Published on *The National Law Review* https://natlawreview.com

# Massachusetts Noncompete Legislation Moves One Step Closer to Enactment

Article By:

Robert M. Shea

In the most recent step in a decade-long effort to enact comprehensive noncompete legislation, the Massachusetts Senate on July 25, 2018, passed an economic development bill containing amendments to Chapter 149 of the Massachusetts General Laws to regulate the use of noncompetition agreements.

Senate Bill No. 2625 defines a "noncompetition agreement" as an agreement in which an employee agrees not to "engage in certain specified activities competitive with the employee's employer after the employment relationship has ended." Significantly, the definition excludes a number of agreements, including "(i) a covenant not to solicit or hire employees of the employer, (ii) a covenant not to solicit or transact business with customers, clients or vendors of the employer, (iii) an agreement made in connection with the sale of a business entity . . . when the party restricted by the noncompetition restrictions is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale," and (iv) an agreement made at employment separation.

Under Senate Bill No. 2625, to be valid and enforceable a noncompetition agreement entered into on or after October 1, 2018 *at the commencement of employment* must:

- be "in writing signed by both the employer and employee";
- "expressly state[] that the employee has the right to consult with counsel prior to signing";
- 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."

To be valid and enforceable a noncompetition agreement entered into on or after October 1, 2018 *after the commencement of employment* must:

- be provided at least 10 business days before the effective date;
- be "supported by fair and reasonable consideration independent from the continuation of employment";

The bill also provides that to be valid and enforceable an agreement must:

- be “no broader than necessary to protect one or more of the following legitimate business interests of the employer: (A) the employer’s trade secrets, as defined in section 1 of chapter 93L; (B) the employer’s confidential information that otherwise would not qualify as a trade secret; or (C) the employer’s goodwill.”
- not extend beyond “1 year from the date of cessation of employment” (or not beyond 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”)
- be “reasonable in geographic reach in relation to the interests protected”;
- be “reasonable in the scope of proscribed activities in relation to the interests protected”;
- include “a garden leave clause or other mutually-agreed upon consideration between the employer and the employee”; And
    - Senate Bill No. 2625 states that a garden leave clause must provide for the payment “on a pro-rata basis during the entirety of the restricted period of at least 50 per cent of the employee’s highest annualized base salary paid by the employer within the 2 years preceding the employee’s termination.”
- be “consistent with public policy.”

Significantly, the bill provides that “[a] noncompetition agreement shall *not* be enforceable against: (i) an employee who is classified as nonexempt under the federal Fair Labor Standards Act . . . , (ii) an undergraduate or graduate student that partakes in an internship or otherwise enters a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii) an employee that has been terminated without cause or laid off; or (iv) an employee that is 18 years old or younger.”

The bill provides that “[a] court may, in its discretion, reform or otherwise revise a noncompetition agreement so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate business interests.”

The bill also makes unenforceable any “choice of law provision that would have the effect of avoiding the [law’s] requirements . . . if the employee is, or has been for at least 30 days immediately preceding the employee’s cessation of employment, a resident of or employed in [Massachusetts].”

Senate Bill No. 2625 was written in a form intended to make it through the Massachusetts House of Representatives (closely resembling House Bill No. 4732). The House has until July 31, 2018, when the legislative session ends, to pass the bill. If that happens, the proposed legislation will be presented to Governor Charlie Baker for his signature. Governor Baker has not signaled his position on this bill but he did support a similar bill two years ago. In light of past failed efforts over the last 10 years, enactment of the proposed law is by no means a foregone conclusion. Continue to stay tuned.



National Law Review, Volume VIII, Number 212