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Look before you leap: Non-compete law in Massachusetts

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INTRODUCTION

Many observers in Massachusetts' business and legal communities took note of legislative activity in the area of "non-compete agreements" this past session, which concluded on July 31, 2010, with no bills ultimately passing into law. Proposals included the complete prohibition of any such restrictive covenants,[1] and the establishment of specific income and time period limitations, pre-determined by statute, in order for such agreements to be enforceable at law.[2]

In anticipation of a much-needed economic recovery in this region in the future, which is likely to be accompanied by an attendant increase in employee mobility, all of the stakeholders that could be affected in any future debate on this topic — employees, employers, policymakers and attorneys — would be well-advised to take note of the substantial body of current Massachusetts law in this area.

This article is meant to outline key principles that are routinely and regularly recognized and enforced by Massachusetts courts with regard to employment agreements that contain non-compete and non-disclosure provisions which govern the rights and responsibilities of both employers and employees here in the commonwealth.

BASIC PRINCIPLES

Parties, including employees and employers, should and do have the right to contract freely. It is in the public interest for our courts to enforce valid agreements that are entered into voluntarily and are supported by consideration. Companies acting in trade and commerce often develop confidential information, including trade secrets, that they are obligated to take steps to protect under the law in order to preserve the value of that property.[3] Employers invest substantially in training and developing employees who transact business on their behalf using the company's confidential information (such as, by way of example only, client lists) to thereby build valuable goodwill with customers.[4]


RAYMOND AUSROTAS

Outside of any agreements, Massachusetts statutory and common law guards against misappropriation of trade secret information by a departing employee. Employers may and do properly also use confidentiality agreements to place their employees on notice of their obligation not to use or disclose truly proprietary company information.[5]

That said, Massachusetts courts will not protect an employer that (i) forces an employee to enter into an employment agreement that primarily resembles a contract of adhesion and is executed under duress, (ii) improperly attempts to interfere with an employee's right to make a living, or develop his or her own professional goodwill and expertise, and (iii) merely uses litigation to chill genuine competition in the marketplace and thereby asks the courts to enforce a non-compete provision that is overly broad in scope and effect.

MASSACHUSETTS COURTS ENFORCE NON-COMPETE AGREEMENTS WHEN TO DO SO IS REASONABLE

Outside of a few specific fields,[6] for many decades Massachusetts courts have enforced restrictive covenants governing post-employment conduct by a departing employee. These have been found to be "enforceable only if it is necessary ➤ 2

1) *See* H.R. 1794, 186th General Court (Mass. 2009).
2) *See* H.R. 4607 186th General Court (Mass. 2010).
3) *See, e.g. Jet Spray Cooler, Inc. v. Crampton,* 361 Mass. 835, 840 (1972)).
4) *See, e.g. Warner-Lambert Co. v. Execuquest Corp.,* 427 Mass. 46, 49 (1998).
5) *See,e.g. Eastern Marble Products Corp. v. Roman Marble, Inc.,* 372 Mass. 835, 839-40 (1977).
6) Restrictions on employment of physicians, nurses and social workers are prohibited. *See* M.G.L. c. 112, §§ 12X, 74D, 135C. A similar statute exists which is applied to certain broadcasting outlets that terminate their employees. *See* M.G.L. c. 149, § 186. Attorney ethical rules prevent any restrictions on their employment in order to protect a client's right to counsel of his or her choosing. *See* Mass. R. Prof. Conduct 5.6(a).

NON-COMPETE

Continued from page 1

to protect a legitimate business interest, reasonably limited in time and space, and consonant with the public interest" and "valid if they are reasonable in light of the facts in each case."[7] These matters have therefore been analyzed on a case-by-case basis.[8]

The Massachusetts Supreme Judicial Court has specifically categorized those legitimate employer interests which provide a satisfactory basis for enforcement of a non-compete agreement:

> It is sufficient to state that the interests which may be protected have fallen into three generic categories: (1) trade secrets ... (2) confidential data ..., and (3) goodwill ... If any or all of these interests are present in a given case in which a non-competitive covenant is part of a contractual agreement, then in the absence of equitable factors which would militate against enforcement ... a court of equity will not deny enforcement of a reasonable covenant.[9]

Although the question is not completely settled, the employment an employer provides to an at-will employee can constitute sufficient consideration to establish an enforceable non-compete agreement, and (particularly where an employment agreement is provided in advance, and executed at the time of hiring) has routinely been found to be valid.[10]

MASSACHUSETTS COURTS HAVE NOT ENFORCED RESTRICTIVE COVENANTS BROADLY OR TO PREVENT HEALTHY COMPETITION IN THE MARKETPLACE

Several principles have emerged in Massachusetts common law which will affect the ability of employers to enforce non-compete agreements against departing employees.

