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Massachusetts Enacts New Noncompetition Law

In today's booming construction market, more and more individuals are leaving to strike out on their own. One of the most common employment law-related mistakes made by roofing contractors is failing to bind certain employees with access to sensitive information, such as pricing or access to your customers, to either a non-compete or non-solicitation of customers agreement. In most instances, the mistake is made because of a belief that these types of agreements are never enforceable. For roofing contractors in Massachusetts and other northeastern states, this belief could not be further from the truth.

Effective August 10, 2018, Massachusetts has new law addressing non-competition agreements for use with employees (which is defined to include independent contractors). The new law applies to non-competition agreements entered after October 1, 2018. The law defines a "noncompetition agreement" as an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended. The new law expressly does not apply to non-competition agreements outside the employment relationship or those made in connection with the sale of a business entity. The law also does not apply to non-competition agreements made in connection with the cessation of or separation of employment, but only if the employee is expressly given seven business days to rescind acceptance. The law is also clear that it does not extend to non-solicitation of customer provisions, non-solicitation of employee provisions, or non-disclosure agreements.

Importantly, the new law provides the minimum requirements for a valid and enforceable noncompetition agreement. In order to be valid and enforceable, a noncompetition agreement, as defined in the law, must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing. The agreement must be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee's employment. If the agreement is entered into after commencement of employment but not in connection with the separation from employment, it must be supported by fair and reasonable consideration independent from the continuation of employment, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and

signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

The new law also expressly provides that the only legitimate business interests of the employer to be protected by a non-competition agreement are its trade secrets, its confidential information not rising to the level of a trade secret, and its goodwill. The agreement must be no broader than necessary to protect these interests.

Moreover, under the new law, the permissible restrictive period is limited to no more than 12 months from the date the employment relationship terminates. An exception applies for employees who breach a fiduciary duty owed their employer or who take property (physical or electronic) from their employer, in which case the duration can last up to two years from the date the employment relationship is terminated.

In terms of the geographic restriction for noncompetition agreements, the new law provides that a geographic area that extends only to the area in which the employee performed duties or provided services during his or her last two years of employment is presumed reasonable.

The noncompetition agreement must also describe the activities the employee is bound to refrain from performing while subject to the restrictive period. The law provides that if the scope of activities is limited to only the types of services provided by the employee during the last two years of his or her employment, the scope of proscribed activities is presumed reasonable.

Lastly, and perhaps most importantly, the noncompetition agreement must be supported by a "garden leave" clause or "other mutually-agreed upon consideration" between the employer and the employee, provided that such consideration is specified in the noncompetition agreement. A "garden leave clause" requires the employer, during the restricted period, to continue paying the former employee an amount defined as at least 50 percent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination. Garden leave pay is not required where the employee breaches the agreement or during any extension of the restricted period due to the employee's breach of a fiduciary duty or taking of property, as noted herein above. Notably, the law is silent as to what would constitute sufficient "other mutually-agreed upon consideration".

In light of the road map created by Massachusetts's new law, the time is ripe to consider binding your salesmen and estimators, among others, to a noncompetition agreement. To bind your salesmen and estimators to a noncompetition agreement, you must be classifying them as exempt from overtime pay because the new law expressly provides that noncompetition agreements are not enforceable against nonexempt employees.

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