Legislative developments concerning non-competes

By Andrew P Botti
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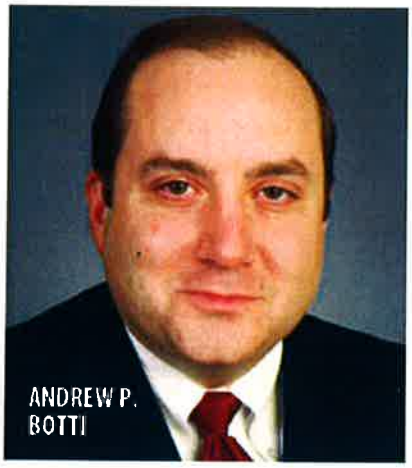

There has been a flurry of activity on Beacon Hill in recent years concerning the law of post-employment restrictive covenants in Massachusetts.

For well over a century, common law has favored the enforcement of well-crafted non-competition agreements. Many companies in Massachusetts are familiar with the use of non-competes, particularly when it comes to the employment of sales personnel.

Since early 2009, however, there has been some willingness within the Legislature to completely revamp the existing non-compete legal landscape. Several proposed bills have sought to bring sweeping changes to the law of non-competes, as well as other post-employment restrictive covenants.

Those efforts within the Legislature have, in essence, attempted to move Massachusetts more in the direction of California when it comes to the enforceability of non-competition agreements. Although stopping short of California's complete ban of non-competes, the Massachusetts legislative proposals would certainly result in the creation of enforcement difficulties, which many businesses may not be able to overcome.

For example, on Jan. 5, 2009, House Bill No. 1794, "An Act to Prohibit Restrictive Employment Covenants," was introduced. The act proposed to amend Section 19 of Chapter 149 (which provides: "No person shall, by intimidation or force, prevent or seek to prevent a person from entering into or continuing in the employment of another person") of the General Laws by adding the following paragraph:

"Any written or oral contract or agreement arising out of an employment relationship that prohibits, impairs, restrains, restricts, or places any condition on, a person's ability to seek, engage in or accept any type of employment or independent contractor work, for any period of time after an employment relationship has ended, shall be void and unenforceable with respect to that restriction. This section shall not render void or unenforceable the remainder of the contract or agreement."

That simple paragraph effectively would have brought to an end the enforceability of any type of post-employment restrictive covenant, effectuating a sea change in the present state of the common law. The broad proscriptive language would have outlawed not only non-competition agreements, but also other forms of post-employment restrictive covenants such as non-solicitation agreements and anti-piracy agreements.

Under that formulation, one could easily argue that a non-solicitation agreement prohibiting a former sales employee from contacting the customers he serviced at his prior workplace would be illegal, since it arguably "impairs ... a person's ability to seek, engage in or accept" employment.

On Jan. 13, 2009, an "Act Relative to Non-Compete Agreements," House Bill No. 1799, was introduced during the same legislative session. The bill dealt with non-competition agreements only. Nevertheless, HO 1799 established certain bright-line enforceability rules not currently found in the common law of Massachusetts.

For instance, Section (c) prohibited the enforcement of a non-competition clause against an employee "whose annual gross salary and commission, calculated on an annual basis at the time of the employee's termination, is less than $100,000[.]"

Also, HO 1799 prohibited non-competition provisions extending beyond two years and allowed for garden leave provisions, but only if the employer paid the ex-employee the greater of 50 percent of the employee's annual gross base salary and commissions, or $100,000.

Both acts would have altered considerably the existing "non-compete" jurisprudence in Massachusetts, particularly for employers who rely on post-employment restrictive covenants to protect customer goodwill and to minimize the possibility of unfair competition by former employees.

Several business interests in Massachusetts, such as the Smaller Business Association of New England and Associated Industries of Massachusetts, weighed in on the legislative formulations. Subsequently, a new formulation of "An Act Relative to Non-Compete Agreements" appeared in late 2009 as a "compromise bill," eventually labeled HO 4607. It called for the following minimum requirements for enforceable non-compete agreements:

- must be in writing and signed by the employee and the employer;

- must apply only to employees making more than $75,000 annually;
- can be of one year's duration only;
- must be provided seven business days before commencement of employment;

and

- must make additional consideration in the amount of 10 percent of the employee's compensation presumptively reasonable where a non-compete agreement is put before an employee after the commencement of employment.

