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New Massachusetts Law Requires Dental Practice Owners to Provide Additional Compensation for Associate Post-Termination Non-Compete Covenants Agreements

While Massachusetts law (See, Massachusetts General Laws Chapter. 112, Sections 12X and 74D) has long provided that employed physicians and nurses cannot be subject to post-termination non-compete covenants, the Massachusetts Legislature has never extended the same unenforceability to such non-competes appearing in associate contracts for dentists. Massachusetts dental practice owners have thus come to rely on post-termination non-compete covenants as an important and customary protection for their practices. The new Massachusetts Noncompetition Agreement Act, Massachusetts General Laws Chapter. 149, Section 24L (the "Act") has changed the scope of enforceability for post-termination non-compete covenants appearing in any associate agreement entered into on or after October 1, 2018.

The Act does not apply to non-compete covenants that are included in practice sale agreements. It also does not apply to post-termination non-solicitation or non-disclosure covenants in any agreements, nor prohibitions on competition or outside activity prohibition in employment agreements that apply during the term of an associate's employment. The Act also grandfathers and does not apply to agreements that went into effect prior to October 1, 2018.

Instead, the Act solely applies to non-compete covenants to the extent that they restrict the ability of an associate to compete in the same market as the practice following the termination of employment. The Act provides that a post-employment non-compete is unenforceable unless it meets numerous limits and standards.

Most noteworthy and new is a maximum limit of up to a one (1) year period , unless the employee breaches his or her fiduciary duties or unlawfully takes employer property; a requirement that the agreement state that the employee has the right to consult with legal counsel prior to signing; a restriction on enforceability against laid off employees or those terminated without cause; and if the agreement is signed during the course of employment, a requirement that the employer pay additional compensation to the associate in the form of "garden leave" payments of no less than 50% of the highest annualized base salary paid by the owner to the associate within the two (2) years that immediately preceded the termination date payable during the non-compete restriction period, or such "other mutually-agreed upon consideration" that must be stated in the agreement

To ensure enforceability, a dental practice owner must now include non-compete language in new associate agreements with these limitations. To ensure enforceability of a non-compete agreement entered into by a current employee, employers must also include one of the two types of required additional compensation: garden leave payments or other mutually agreed upon consideration. The Act defines "garden leave" payments as payments that the owner makes to the associate during the "restricted period," on a pro-rata basis throughout the entirety of the restricted period.

In contrast to garden leave payments, the Act provides practically no guidance with respect to what constitutes "other mutually-agreed upon consideration." Such consideration need not be paid at a certain time(s) or in a certain amount. It must simply be agreed-to between the owner and the employee and reasonable to compensate the employee for the restriction on his or her ability to practice after termination. For example, it could be payment of malpractice insurance costs or a bonus paid at either signing or resignation/termination of employment.

If the non-compete agreement is entered into during employment, an owner must take several factors into consideration in determining whether the non-compete agreement offered to employees should be supported by garden leave payments or other mutually agreed upon consideration. While garden leave payments are certain with respect to their timing and amount, they are substantially more than most practices are prepared to pay and are subject to the Massachusetts Weekly Wage Law (the "Wage Law"), M.G.L. c. 149 § 148. An owner who fails to make garden leave payments may thus potentially be liable to an employee for the remedies set forth in the Wage Law, which include treble damages, attorney's fees, and other costs.

Until there is more guidance on what constitutes "other mutually-agreed upon consideration" practices are likely to consider using some form of alternative consideration to support the enforceability of a non-compete. But, until there is a change in the law or a court case ruling on the scope of acceptable "mutually-agreed upon consideration", there is little certainty as to what amount of consideration will be considered reasonable and sufficient to support enforcement of a post-termination non-compete against an employee.

The health/dental law attorneys at Pierce & Mandell, P.C. are available to advise dental practice owners, buyers, seller and employee on how the new Massachusetts Noncompetition Agreement Act will affect their current or new contracts, associations and transactions.

Feel free to contact Bill Mandell, Esq. at bill@piercemandell.com, Hannah Schindler Spinelli, Esq. at hannah@piercemandell.com, Scott Zanolli, Esq. at scott@piercemandell.com or Julie Niejadlik, Esq. at julie@piercemandell.com for more information about our representation of dentists and dental practices affected by this new law.