

# The New Age of Non-Competes – Massachusetts’ New Non-Compete Law.

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The Massachusetts legislature has spent the last nine years attempting to craft legislation to limit non-competition clauses (“non-competes”). This year it finally succeeded after nearly a decade of contentious debate. On October 1, 2018, Massachusetts’ new non-compete law went into effect marking the beginning of a new age (and possibly the end) of non-competes.

Non-compete agreements are now banned unless they meet certain statutory requirements. Among other requirements, the agreement must be:

- in writing,
- signed by both the employer and employee, and
- state that the employee has the right to consult counsel prior to signing.

The duration of a non-compete is now also expressly limited to one year or less post-employment. There is an exception to this time limit for an employee who breaches his or her fiduciary duty or steals the employer’s property, in which case the non-compete may remain in effect for up to 2 years. A non-compete must also be based upon at least one of the three following designated legitimate business interests: trade secrets, confidential information, or employer goodwill.

Notice to the employee is a critical aspect of the new law. If an employer requires a non-compete at the beginning of employment, it must provide a copy of the agreement to the employee either before making a formal offer, or 10 days before the employment begins, whichever comes first. If an employer requires a non-compete mid-stream of employment, it must provide notice of the agreement not less than 10 business days before the agreement becomes effective. Moreover, non-competes entered during employment must be supported by independent consideration *beyond* continued employment.

A non-compete must also include a “garden leave” clause or other mutually-agreed consideration. A “garden leave” clause requires the employer to pay the employee for the

duration of the non-compete period at least 50 percent of the employee's highest salary within the last 2 years of employment. The employer's obligation to pay the garden leave is relieved only if the employee breaches the agreement. This provision imposes a mandatory financial burden that is likely to result in the demise of employer's use of non-competes in the future.

The new law applies to both employees and independent contractors. It bans non-competes with employees who are classified as "non-exempt" under the Fair Labor Standards Act as well as those who are terminated without cause or laid off. The law also applies to employees of a company located outside of Massachusetts if the employee is, and has been residing in Massachusetts for at least 30 days immediately preceding cessation of employment. However, the law does not regulate non-competes between business owners as part of the sale of a business.

The reasonableness of a non-compete agreement's scope has historically been a primary source of dispute. Clarity is provided in this regard under the new law. A non-compete will be presumed reasonable in scope if it is (i) limited to the geographic areas in which the employee provided services or had a material presence or influence within the last 2 years of employment, and (ii) limited to the specific types of services the employee provided during the last 2 years of employment.

The new law is not retroactive. Non-compete agreements entered into prior to October 1, 2018 will continue to be governed by the pre-existing body of common law concerning the enforceability of those agreements.

It is essential that companies review their current non-compete language to ensure compliance. Cumulative employment agreements containing a non-compete clause should also be reviewed. Such cumulative agreements may warrant removal of the non-compete entirely and use of a non-solicitation and non-disclosure agreement to protect business practices without risk of challenge to the non-compete portion of the agreement.

Please contact Attorney Kimberly Alley at Perkins & Anctil, P.C. if you need assistance in reviewing your non-compete or other employment agreements.