Such bright-line rules for enforceability do not exist in the present common-law jurisprudence. Those baseline legal requirements impose certain employer costs of enforceability as well.

Perhaps the most controversial aspect of HO 1799 was its attorneys' fees provision. The act called for the mandatory award of counsel fees to the employee *even in cases in which the employer was successful in court in enforcing the non-compete provision.*

That provision was contrary to the longstanding and well-recognized "American Rule" requiring litigants to bear their own costs and expenses, irrespective of outcome.

In October 2010, the Joint Committee on Labor and Workforce Development held the requisite public hearing on the latest formulation of the HO 1799, which had been relabeled HO 4607. The bill was reported favorably out of committee, but was not taken up by the full Legislature. Accordingly, the act and its various formulations effectively died at the end of the 2010 legislative session.

The next legislative session saw the introduction of yet another round of proposals regarding restrictive covenants. On Jan. 20, 2011, "An Act Relative to Noncompetition Agreements" was reintroduced in the House as HO 2293.

The mandatory minimum salary requirement was eliminated, as was the 10 percent payment as presumptively adequate consideration when a non-compete agreement is presented to an employee after commencement of employment.

The new version of HO 1799 also recognizes garden leave provisions. The mandatory attorneys' fee provision remains in place as a substantial "wild card" and deterrent concerning enforcement actions.

On Jan. 21, 2011, "An Act Relative to the Prohibition of Noncompetition Agreements" was filed with the House as HO 2296. The proposal is very simple in formulation but profound in impact should it become law. It provides in pertinent part:

"Except as provided in this Section, any contract that serves to restrict an employee or former employee from engaging in a lawful profession, trade or business of any kind is deemed unlawful."

The language of HO 2296 is similar to that of HO 1794. In a way, HO 2296 is déjà vu all over again, as it more or less mirrors the restrictions set forth in HO 1794, which began the legislative foray into this area back in January 2009.

A very similar bill was introduced in the Senate (No. 00932) on Jan. 19, 2011, which would amend Section 19 of Chapter 149 to prohibit restrictive employment covenants entirely.

Both HO 2293 and HO 2296, as well as S 0932, have been assigned to the Joint Committee on Labor and Workforce Development. Public hearings on the bills were held on Sept. 15, 2011. The secretary of Housing and Economic Development testified "for substantial reform of the current rules on the enforceability of non-competition agreements in Massachusetts."

Since their initial appearance in 2009, these reform bills have been touted as "job creation" mechanisms, the argument being that prohibiting non-competes would allow for greater employee mobility and therefore increased hiring.

A 2009 study of the affect of non-compete agreements on the biotech industry, however, reached a different conclusion:

"Our results suggest that the legal structure in California that places no restrictions on post-employment activities hinders firm's research and development activities. We believe this occurs because firms cannot protect the tacit knowledge held by employees. We also considered the issues of whether legal structure was more important to younger and smaller firms. Our results here suggest that smaller firms are particularly affected by the legal structure in California. The results clearly highlight the importance of legal structure when firms are particularly reliant upon competitive advantages based upon tacit knowledge." See "Non-Competition Agreements and Research Productivity in the Biotechnology Industry," Cooms and Taylor (University of Richmond, 2009).

An earlier study from 2000 compared the legal environment of Silicon Valley, Calif., where non-competes are illegal, to that of other high-tech areas such as Route 128 in Massachusetts, North Carolina's Research Triangle, and Austin, Texas. The study found no "growth-stifling effects" of non-competes in the geographic areas that enforce them:

"There is no doubt that Silicon Valley has experienced unmatched success over the last few years, but when data reflecting the success of the four regions is adjusted to measure the successes of the four regions in relative terms, it seems clear that all four areas are experiencing very high rates of growth, in terms of the number of new technology-related businesses, the amount of venture capital investment, and the number of venture capital transactions. In short, all four are high technology

boomtowns. If there is validity [to the] theory that California's prohibition of noncompetition clauses in employment agreements was a critical factor in the development of Silicon Valley culture and its associated success, then one would expect the four regions' levels of success, as measured by growth in the high technology and emerging companies sector, to correlate in some fashion with the extent to which each region tends to enforce such covenants. Unfortunately, the available data for the last few years does not seem to correlate with each region's law in such a fashion: despite significant legal differences between the regions, they all seem to be experiencing phenomenal growth and success." See "A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions," Woods, 5 Va. J.L. and Tech. 14 (2000).

