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Massachusetts Non-Compete Law

4-Year Anniversary of the Massachusetts Noncompetition Agreement Act: The Act's Impact and Lessons Learned from the Last Four Years

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Quick Refresher of the Massachusetts Noncompetition Agreement Act (MCNA)

- This Legislation was almost 10 years in the making
 - Initially tried to ban non-competes altogether
- Law was a compromise of six competing bills from 2017
- Biggest changes from status quo (and other states)
 - Consideration requirements
 - Inability to enforce in event of certain types of termination
- Good news – it is not ALL bad for employers!
 - Presumptions of Reasonability
 - Solidified protections through other restrictions

Massachusetts Noncompetition Agreement Act – Quick Refresher

- What types of agreements does it apply to?
 - Traditional non-competition restrictions not related to sale of business
- What types of agreements are not impacted by the statute?
 - Covenants not to solicit **or transact business** with Customer/Client/Vendor
 - Covenants not to solicit **or hire** Employees of Employer
 - Non-compete covenants entered into with sale of a business
 - Non-compete covenants outside of the employment relationship
 - Forfeiture agreements
 - Non-disclosure/Confidentiality agreements
 - Invention assignment agreements
 - Stand alone garden leave clauses
 - Non-compete agreements made with separating employee if employee expressly given seven **business** days to rescind acceptance

The “Good”

- Presumptions of reasonability if:
 - Limited to protect traditional legitimate business interests
 - Employer shows it cannot be adequately protected with any other restrictive covenants
 - *Agero Admin. Serv. Corp. v. Campolo*, 366 F. Supp. 3d 170, 172 n.2 (D. Mass. 2019).
 - Reasonable in geographic reach
 - Reasonable in the scope of proscribed activities
- Other restrictive covenants formally recognized
 - Non-solicit and **non-servicing** customers/clients/**vendors**
 - Non-solicit and non-**hire** of employees
- Does not impact agreements signed before 10/1/18
 - *NuVasive, Inc. v. Day*, 954 F.3d 439, 444 (1st Cir. 2021).
 - *Agero Admin. Serv. Corp. v. Campolo*, 366 F. Supp. 3d 170, 172 n.2 (D. Mass. 2019).
 - *Sodexo Operations, LLC v. Abbe*, 382 F. Supp. 3d 162, 164 n.1 (D. Mass. 2019).
 - *Tannatt v. Varonis Sys.*, 2019 U.S. Dist. LEXIS 27325 at *10 (D. Mass. Feb. 21, 2019).
 - *Croteau v. MiTek Inc.*, 2020 U.S. Dist. LEXIS 144097 at *22 n.5 (D. Mass. Aug. 12, 2020).
 - *Marion Family Chiropractic, Inc. v. Seaside Family Chiropractic, LLC*, 2022 U.S. Dist. LEXIS 62155, at *17 (D. Mass. Apr. 4, 2022).

The “Meh”

- In writing, signed by both the employer and the employee
- States the right to consult with counsel
- Non-Competes are prohibited with respect to:
 - Non-exempt employees
 - Student interns
 - Employees under the age of 18
- Choice of law/Exclusive venue
 - **MYTH BUSTER**
 - *Healthcare Servs. Grp., Inc. v. Moreta*, 2019 U.S. Dist. LEXIS 198954, at *20 n.6 (E.D. Pa. Nov. 15, 2019).
 - *Hilb Grp. Of New Eng., LLC v. LePage*, 2022 U.S. Dist. LEXIS 88175, at *9 n.4 (E.D. Va. May 16, 2022).
 - *Onward Search LLC, v. Noble*, 2022 U.S. Dist. LEXIS 121506, at *31 (D. Conn. July 11, 2022).

The “Bad”

- 10 *business* day notice requirements
 - – **MYTH BUSTER**
- Time restrictions limited to one-year post-employment
 - – **MYTH BUSTER**
- Non-Competes are prohibited with respect to:
 - Employees terminated without cause or by layoff

The “Ugly”

- Consideration

- Garden leave or other “mutually agreeable” consideration
- Must be explicitly identified in agreement

- *KPM Analytics N.A. Corp. v. Blue Sun Sci., LLC*, 2021 US Dist. LEXIS 132167, at *96 (D. Mass. July 15, 2021).

In consideration for his/her employment by the Company, the Employee agrees as follows ...

In view of Employee's anticipated access to knowledge of the customers, trade secrets, technology and other proprietary information relating to the business of the Company, the Employee agrees that in the event of his/her voluntary separation with the Company, he/she will not directly or indirectly own, manage, operate, join, control or participate in the ownership, management, operation or control of, nor be connected as director, officer, employee, partner, agent, consultant or otherwise with any business organization which directly competes with the business of the Company at any time during the period of his/her employment with the Company and for a period of one (1) year thereafter if Employee is not terminated by the company. (italics added)

The “Ugly” – Not a walk in the Garden

- Garden leave – **MYTH BUSTER**
 - Payment during restrictive period of at least 50% highest annualized base salary within two years
 - Waiver likely only at departure
 - Cannot stop paying unless/until a breach
 - Paid even if employee starts new (non-competitive) employment
 - Payments are made pursuant to the Wage Act

