NOTE TO MEDIA: *Daniel J. Blake and other members of LeClairRyan's Employment Litigation practice are available as resources for bylined articles or interviews on various labor and employment issues.*

For: LeClairRyan, Boston
From: Parness & Associates, Aberdeen, N.J.

FOR IMMEDIATE RELEASE

Companies Should Revisit Noncompete Policies in Wake of New Massachusetts Law, Warns LeClairRyan Attorney

-- Recently signed bill sets new standards for contractors and employees, Daniel J. Blake advises.

BOSTON (9/4/18)—— The looming deadline imposed by a new Massachusetts law should spur many companies to review their noncompete agreements, advises Daniel J. Blake, a Boston-based partner in LeClairRyan and a member of the national law firm's Employment Litigation team. "While the law does not prohibit the use of noncompete agreements altogether, it does create specific standards regarding the enforceability of such agreements," he notes.

Fortunately, businesses still have time to prepare for the new rules— Massachusetts Independent Contractor Law (M.G.L. c. 149 § 24L) —which go into effect on October 1, 2018, and will apply only to agreements signed on or after that date, he adds.

Blake sets out some highlights, along with suggestions to employers, in a blog, *New Noncompete Agreement Law in Massachusetts*. Notably, the new law includes independent contractors within the definition of "employee," and applies to employees and contractors who work or reside in Massachusetts. "Employers in neighboring states in particular should take note that Massachusetts residents are covered even if they work in another state," he says. "Further, a choice of law clause providing that the law of some other jurisdiction will apply will not be effective with regard to employees who have worked or lived in Massachusetts for at least 30 days prior to termination."

The law provides that noncompete agreements may not be enforced against certain types of employees, including those that are non-exempt under the Fair Labor Standards Act (i.e., those eligible for overtime); undergraduate or graduate students who are employed as interns or are engaged in short-term employment, as well as employees under the age of 18; and employees who have been terminated without "cause" or who have been laid off.

Consistent with established Massachusetts case law, the Massachusetts Independent Contractor Law provides that a noncompete agreement must be no broader than necessary to protect the confidential information, trade secrets, or goodwill of the employer. The law sets limits on the duration of a covenant not to compete and also sets limits on geographic scope restrictions and the scope of restricted activities, Blake explains.

"The law also requires that the agreement provide 'garden leave' [payment during the restricted period of at least 50% of the employee's highest annual salary within two years prior to the employee's termination] or other mutually-agreed upon consideration."

Similar to the federal Age Discrimination in Employment Act's release requirements, the Massachusetts law has specific provisions regarding review and consideration of noncompete agreements for new and existing workers.

"In the case of a potential hire, the written noncompete agreement must be provided with the formal offer of employment, or 10 business days before employment starts, whichever is earlier," Blake details. "The agreement must also expressly state that the individual has the right to consult with counsel prior to signing."

For existing workers, a written copy of a new noncompete agreement must be provided 10 business days before the agreement is to be effective, and must expressly state that the individual has the right to consult with counsel prior to signing. Any civil actions relating to noncompetition agreements must be brought in the county where the individual resides or, if the parties agree, in the Business Litigation Session of the Suffolk Superior Court.

He adds that the noncompete law will not apply to certain kinds of agreements, including:

- agreements restricting solicitation of customers or former coworkers;
- nondisclosure and confidentiality agreements;
- noncompete agreements entered into in connection with the sale of a business; and
- noncompete agreements made in connection with separation from employment, provided that the employee is given seven days to rescind acceptance.

With passage of the law, Massachusetts joins a number of states such as California, Florida and Michigan in giving specific statutory guidance regarding the enforceability of noncompete agreements. "Employers planning to use noncompete agreements going forward should review and revise their agreements and overall strategy for protection of legitimate business interests in order to be ready for the October 1st effective date," counsels Blake. "Corporate counsel and other legal advisors can help businesses to understand the nuances of the new law, and may recommend changes that are necessary to comply with it."

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As a trusted advisor, LeClairRyan provides business counsel and client representation in corporate law and litigation. In this role, the firm applies its knowledge, insight and skill to help clients achieve their business objectives while managing and minimizing their legal risks, difficulties and expenses. With offices from coast to coast, the firm represents a wide variety of clients nationwide. For more information about LeClairRyan, visit www.leclairryan.com.

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Press Contacts: At Parness & Associates Public Relations, Bill Parness, (732) 290-0121, bparness@parnesspr.com or Lisa Kreda, lkreda@parnesspr.com