Non-competition agreements are construed narrowly and against employers in order to guard against the potential for unequal bargaining power that may be present in the contract.[11] They cannot be used solely to protect an employer from ordinary competition in the workplace.[12] It is best to enforce these promptly, and an employer that fails to action to protect its interests after receiving notice of a clear violation may be found to have slept on its rights.[13]

A material change in an employee's job duties and responsibilities will often result in a court finding that the agreement governed only that prior position and has been rescinded.[14]

If an employer discharges an employee prior to the expiration of an employment contract for a fixed term that contains a non-compete provision, in a manner constituting a material breach by the employer, this has the potential to excuse the employee from the requirement to honor the restrictive covenant.[15]

Finally, in a fairly recent case (upheld on appeal), an aggressive lawsuit was filed against a former employee to enforce a non-compete with what the court found to be an improper motive, brought based on limited investigation and ultimately insufficient evidence, which efforts completely boomeranged and resulted in the employer itself being found liable for an unfair act in trade and commerce. The employer was forced to pay treble damages and attorneys' fees to its former employee.[16]

CONCLUSION

Although the terms of many employment agreements may often be identical from one business to the next, whether or not enforcement of a non-compete provision against an employee is reasonable under the circumstances will be determined by the actual facts presented by a given employee's departure from an employer. Massachusetts courts have historically displayed a consistent willingness to examine these disputes in detail and take appropriate steps, including injunctive relief if necessary, to protect both employers' and employees' legitimate — but sometimes conflicting — rights when this happens.

Given the nearly unlimited variety of industry-driven issues confronted by both employers and employees when they part ways, Massachusetts policymakers should not overlook established precedence and well-developed common law before creating any new statutory standards (which may well have unintended consequences) to govern such an occurrence.

Our economy and region have traditionally provided a welcome home to many successful and growing businesses, as well as their employees, under the current legal framework described above. Given the current economic climate, it would be wise to tread carefully before tilting — in either direction — this challenging but often fairly resolved balance of interests. ■

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7) *Boulanger v. Dunkin' Donuts Inc.*, 442 Mass. 635, 639 (2004) (citing to *Marine Contrs. Co. v. Hurley,* 365 Mass. 280, 287-89 (1974) and *All Stainless, Inc. v. Colby,* 364 Mass. 773, 778 (1974)).

8) *Novelty Bias Binding Co. v. Shevrin*, 342 Mass. 714, 716 (1961).

9) *New England Canteen Service v. Ashley,* 372 Mass. 671, 674 (1977).

10) *See, e.g. Economy Grocery Stores Corp. v. McMenamy,* 290 Mass. 549, 552 (1935); *Sherman v. Pfefferkorn,* 241 Mass. 468, 473 (1922); see also *Wilkinson v. QCC, Inc.,* No. 99-P-1854 (Mass. App. Dec. 21, 2001) (unpublished memorandum under Rule 1:28); *Stone Legal Res. Group, Inc. v. Glebus, reprinted at* 2002 Mass. Super. LEXIS 555 (Mass. Super. – Dec. 17, 2002). *But see IKON Office Solutions, Inc. v. Belanger,* 59 F.Sup.2d 125, 130-32 (D. Mass. 1999); *Tyler Techs., Inc. v. Reidy,* No. 06-4404-BLS1, *reprinted at* 21 Mass. L. Rep. 669, 2006 Mass. Super. LEXIS 59 (Mass. Super. Ct. – Suffolk, Oct. 30, 2006).

11) *See, e.g. Sentry Ins. V. Firnstein,* 14 Mass. App. Ct. 706, 707 (1982).

12) *See Lajoie Investigations, Inc. v. Griffin, reprinted at* 1996 Mass. Super. LEXIS 518 (Mass. Super. – March 11, 1996).

13) *See, e.g. Stewart v. Finkelstone*, 206 Mass. 28, 36 (1910); *Alexander & Alexander v. Danahy,* 21 Mass. App. Ct. 488, 494-95 (1986); *see also Optical Publ. Co. c. McCue*, No. 83-0474-F, *reprinted at*, 1984 U.S. Dist. LEXIS 17989, *17-18 (D. Mass. – Apr. 2, 1984).

14) *See AFC Cable Sys. v. Clisham,* 62 F. Supp. 2d 167, 173 (D. Mass. 1999); *Lycos, Inc. v. Jackson*, No. 04-3009, *reprinted at*, 18 Mass. L. Rep. 256 , 2004 Mass. Super. LEXIS 348, *10 (Mass. Super. Ct. – Middlesex, Aug. 25, 2004).

15) *See, e.g. Ward v. American Mut. Liability Ins. Co.,* 15 Mass. App. Ct. 98, 100-101 (1983).

16) *See Brooks Automation, Inc. v. Blueshift Techs., Inc.,* No. 05-3973-BLS2, *reprinted at* 2006 Mass. Super. LEXIS 18 (Mass. Super. Ct. – Suffolk, Jan. 17, 2006), *aff'd,* 69 Mass. App. Ct. 1107, *review denied,* 449 Mass. 1110 (2007).