The “Ugly” (Cont’d)

- Other mutually agreeable consideration
 - No guidance
- Examples of other mutually-agreed upon consideration
 - Signing bonus
 - Eligibility for incentive compensation, bonus, stock options
 - Possibility of severance
 - Garden Leave “Light”
 - **MYTH BUSTERS**
 - Need not be same value as Garden Leave
 - Need not be paid after employment during restricted period
 - Need not be guaranteed payment, can be conditional consideration

National Trends – Legislation, Change in Workplace, Judicial Ambivalence

- Biden EO urges curtailing restrictive covenants
- 28 states (42 changes) to regulation of noncompete agreements
 - Recent new laws in CO, OR, IL , NV, CT, NJ, VA, D.C.
 - Wage thresholds (all over map)
 - Notice (advance, posting, distribution, post-departure)
- Non-competes, similar contracts under greater scrutiny by courts, enforcement agencies (DOJ)
- Customer and Employee solicitation restriction litigation on rise
- Raiding claims on rise
- Multi-state agreements

Key Takeaways

- Massachusetts employees
 - Statutory issues (consideration, notice), update agreements when able
- Multi-state employees
 - Pick a strategy, draft accordingly
- All employees
 - Limit use of true non-competes
 - Bolster other restrictions
 - Clearly define Confidential Information
 - Non-servicing of customers/vendors
 - No hire of employees (with liquidated damages)
- Protocols for Onboarding and Offboarding
 - Review potential hire agreements, direct “clean” departures
 - Exit interviews, reminder letters, monitoring activity, return of equipment/files

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Questions?

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Thank **you.**

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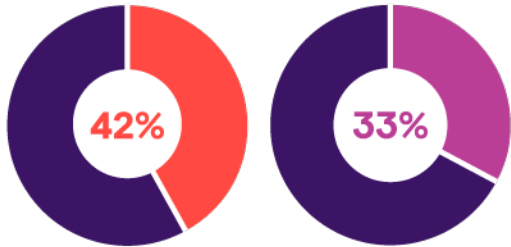
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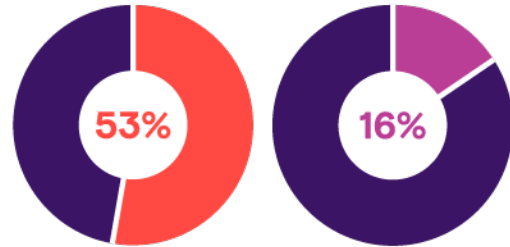
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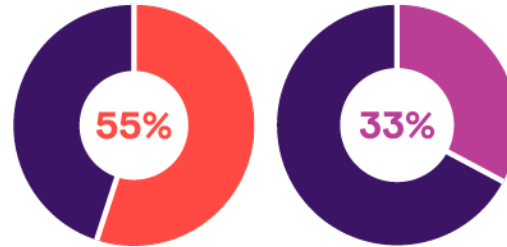
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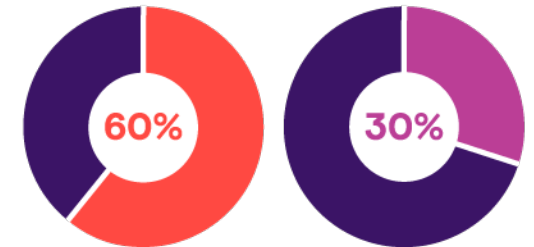
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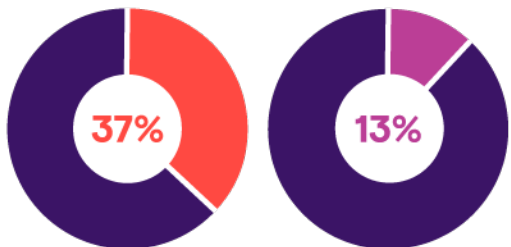
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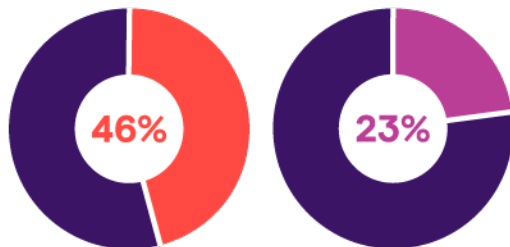
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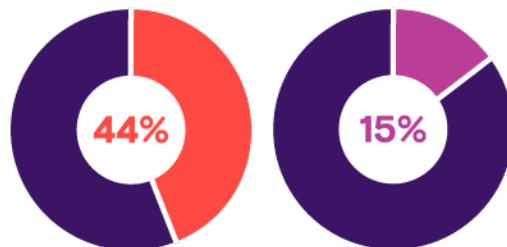
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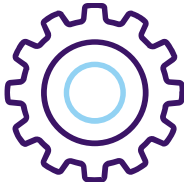
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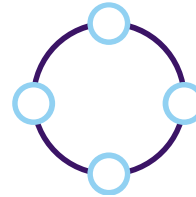
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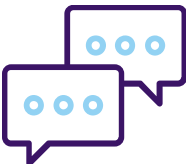
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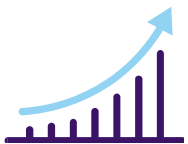
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