

# Requirement to Update Non-Compete Agreements for Massachusetts Employees

Insights

October 1, 2018

The Massachusetts Noncompetition Agreement Act goes into effect on October 1, 2018 and will impact employers' current practices with respect to post-termination non-competes for Massachusetts-based employees. This is relevant to you if you intend to hire Massachusetts-based employees or bind an existing Massachusetts-based employee to a post-term non-compete provision in the future because you will need to make updates to the non-compete provision in your form PIIA.

## Updated Requirements

The Act imposes a number of requirements on how a post-termination non-compete provision must be drafted and communicated to employees in order for it to be enforceable.

## Complying with the Law

Non-compete agreements entered into recently or after October 1, 2018 with Massachusetts-based employees, including in your current form Proprietary Information and Invention Assignment Agreement ("PIIA"), ***may not be enforceable***. Also, under the Act, post-termination non-compete provisions entered into after October 1 will not be enforceable against certain Massachusetts-based employees, including but not limited to, nonexempt employees and employees terminated without cause.

**If this issue is relevant to your business, we can counsel you on how to amend your agreements to take into account these requirements.**

**Prospective Employees.** After October 1, employers must comply with the procedural requirements of the law, which include providing a prospective employee a copy of the non-compete agreement by **the earlier of** (i) a formal offer of employment or (ii) 10 business days before the commencement of the employee's employment.

**Existing Employees.** If an employer wishes to bind an **existing** employee to a non-compete agreement after October 1, then the agreement must be supported by "fair and reasonable consideration" independent from the continuation of employment, and the employee must be given at least 10 business days to consider the agreement before signing.

**All employees.** Both the employee and the employer must sign the non-compete agreement in order for the non-compete provision to be valid. In order to impose a post-term restriction, the non-compete must also include a number of provisions, including but not limited to, the following:

- Acknowledgements by the employee that the restriction is not broader than necessary and cannot be adequately protected through an alternative restriction.
- A provision that provides for garden leave or other "mutually agreed-upon consideration" during the restricted period. In order to meet the garden leave requirement, an employer must commit to paying fifty percent (50%) of the employee's base salary for the duration of the restricted period.
- A statement that the employee has the right to consult with counsel prior to signing the agreement.

A provision that any action to enforce the non-compete must be brought in Suffolk Superior Court in Boston, Massachusetts.

**If you have any questions regarding the matters covered in this client alert or need assistance with complying with the new law, please contact your Gunderson attorney.**

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