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CLIENT ALERT

GOVERNOR BAKER SIGNS ACT LIMITING EMPLOYERS' ABILITY TO REQUIRE NONCOMPETITION AGREEMENTS

On August 10, 2018, Governor Charlie Baker signed An Act Relative to Economic Development in the Commonwealth which contains the new Massachusetts Noncompetition Agreement Act (the "Act"). The Act goes into effect on October 1, 2018 and significantly limits the ability of employers to require their employees and independent contractors to enter into noncompetition agreements. The Act does not affect noncompetition agreements executed before October 1, 2018, which will continue to be governed by common law.

Enforceability Limitations

With limited exceptions as described below, the Act provides that a noncompetition agreement may be enforced, but only if the agreement:

1. If executed in *connection with the commencement of an individual's employment or independent contractor relationship*: (a) is in writing and signed by both the employer and employee or independent contractor; (b) expressly states that the employee or independent contractor has the right to consult with counsel prior to signing; and (c) is provided to the employee or independent contractor before a formal offer of employment is made or 10 business days before the commencement of the individual's employment or independent contractor relationship, whichever comes first;

2. If executed *after the commencement of employment or creation of an independent contractor relationship*: (a) is in writing and signed by both the employer and employee or independent contractor; (b) expressly states that the employee or independent contractor has the right to consult with counsel prior to signing; (c) is provided to the employee or independent contractor at least 10 business days before the effective date of the agreement; and (d) is supported by fair and reasonable consideration other than the continuation of employment.

3. Is limited in duration to 12 months, unless an employee has breached a fiduciary duty he or she owes to the employer or has unlawfully taken the employer's property, in which case the duration may extend to 24 months.

4. Is: (a) reasonable in geographic reach in relation to the interests protected; (b) reasonable in scope of proscribed activities in relation to the interests protected; and (c) consistent with public policy.

5. Is no broader than necessary to protect the employer's: (a) trade secrets, as defined in G.L. c. 93L, § 1; (b) confidential information that otherwise would not qualify as a trade secret; or (c) goodwill. An agreement will be presumed necessary to protect such an interest if that interest cannot be adequately protected by other types of restrictive covenants, such as non-solicitation, non-disclosure, or confidentiality agreements.

6. Contains a "garden leave clause" or other mutually-agreed upon consideration between the employer and the employee or independent contractor. A "garden leave clause" is a provision that compels the employer to continue to pay the employee or independent contractor during the period in which the individual's ability to compete with the employer is restricted at a rate of at least 50% of the individual's highest annualized base salary paid by the employer within the 2 years preceding the individual's termination. It is unclear if parties may mutually agree to consideration less than the amount to which an employee or independent contractor would be entitled under a "garden leave clause."

The requirements and restrictions described do not apply to certain types of agreements, including, for example, agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance of the agreement.

Exceptions

Even if a noncompetition agreement satisfies the standards set forth above, employers are prohibited from entering into noncompetition agreements with:

- Employees considered to be nonexempt under the federal Fair Labor Standards Act (i.e., employees who are entitled to overtime pay);
- Students (currently-enrolled, undergraduate or graduate, full- or part-time) who participate in an internship or otherwise enter into a short-term employment relationship with the employer (paid or unpaid);
- Employees who are terminated without cause or laid off; and
- Employees who are 18 years old or younger.

Planning Ahead

Employers should update their standard noncompetition agreements and process for provision of such agreements to ensure compliance with the requirements described above by October 1, 2018. If you have any questions about the Act, or would like assistance with your compliance efforts, please feel free to contact Attorneys Paul Holtzman (pholtzman@kb-law.com), Jill Meixel (jmeixel@kb-law.com), or Allison Belanger (abelanger@kb-law.com) at Krokidas and Bluestein LLP.