LAREDO & SMITH, LLP

IN BRIEF

NEWSLETTER • OCTOBER 2018

Employer Alert: Non-Compete Reform Law Passes In Massachusetts

Effective October 1, 2018, employers must comply with a new Massachusetts non-compete law geared at protecting both employees and independent contractors from undue restrictions on their ability to work, on one hand, while providing employers some leeway to protect their business interests through compliant, reasonably-tailored non-competition agreements. Non-compete agreements are contracts between employers and workers (both employees and independent contractors) that restrict workers from engaging in certain competitive activities for a defined period of time after termination of their relationships with the business.

Like several other states, Massachusetts now wholly prohibits employers from entering into or enforcing non-competes with non-exempt workers, undergraduate and graduate students, individuals 18 years or younger, workers who are laid off, and workers who are terminated "without cause". For all other workers, non-competes must meet strict statutory requirements to be enforceable.

First, the agreement must be in writing, signed by both the employer and the worker, and state that the worker has the right to consult a lawyer before signing. Second, the employer must provide notice of the non-compete to the worker either (a) before making a formal offer or ten days before the worker's start date, whichever is earlier, or (b) no less than ten days before the effective date of the agreement if the non-compete is signed after work has already begun. Finally, non-competes entered into after the work has begun must be supported by independent "fair and reasonable" consideration.

Further, with respect to time, geography, and activity restraints, non-competes will be presumptively enforceable if (a) the restrictive period is one year or less,

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"Upset at you for breaching the non-compete? Of course not."

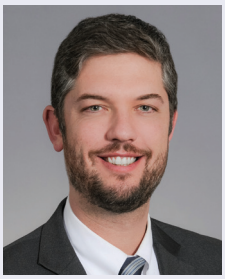
Firm News

Marc Laredo

Marc Laredo, Mark Smith, Matt Kane were named *Super Lawyers* and **Payal Salsburg** was named a *Rising Star.*

Mark Smith

Matt Kane was named to *Best Lawyers* in the area of Commercial Litigation



Matt Kane

Matt Kane and **Payal Salsburg** co-wrote an article on the payment of contingent fees to expert witness locator firms that was published in the Massachusetts Bar Association's eJournal.

Payal Salsburg

Payal Salsburg was appointed to the Steering Committee of the Boston Bar Association's Business and Commercial Litigation Section.

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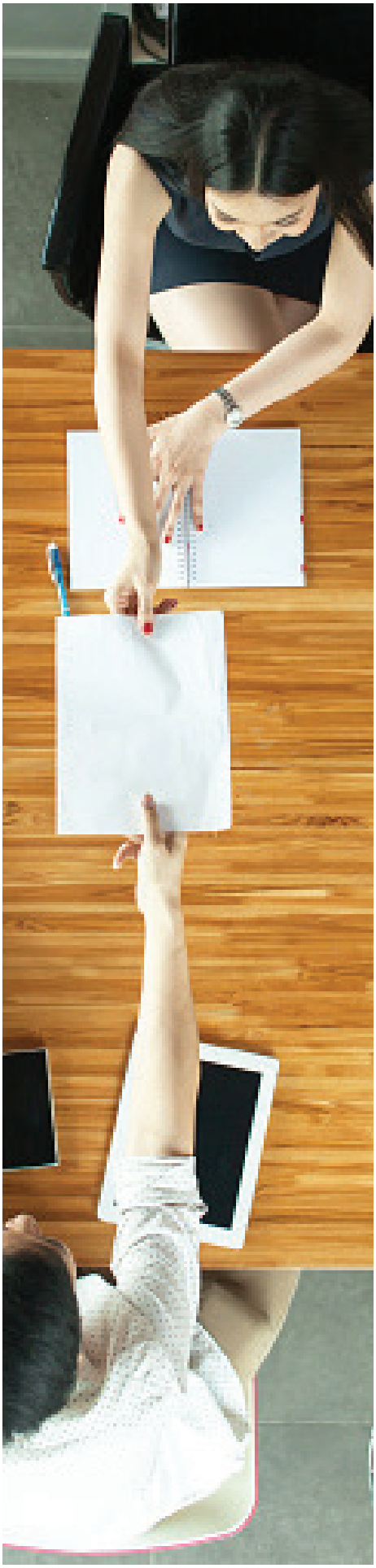
(continued from other side)

unless the worker has breached a fiduciary duty to the employer or has engaged in misappropriation, in which case the duration can be up to two years; (b) geographic restrictions are limited to the areas in which the worker provided services or had a material presence during the last two years of work; and (c) activity restrictions are limited to the specific types of services the worker provided during the last two years of work. In addition, to enforceable non-competes must contain a "garden leave" clause providing the worker at least fifty percent (50%) of his or her highest base salary within the last two years of work, or some other "mutually agreed upon consideration specified in the agreement" such as stock options, a hiring bonus, or other similar alternative payment. If the worker breaches the non-compete or the employer chooses not to enforce the restrictions, however, the employer is relieved from its statutory garden leave obligation. Moreover, employers cannot escape the application of this new law by use of choice of law provisions that would require application of a different, more "employer-friendly" state's law.

Despite its breadth and specificity, the new law does not apply to non-solicitation agreements, contracts made in connection with a sale of a business, non-disclosure or confidentiality agreements, forfeiture agreements, separation agreements in which workers expressly receive seven days to rescind acceptance, and agreements in which workers agree not to reapply for work with the same employer after termination. It also does not require employers to "re-do" existing non-competes that were entered into prior to October 1, 2018.

Nevertheless, employers may want to be prudent and review existing non-competes, offer letters, and policies for compliance with the new law, and consider revising their forms to give their non-competes a better, predictable chance of being upheld in court. On the other hand, some employers may choose to rely on the new law's "blue pencil" provision that allows a Massachusetts court to use its discretion and rewrite an otherwise unenforceable non-compete to the extent necessary to protect the employer's legitimate business interest but only so far as the restrictions are consistent with the Commonwealth's public policy. Employers should also consider whether to reserve non-competes only for key workers who would pose a significant risk if they went to work for competitors, and continue to use non-solicitation and non-disclosure agreements for other workers.

While this new law introduces some certainty to the enforceability of non-competes in the Commonwealth, it also brings into play undefined concepts like termination "without cause," "fair and reasonable" consideration, and "mutually agreed upon consideration" that we hope become clear as employers and courts continue to grapple with these knotty issues.



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