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Mass. Noncompete Law Overhaul Not As Strict As It Seems

By **Alison Noon**

Law360 (August 17, 2018, 3:21 PM EDT) -- Massachusetts employers may easily work around newly rewritten state noncompete laws by using escape clauses in the legislation or by turning to nonsolicitation agreements, corporate counsel monitoring the legislation told Law360.

Despite lawmakers' characterizations that noncompete reform would limit the arrangements businesses use to protect their interests, legislative compromises appear to have provided avenues for employers to avert certain constraints on who can be subject to the broadest of restrictive covenants and dodge a first-of-its-kind requirement to compensate former employees while they're sidelined.

The noncompete reform was one of several policy changes lawmakers tacked on to an economic development bill in the final hours of the 2018 legislative session. The overwhelmingly Democratic Massachusetts Legislature passed the amended bill early on Aug. 1, and Republican Gov. Charlie Baker signed most of House Bill 4732, including the noncompete provision, on Aug. 10.

Legislators attempted to increase employees' freedom of movement with a 12-month cap on restricted periods, a prohibition on engaging hourly employees in noncompetes, a ban on certain clawback agreements and a requirement that employers must disclose intentions for a noncompete with job applicants.

Under a so-called garden leave policy unrivaled in any other state, employers must offer "support" to former workers during noncompetition periods with at least half of the highest annual salary they earned in the prior two years or some "other mutually-agreed upon consideration."

"It will be very interesting to see how that plays out in practice because it definitely, in my reading anyway, opened the door for garden leave to basically be avoided in the future, provided the employee and the employer mutually agree on what the consideration is," Richard C. Van Nostrand, partner at Mirick O'Connell DeMallie & Lougee LLP, said.

The "other" could seemingly be any alternative, however nominal, Van Nostrand and other employment attorneys said.

"The obvious question that precipitates is: In practice, how many employees will be able to bargain for consideration that will be the equivalent of garden leave?" Van Nostrand said.

With no state plans for a major public awareness campaign and considering that labor rights groups largely focus on nonexempt workers who are newly exempt from noncompetes, Van Nostrand said he expects employees who sign noncompetes under the new law will not be aware they could push for as much as 50 percent in garden leave.

Katharine O. Beattie of Mintz Levin Cohn Ferris Glovsky and Popeo PC said garden leave is the law's most likely culprit for future litigation. The provision, named after stipends that English executives have received to tend to their gardens, "doesn't give guidance as to whether the other agreed upon consideration has to be equal in some way to 50 percent of base salary," she said.

Massachusetts employers rethinking contracts before the law takes effect on Oct. 1 are finding that and other wiggle room in the legalese.

"I've already got clients reaching out to us to assess both their template agreement and overall approach,"

Beattie said. "That includes how they could strengthen other aspects, like nonsolicitation."

Among standout changes the Legislature has touted, the new law prohibits employers from binding nonexempt or hourly workers, university students, interns, minors and anyone laid off to noncompetes. Employees terminated without cause will also be immune from noncompetes, Andrew C. Liazos of McDermott Will & Emery LLP explained, "because why did you fire them in the first place if they were that important?"

But in customer-driven industries from pharmaceutical sales to hairstyling, nothing bars employers from wielding beefed-up nonsolicitation agreements instead.

"What I can tell you is there's a lot more interest in having very solid nonsolicitation agreements and trade secret agreements," said Liazos, head of McDermott's executive compensation group and its Boston benefits practice.

Liazos, who is also vice chair of the American Bar Association's Employee Benefits Committee, said legislators "completely carved out" all other types of restrictive covenants from the legislation, corralling businesses toward nonsolicitation, nondisclosure, no-poach and confidentiality agreements.

A strong, specific and thoughtfully crafted contract preventing former employees from attempting to draw on past clients, vendors, co-workers or trade secrets could, to some extent, undermine new protections for certain workers, including those who are hourly. If a worker's livelihood is largely based on customers at a previous employer, Mintz Levin employment specialist Beattie said, "then a nonsolicitation agreement, in that circumstance, will effectively operate as a noncompete agreement."

"I think again that's the balance the Legislature was trying to strike between the competing concerns on either side of this noncompete argument: How do we let folks keep their livelihoods after leaving a company while at the same time allowing the company to protect those key business interests like customer goodwill and confidential information?" Beattie said.

In another provision with notable absences in definitions, attorneys said, the law attempts to keep employers from springing noncompete agreements on existing workers who are neither joining the company nor planning to leave it. Van Nostrand said courts have upheld the "sign or die" scenario, so lawmakers "attempted to change the equation."

Starting in October, employers who want to enact noncompetes midjob must show some "fair and reasonable consideration" other than continued employment to support entering into the agreement. But the legislation does not define a "fair and reasonable" reason, likely leaving the definition for judicial review, Van Nostrand said.

"What is probably the thorniest part of this whole issue is, because this is so fact-based, it's very difficult in the abstract to say 'well that won't be enforced' or 'that will be enforced,'" Van Nostrand said. "From my personal perspective, one of the reasons why this area is so interesting to practice in is because it is so fact-driven; the law is fairly straightforward, but how a judge may apply that law to facts, you never know."

--Editing by Aaron Pelc.