A look at the unemployment figures for those regions also tends to negate any purported connection between the prohibition of non-compete agreements and job creation.

For example, in May 2011, the unemployment rate for Silicon Valley was 9.7 percent. During the same time period, unemployment in Massachusetts was 7.6 percent, and in the Research Triangle, 7.5 percent. The statistics for 2010 were even more disparate. The statewide unemployment rate in California as of June 2010 was 12.3 percent and in Silicon Valley, 11.8 percent, much worse than the national average of 9.7 percent.

In Massachusetts — where non-competes are routinely enforced — the unemployment rate for the same time period was 9.1 percent statewide. In the Research Triangle (North Carolina) the unemployment rate in 2010 was 8 percent, much better than the national average at that time. North Carolina also enforces non-competes. (Source: U.S. Bureau of Labor Statistics).

In short, the non-compete legal landscape in Massachusetts remains somewhat unpredictable because of these recent legislative initiatives.

Andrew P. Botti is a director at the McLane Law Firm in Woburn.

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Hear Andrew debate Boston Globe Reporter on National Public Radio regarding Massachusetts Non- compete Laws. To listen to the podcast, click here.

Andrew was recently quoted in the Boston Business Journal: ***Patrick Threatens Enforcement Ban on Noncompetes***

Andrew was recently quote in Massachusetts Lawyers Weekly: ***Non- compete Proposals Back on Beacon Hill***

Biography

For over twenty years Andrew has represented large corporations, smaller businesses, and family owned and operated enterprises in complex commercial and employment- related disputes. He has tried numerous commercial and employment based cases to verdict in both state and federal court, and has appeared before various administrative and legislative agencies such as the Massachusetts Commission Against Discrimination. Most recently, Andrew testified before the Joint Committee on Labor and Workforce Development of the Massachusetts legislature regarding the efficacy of H. 2293, "An Act Relative to Non- competition Agreements," and has been actively involved in the debate over the bill's current formulation.

Andrew served formerly as Chairman of the Board of SBANE, the Smaller Business Association of New England, from 2009 - 2011. SBANE was founded in 1938 to promote and foster the interests of smaller businesses throughout the 6 state region.

Andrew received his J.D. from Northeastern University (1991) and B.A. from Columbia University (1983). Previously he was a Partner at Colucci Norman, LLP in Beverly, MA as well as a Partner, Donovan Hatem LLP in Boston, MA.

Practice/ Industry Groups

- Business Litigation
- Employment and Labor Law
- Non- Competition Law
- Trade Dress/ Copyright
- Trade Secrets

Representative Work

- Represents minority shareholders of close corporations in freeze- out actions based upon self-dealing and aggressive accounting schemes.
- Obtained injunctive relief in several non- competition cases against corporate officers who left employment to start competing ventures utilizing confidential and proprietary business information and trade secrets of former employers.
- Defends corporations against claims of race, gender and national origin discrimination, as well as disputes involving the Massachusetts Wage Act. Advises management on a myriad of employment related issues.
- Obtained temporary restraining order in federal court prohibiting officers and directors of investment fund who failed to honor terms and conditions of offering memorandum from moving over $24,000,000 in investors' money off- shore pending hearing on request for preliminary injunctive relief.
- Represented major credit card and banking institutions in defending class action suits brought under the Fair Credit Reporting Act, Truth in Lending Act, and the Fair Debt Collection Practices Act, as well as breach of contract and privacy claims.
- Defended Federal Court injunction sought by major bus companies against minority- owned discount carrier. The case was featured in an article appearing on the front page of The Wall Street Journal on January 28, 2005, entitled "On the East Coast, Chinese Buses Give Greyhound a Run."
- Coordinated the defense of a major breach of warranty claim for $500,000,000 against a manufacturer of sophisticated fire detection devices in an action arising from the 1995 fire at the Malden Mills facility in Lawrence, MA. Incident was the fourth largest industrial fire in U.S. history.

