FOLEY & FOLEY P C
ATTORNEYS AT LAW

EMPLOYMENT LAW ALERT
Creating Calm in the Chaos: What Employers Need to Know About Massachusetts' New Non-Compete Law
Part 1 of 2

HELP IS ON THE WAY: Employment law compliance and HR-related risk management is our endgame and we are always looking for ways to more effectively help our clients achieve that goal. We know our clients: you are short on time and other priorities consume resources. That is precisely what has led us to develop a Massachusetts Non-Compete Law Compliance Toolkit. This is Part 1 of a two-part Employment Law Alert that will answer frequently asked questions and then introduce a toolkit that will allow your company to achieve compliance with this new law.

Massachusetts has earned a well-deserved reputation as an employee-friendly state. Restricting the use of Non-Compete agreements in the workplace is no exception. After years of relying on the courts to shape the law, the legislature acted. On August 10, 2018, Governor Baker signed into law significant changes to Massachusetts' non-compete law.

The new law is important and must be taken seriously as it changes key aspects of the way employers in Massachusetts can and should be using non-competes. For decades, we have been preparing and successfully defending restrictive covenants. Interpreting this new law is tricky because it codifies a number of existing common law principles while introducing new elements that must be integrated into new agreements. In this alert (the first in a series of two), we answer some frequently asked questions about the new law and about restrictive covenants, generally. In the subsequent alert, we'll provide practical and compliant advice and solutions.

Q: What does "restrictive covenant" mean?
A: This is the broad term for restrictions placed on employees and/or former employees. A non-compete agreement is one form of restrictive covenant where the employee promises not to compete with the employer, whether by forming his/her own organization or joining an existing competing organization. Non-solicitation agreements and agreements protecting trade secrets, goodwill, or other confidential information are other forms of restrictive covenants.

Q: Which types of restrictive covenants are addressed by the new law?
A: The law addresses trade secrets and non-competition. It also addresses separation agreements that address non-competition. With regard to trade-secrets, the changes in the law are favorable to employers. With regard to non-competition agreements, the changes are less favorable. It is important for employers to know that non-solicitation agreements, nondisclosure agreements (NDA) and confidentiality agreements are not impacted by the new law.

Q: How does the law impact agreements related to trade secrets/confidentiality?
The new trade secrets law will largely bring Massachusetts in line with the majority of states by tracking the Uniform Trade Secrets Act (UTSA). The new law makes it easier to protect trade secrets by: 1) recognizing trade secrets that have both actual and potential value – previously, potential value was not a factor; and 2) allowing courts to act to prevent not only actual misappropriate of trade secrets, but also threatened misappropriation, which could occur if a former employer began working for a competitor.

Q: Does the law impact existing non-compete agreements?
A: The law will apply to non-competition agreements entered into on or after October 1, 2018. If there was consideration provided when existing non-competes were executed, those Agreements will remain enforceable, presuming they meet the longstanding core common law precepts. However, most attorneys experienced in this area of law are of the belief that existing agreements that are not in line with this new law are definitely far more likely to be challenged than they were before the law was passed. We can help you evaluate existing non-compete agreements and assess your risk of a legal challenge.

Q: What does the law say about non-competes entered into after October 1, 2018?
A: The new law codified some long-standing aspects of Massachusetts common law regarding non-competition agreements. For example, the new law requires that agreements be limited to twelve months and reasonable in scope and geographic reach. We have prepared and successfully defended non-competition agreements for decades and know precisely what "reasonable in scope and geographic reach" means to the courts in MA. There are multiple new aspects of the law, including: limitations on the types of employees who may validly enter into an agreement (not your non-exempt employees); and a requirement that agreements contain a garden leave clause or mutually-agreed upon consideration.

Q: What steps must an employer follow in executing a non-competition agreement?
A: Here's where it gets a bit tricky. The steps differ depending on whether the agreement is entered into at the time of hire, during employment, or at the time of termination. The new law does make it more complex for employers to move current employees under new non-competition agreements. But, doing so is permissible. We can help you navigate the required steps with each type of employee.

Q: Non-competition agreements seem too cumbersome. What are my other options?
A: We get it. This law makes it more challenging for employers to enter into enforceable non-competition agreements with employees. But, they may still be the right choice for certain employers or certain employer/employee relationships. We can help you evaluate how your organization can best protect its desired interests without facing excess costs or complexities. It may be that non-compete agreements remain a necessary tool for your organization. Or, it may be that confidentiality agreements and non-solicitation agreements achieve your goals and non-compete agreements can generally be avoided.

As we said at the outset, it's critical that employers pay attention to this new law. The first step is to think about the protections that are important to your organization. We hope that this document will help you in considering what's important for your organization. The next step is to evaluate what's in place and decide how to move forward given your priorities and the parameters outlined in the new law. In our next communication, we'll provide guidance and solutions that can help you take action.

Please reach out to us anytime.