

Renewed Life for Potential Legislative Restrictions on Noncompetition Agreements in Massachusetts?

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On March 2, 2016, Massachusetts House Speaker Robert A. DeLeo announced that he supported legislative restrictions on employee noncompetition agreements. Speaker DeLeo's statements, made in a speech to the Greater Boston Chamber of Commerce, may be a turning point in the long-running debate in Massachusetts over whether noncompetes should be banned or restricted through legislation.

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Past Legislative Efforts

Since 2008, there have been numerous bills introduced in the Massachusetts legislature aimed at either eliminating or regulating the use of most employee noncompetition agreements. None have passed, and the enforcement of noncompetition has remained governed by Massachusetts case law.

Proponents of legislative restrictions on noncompetition agreements received a boost in September 2013 when, in testimony before the Massachusetts legislature's Joint Committee on Labor and Workforce Development, then-Governor Deval Patrick's secretary of housing and economic development testified that the Patrick administration supported the "outright elimination of enforceability" of all noncompetition agreements in Massachusetts, regardless of duration or geographic scope. Despite the governor's support, a noncompetition bill was not passed.

In 2014, Governor Patrick went a step further and introduced his own legislation to ban employee noncompetes. Governor Patrick included in his economic stimulus bill a proposed new Chapter 93K to the Massachusetts General Laws enacting the Uniform Trade Secrets Act. The new Chapter 93K contained a

provision that would have rendered “void and unenforceable” any noncompetition agreement with an employee or independent contractor. The new Chapter 93K, however, was not passed into law and Governor Patrick left office following the end of his second term.

The prospects for the passage of any noncompetition legislation appeared to dim with Republican Governor Charlie Baker taking office in January 2015. Indeed, attention paid to such potential legislation in the business and legal communities (as well as the media) waned significantly. Although bills to ban or regulate noncompetition agreements were reintroduced in 2015, none even made it to a committee hearing. Governor Baker expressed openness to reasonable restrictions being placed on employee noncompetes. Nevertheless, regulating the use of noncompetes did not appear to be high on his list of priorities.

Speaker DeLeo’s Proposal

Given the relative lack of attention paid to noncompete legislation in Massachusetts during the past year or so, Speaker DeLeo’s March 2 announcement took many by surprise. According to the *Boston Globe*, however, the Speaker and his staff have been working with business leaders during the past year to develop a “compromise” proposal that would not ban noncompetes but would place certain reasonable restrictions on them. Specifically, he proposes that legislation include: (1) a duration limitation of one year; (2) a requirement that employers provide advance notice to job applicants and employees who will be asked to sign a noncompetition agreement with a stated right to seek the advice of counsel; and (3) an exemption for low income workers.

Where Things Stand

It is premature to predict whether the legislation will pass. Speaker DeLeo announced only his proposal for noncompete legislation; he has not presented a bill. Thus, while the three parts to his proposal may appear reasonable to many employers, we know that “the devil is in the details,” and there may be aspects of the actual bill that end up being highly problematic for employers. Indeed, the three parts to his proposal have been included in some of the prior bills introduced in the legislature. Moreover, a bill that most employers find acceptable may not be at all acceptable to employee advocates (nor to many in the venture investing world) who believe that Massachusetts needs a California-like ban on employee noncompetes, and not just some modest restrictions that are simply consistent with those already imposed by Massachusetts courts.

For now, employers can take a wait-and-see approach. The current Massachusetts legislative session ends in July of 2016, so if legislation is passed and signed into law by Governor Baker it should happen within the next five months. With that in mind, it may be a good idea for employers to evaluate their noncompete practices to ensure they are consistent with existing law and, hopefully, enforceable under new law.

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