- Andrew recently served as Chairman of the Unsecured Creditors Committee appointed by the United States Trustee relative to In re Modern Continental Construction Co., Inc., a $900,000,000 Chapter 11 bankruptcy proceeding.

Mr. Botti has the following published cases relating to his practice in the areas of business and employment litigation:

Cook, et. al. v. ACS State & Local Solutions, Inc., -- F.3d --, 2011 WL 6221645 (8th Cir. 2011) (class action re data privacy);

M/ K Systems, Inc. v. Glesmann, et. al., 79 Mass. App. Ct. 1101 (2011) (theft of trade secrets);

Cook, et. al. v. ACS State & Local Solutions, Inc., 2010 WL 4813848 (W.D. Mo.2011) (class action re data privacy);

Wiles, et. al. v. LocatePlus Holdings Corp., 2010 WL 3023909 (W.D. Mo.) (federal privacy law class action);

Gil v. Vortex, LLC, 697 F.Supp.2d 234 (D. Mass. 2010) (D. Mass.) (handicap discrimination);

Corapi v. C & C Realty Development (2009 WL 3430297) (Mass. App. Div. 2009) (broker's commission);

Biffer v. Capital One Services, 2006 U.S. Dist. Lexis 8074 (D. Conn.) (identity theft);

In re Gitto Corp., 321 B.R. 367 (Bankr. D. Mass. 2005);

Kuhn v. Capital One Financial Corporation, Inc., 2004 Mass Super Lexis 514 (consumer class action); Christopher C. Clark v. The Stipe Law Firm LLP, 320 F. Supp. 2d 1207 (W.D. Okla. 2004) (Civil RICO);

Corporate Teledata, Inc. v. Thomas J. Sullivan. et al, 15 Mass. L. Rptr. No. 32, 765 (2003) (denial of relief pursuant to Mass. R. Civ. P. 60(b)):

Corporate Teledata, Inc. v. Thomas J. Sullivan, et. al, 15 Mass. L. Rptr. No. 20, 457 (2003) (dismissal as discovery sanction);

In re: Malden Mills Industries, Inc., et. al. v. E.I. Du Pont de Nemours & Co., et. ai, 277 B.R. 449 (Bankr. D. Mass. 2002) (catastrophic property damage litigation);

Big Top USA, Inc. v. The Whittern Group et. al., 998 F. Supp. 30 (D; Mass 1998) (trade dress infringement);

Big Top USA, Inc. v. Tha Whittern Group et. al., 183 FRD 331 (D. Mass. 1998) (discovery sanctions);

Price v. BIC Corporation, 142 NH 386 (1997) (products liability);

New Balance Athletic Shoe, Inc. v. Boston Edison Company, 29 UCC Rep. Serv. 2d 397 (1996) (property damage);

Vasapolli, et. al. v. Rostoff, et. al., 39 F. 3d 27 (1slCir. 1994) (FDIC litigation);

United States of America v. Instruments, S.A., Inc., 807 F. Supp. 811 (D.C. Cir. 1992) (constitutional challenge to federal procurement act).

Admissions & Recognition

Andrew is admitted to the Supreme Judicial Court of Massachusetts (1991) and the United States District Court for the District of Massachusetts as well as the First and Eighth Circuit Court of Appeals.

- Associated Industries of Massachusetts/ Human Resources Committee (January 2012 - present)

- AV Peer Review Rated by Martindale- Hubbell
- *New England Super Lawyers*® (Business Litigation)
- SBANE - Chairman of the Board (2009-2011)
- SBANE - Executive Committee (2008-2009)
- SBANE - Co- Chair/ Human Resources Committee (2007-2009)
- International Association of Defense Counsel
- The Federalist Society
- Andover Republican Town Committee (2001- present)
- Merrimack Valley Chamber of Commerce
- The Lanam Club

Articles

More than twenty of Andrew's cases have been published in official case reporters.

