation and to prepare compliant language and forms for future non-compete agreements.

Harris Mufson: Hello and welcome to the Proskauer Brief and Hot topics on Labor and Employment Law. I'm Harris Mufson and on today's episode, I'm joined by Samantha Regenbogen, and we are going to discuss significant reform to Massachusetts law regarding non-competition agreements. So, Samantha, on August 10, 2018, the Massachusetts governor signed into law a bill making significant reform to Massachusetts law regarding non-competition agreements and adopting the Uniform Trade Secrets Act. Can you first just describe what this Uniform Trade Secrets Act is?

Samantha Regenbogen: Sure. So the Uniform Trade Secrets Act, which is sometimes referred to as the UTSA, is essentially an act that was adopted by states across the country in an attempt to unify the approach to protecting trade secrets. And this is especially important where you have companies or entities operating across more than one state. Massachusetts is now joining, I believe, 48 other states as well as Washington DC in adopting the UTSA. And notably that leaves New York behind as the only state to not have adopted in some form or in some portion, the UTSA.

Harris Mufson: In terms of the non-competition law that was passed, can you explain how non-competes will or will not be enforced in Massachusetts going forward.

Samantha Regenbogen: So, just to start, I'll give you the background that this has been many, many, many years in the making, and it has failed on all other occasions until this year. This is a rather momentous moment for the Massachusetts legislature. The statute is going to apply to both Massachusetts residents and Massachusetts employees; distinction only because an employer in another state, such as Rhode Island, might have employees working in Rhode Island, but who commute from Massachusetts in that scenario this law applies to them as well.

The statute is intending to govern non-compete agreements only, and the language of the statute explicitly exempts certain other related types of agreements from its coverage. So, for instance, non-disclosure agreements, non-agreements, agreements applying to the sale of a business or invention assignment agreement—none of those are going to be covered by this. This is strictly applying to non-compete agreements. I think the most notable provision here is that this does not apply to non-compete agreements entered in connection with employee separation, so long as the employee has seven days to rescind or accept it.

So that means that, if the employee is entering into a non-compete agreement as part of a separation from employment, perhaps in return for a severance payment, so long as the employee has been given seven days to rescind the regulation and the minimum enforceability requirements out in this fall will not apply.

Harris Mufson: Okay, so this will only apply to non-competition agreements essentially that were signed during the course or at the beginning of an individual's employment and not in connection with a separation agreement, as long as there's that seven-day revocation period.

Samantha Regenbogen: That's right.

Harris Mufson: So Sam, one of the interesting aspects of this law is that it actually prohibits employers from entering into non-competition agreements with certain categories with employees. Can you talk about those categories?

Samantha Regenbogen: So, the first big category of employees who may not be governed by a non-compete agreement at all are employees who are classified as non-exempt or overtime-eligible. The majority of employees who are under the age of 18 are undergrads or graduate students who—you know—work as interns or in other kinds of short-term employment arrangements, may not be governed by a non-compete. And finally and I think, most notably, employees who are terminated without cause or who are laid off cannot be governed by a non-compete. And so, because the law does not define the term “without cause,” I think it’s probably reasonable to expect that contracts are going to start incorporating a definition for cause to try to obviate any ambiguities or disputes under this particular provision of the law.

Harris Mufson: And so for individuals who may be subject to non-competes, those who do not fall within those exceptions, does the law establish any sort of minimum requirements in order for non-competition agreements to be enforceable in Massachusetts?

Samantha Regenbogen: Yes, and it establishes a number of requirements. So, a non-compete agreement now must be in writing, and it must be signed by the employee and the employer. And this writing that contains the non-compete has to have some provision that states explicitly that the employee has a right to consult with counsel prior to signing. There’s some rules now about the timing in terms of when the non-compete agreement must be provided to the employee. So, now, the non-compete is being entered into during the course of hiring an employee. The employee must receive a copy of the non-compete at least ten days prior to the date of hire. If the agreement is entered into after the date of hire, the employee needs to receive the agreement at least ten days prior to the effective date. There’s some rules governing kind-of the scope and extent of coverage of the non-compete.

For instance, a non-compete now cannot exceed 12 months in duration unless the employee has breached the fiduciary duties or has unlawfully taken physical or electronic property; and in those two situations, a non-compete can be extended to a maximum of 24 months or two years. I think probably one of the most material requirements is going to really impact the way that employers are considering the cost benefit analysis of a non-compete arrangement.

It's the requirement that the agreement include a garden-leaf provision. And that could require the employer to either pay the employee at least 50% of the employee's highest annualized based salary over the past two years or other mutually agreed upon consideration. "Other mutually agreed-upon considerations" is not defined at all. It's not explained whether that should be more than what the 50% of the salary would otherwise be. And so, it's leaving open to interpretation how employers are going to satisfy this garden-leaf requirement.

Finally, if the non-compete is signed after the commencement of employment, no longer can continued employment alone constitute consideration; rather, the employer must provide additional consideration that is fair and reasonable in order to ask that the non-compete agreement be enforceable.

So in addition to these additional enforceability requirements, the law also codifies some principles that were already being interpreted by courts in Massachusetts, but gives us a little bit more details, so there's a bit more predictability about what will or will not be enforceable. The first example here is reasonableness in scope. It's always been the case that a non-compete must be reasonable in terms of its geographic reach. But now we know that it is preemptively reasonable to limit employees from competing within the geographic area where the employer had provided services or had a material present or influence during the last two years of employment. So that should help employers have a better idea of what geographic reach is or is not reasonable under the law.

Harris Mufson: So, two final questions. One is: when does this law go into effect? And two: how does it affect at all existing non-competition agreements between employers and employees in Massachusetts?

Samantha Regenbogen: Sure. It goes into effect on October 1, 2018. So, in less than 2½ months. And it does not apply retroactively, so, to the extent there is existing non-competes, they will not be governed by this new law.

Harris Mufson: Alright, thank you for joining us on this Proskauer Brief today. Stay tuned for more insights on the latest hot topics in labor and employment law, and be sure to follow us on iTunes.

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