

NEW MASSACHUSETTS LAW LIMITING EMPLOYEE NON-COMPETE AGREEMENTS

After numerous failed attempts, the Massachusetts legislature has finally passed a new law limiting non-compete agreements between a company and its employees and independent contractors. The legislation was signed into law by Massachusetts Governor Charlie Baker on August 10, 2018. It becomes effective on October 1, 2018.

In many respects, the new law simply codifies many of the historic common law requirements for an enforceable non-compete: it must be reasonable in scope and be necessary to protect the reasonable business interests of the employer. However, the law also contains some additional requirements, several of which promise to be problematic for many employers, as further discussed below.

In order to be enforceable, the new law requires the following:

- A non-compete must be in writing and signed by both the Company and the employee or independent contractor;
- It must state that the employee or independent contractor had the right to consult with legal counsel before signing the agreement;
- The employer must provide a copy of the non-compete to the service provider. For a new employee or independent contractor, the agreement must be provided by the earlier of (i) the making of a formal offer to the service provider or (ii) at least 10 business days before he



- or she starts work. A non-compete required of an existing employee or independent contractor must be provided at least 10 business days before it is to become effective and it must be supported by additional consideration (e.g., a raise, bonus, etc.). Continued employment is NOT deemed to be additional consideration sufficient to support the new non-compete agreement.
- With limited exceptions, the term of the non-compete is limited to one-year or less following termination of the service provider's employment by the Company.

At least two provisions of the new law are likely to reduce the use of non-competes by companies that employ Massachusetts employees or independent contractors. First, the new law states that a non-compete will not be enforced unless it contains a provision requiring the employer to pay the former service provider throughout the post-employment term of the non-compete. The amount to be paid is at least 50% of his or her highest salary during the past two years of employment.

Secondly, the non-compete will not be enforced if the employee is terminated without cause or is laid off.

It is important to note that the new law only applies to non-competes required by a company in connection with services provided by employees and independent contractors. It does not apply to agreements arising in connection with a sale of the business and it does not apply to agreements restricting solicitation of other employees or customers. If we can provide any further information, please contact your regular PLDO attorney or PLDO Partner William F. Miller of our Corporate & Business Team at 401-824-5100 or email wmiller@pldolaw.com.



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William F. Miller is a Partner with Pannone Lopes Devereaux & O'Gara LLC and a member of the Corporate & Business Law Team. He is a highly skilled attorney with more than 30 years of experience who focuses his practice on corporate and business law matters, including mergers and acquisitions, angel, venture capital and private equity financing, commercial contract matters, intellectual property protection and licensing, and entity and investment fund formation. Mr. Miller frequently advises early stage technology companies, manufacturers, service and distribution companies as well as investors in such companies.

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