- Commentary in "**Legislative developments concerning non- competes**", New England In- House (March 13, 2012)
- Quoted in "**Start- up can enforce exec's non- compete**", New England In- House (February, 2012)
- Quoted in "**Non- compete litigation picks up as the economy improves**", Boston Business Journal (December 23, 2011)
- Quoted in "**Non- compete Agreements in Massachusetts Poised for Compromise**," Mass High Tech (September 19, 2011)
- Quoted in "**Patrick Threatens Enforcement Ban on Noncompetes**," Boston Business Journal (September 16, 2011). To view the full version of this article, click here.
- Quote in "**Non- compete Proposals Back on Beacon Hill**," Massachusetts Lawyers Weekly (September 16, 2011). To view the full version of this article, click here.
- Quoted in "**Survey Shows Judges Embracing Individual Voir Dire,**" *Massachusetts Lawyers Weekly (June 16, 2011).* To view the full version of this article, please click here.
- Quoted in "**State Eco- Dev, Chief Warns Mass Biz Harmed by Noncompete Laws**," State House News Service (September 15, 2011).
- **MCAD Disability Regulations Committee**, member of MCAD authorized committee charged with drafting regulations relative to disability discrimination, 2010- present.
- Co- Chair, **10th and 11th Annual New England Business Litigation Conference**, *Massachusetts Continuing Legal Education*, January 2011 and 2012.
- Panelist, "**Employee Non- Compete Agreements and Job Creation: The Status of Law Reform a Year Later**," *Boston Bar Association*, July 2010 and July 2011.
- Featured in "**Lawyers look to the Supreme Court for clarity on data privacy issue**," *Mass Lawyers Weekly Blog*, December 2010. To view the full version of this article, please click here.
- "**Reach of Retaliation Claims Expanded**," *New England In- House*, September 2008.
- "**Who owns customer goodwill, after all?**" *New England In- House*, May 2007.
- "**SJC rejects court- imposed buy- out of minority shareholders?**" *New England In- House and Massachusetts Lawyers Weekly "Opinion" column*, January 2007.
- "**Non- competes must be updated to remain effective.**" *New England In- House*, October 2006.
- **Free Market Competition or Treason, Employee Duty of Loyalty: A Précis for the General Counsel (2004)**. *This publication has been included in the Virtual Library of the 17,000- member American Corporate Counsel Association.*
- **Massachusetts Procedure, Lawyers Cooperative Publishing (1994)** *(Contributing Author).*
- Quoted in "**Carr Appeals Court Ruling on Contract**," *The Boston Globe, Business Section (October 20, 2007).* To view the full version of this article, please click here.

- Quoted in "**Small Business Matters; E- mail management is all about developing a workable system,**" *The Boston Herald, Business Section, Article by Jennifer Heldt Powell (October 13, 2006).*
- Quoted in "**Deal or No Deal: Lawyers Weigh in on Settlement vs. Trial,**" *Massachusetts Lawyers Weekly (March 24, 2006).*

Involvement

Andrew is an active member of the Massachusetts business community. From 2009 - 2011, he served as Chairman of the Board of Directors of the Smaller Business Association of New England or SBANE. He also served as Co- Chairman of SBANE's Human Resource Committee, where he was instrumental in establishing the annual SBANE H.R. Symposium.

As SBANE's Chairman, Andrew started the Women in Business Committee and placed four women CEOs on the Board of Directors. He formed the Marketing and Membership Committee and modernized the website so as to include social media. Andrew also worked to oppose proposed non- compete legislation which was unfair to business owners.

Andrew is a member of The Lanam Club, a business club located in Andover, Massachusetts. Andrew also sits on the Massachusetts Commission Against Discrimination or MCAD- authorized committee charged with making recommended changes to the state's disability regulations.

Andrew is a regular participant in Massachusetts Continuing Legal Education and the Boston Bar Association Symposia.