Recent Developments Affecting Noncompetition Agreements in Massachusetts

There have been two recent developments affecting noncompetition agreements in Massachusetts that employers need to be aware of and take into account as they craft and review their own restrictive covenant forms.

New Judicial Decision - Employment is Not Sufficient Consideration

Pursuant to the Massachusetts Noncompetition Agreement Act, M. G. L. c. 149, § 24L (the "Act"), all noncompetition agreements ("noncompetes") in Massachusetts entered into after October 1, 2018, are required to meet certain requirements to be enforceable.

Of the requirements of the Act, discussed in full here , the most confounding for employers has been the requirement that the noncompete include a provision providing for garden leave (payment by the employer during the restricted period specified by the noncompete) or "other mutually agreed-upon consideration." While garden leave[1] is further explained in the statute, the latter option is not. As a result, interpretation was left to the courts.

On July 15, 2021, United States District Judge Timothy S. Hillman issued a decision that sheds some long-awaited, albeit faint, light on what constitutes sufficient consideration under the Act. Specifically, Judge Hillman found that the noncompete at issue was unenforceable, in part due to its failure to include a garden leave clause or another mutually agreed upon form of consideration. Even though the noncompete was entered into only a few weeks after the employee started work, and even though the document expressly declared that it was being entered into "[i]n consideration for [the employee's] employment by the company," the court found the failure to meet statutory consideration requirements fatal.

The noncompete was also found unenforceable due to its failure to expressly state that the employee had the right to consult with counsel prior to signing it. While this aspect of the decision is not surprising given the clear statutory requirement, it is noteworthy in that it demonstrates that statutory drafting requirements are not merely technical, but essential to enforcement.

Key takeaways from the decision for Massachusetts employers are that (1) they should review their

[1] Sufficient "garden leave" is specified to be at least fifty percent (50%) of the employee's highest annualized based salary paid by the employer in the two (2) years before termination, payable for the duration of the restricted period.

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noncompetes entered into after October 1, 2018, to confirm compliance with the Act; (2) continuation of employment, alone, is not considered adequate consideration to meet the "other mutually agreed upon consideration" requirement under the Act; and (3) noncompetes must expressly state that the employee has the right to consult counsel.

New Presidential Executive Order

On July 9, 2021, President Biden inked a new executive order titled "Promoting Competition in the American Economy" (the "Order"). Sweeping in scope, the Order sets out 72 initiatives with goals ranging from lower prescription drug prices and easier airline refund procedures to increased enforcement of antitrust laws. However, the Order also expressly encourages a federal limitation on noncompete agreements. While many of the initiatives in the Order are industry-specific, virtually all employers could be affected by President Biden's directive regarding noncompetes.

With respect to noncompetes, the Order "encourages" the Federal Trade Commission and other federal agencies to ban or limit noncompete agreements. No specific guidance is offered by the Order as to the breadth of restrictions the Biden Administration would ultimately like to see. Should agencies choose to accept President Biden's encouragement, employers would not see changes any time soon. Given, the nature of the rulemaking process and the significance of the issue, it is likely that any significant changes would take several months if not years to reach fruition. However, the matter is of great importance to employers and employees alike.

Advocates on both sides of the issue have already begun lobbying the Biden Administration following the Order's publication, and it will be important to follow developments in the coming months. HRW's Max Perlman was among a group of 59 experts in the noncompete space from around the country that provided guidance to the White House and FTC via letter on how best to enforce the Order in a manner that balances the competing interests at play. Until concrete action is taken on the Order, however, Massachusetts employers should continue to focus on compliance with state-level regulations and requirements for noncompetes.

For Questions/Compliance Assistance

If you have any questions about the Act and its potential impact on your business or organization, please contact:

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