

NEW HAMPSHIRE GOVERNOR SIGNS NEW LAW AFFECTING NON-COMPETE AND NON-PIRACY AGREEMENTS IN THE WORKPLACE

By: *Peg O'Brien, Esq.*
Email: mobrien@devinemillimet.com
Phone: 603.695.8631

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On May 15, 2012, Governor Lynch signed into law HB 1270, which requires all New Hampshire employers to provide prospective employees "prior to or concurrent" with making an offer of employment a copy of any "non-compete or non-piracy agreement" that the employer will require the employee to execute upon hiring. The legislation requires employers to provide the same "advance notice" to current employees who are required to execute a non-compete or non-piracy agreement upon a change in job classifications. The new law, enacted at New Hampshire R.S.A. 275:70, will become effective on July 14, 2012.

The text of the new statute is only two sentences: "Notice of Non-Compete and Non-Piracy Agreements Required. Prior to or concurrent with making an offer of change in job classification or an offer of employment, every employer shall provide a copy of any non-compete or non-piracy agreement that is part of the employment agreement to the employee or potential employee. Any contract that is not in compliance with this section shall be void and unenforceable." The statute does not define the terms "non-compete" or "non-piracy." As typically used by employers, a "non-compete" agreement prohibits an employee from working in or setting up a competing business for a certain period following termination of employment. A "non-piracy provision," also known as a "non-solicitation provision," in an employment agreement, restricts the employee from soliciting the employer's customers or employees, or making use of the employer's confidential information following termination of employment. Both covenants are utilized to safeguard an employer's protectable business interests.

While the statute is clear on two discrete points in time in an employment relationship – hiring and job change – it fails to address any other point in time. For example, what if the nature of a business evolves post-hiring of a key employee and the company decides that a non-compete is necessary to protect its proprietary information? The statute does not address non-competes mid-stream in an employment relationship, outside of the limited context of a change in position. From the statute's omission, it is possible that a court

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

may rule such mid-stream non-compete agreement between an employer and employee “void and unenforceable.” However, such a finding is hard to square with the doctrine of at-will employment and the right of a business to contract freely with its employee. There are no other known statutes in other states similar to this and there are no other statutes in New Hampshire which discuss non-compete and non-piracy agreements.

For now, this new statute is clear that at the time an employer either offers a job or offers a change in job classification, an employer is free to request an employee to sign an otherwise enforceable non-compete or a non-piracy agreement. However, in light of the limited text to this statute, employers are cautioned to consult with counsel prior to requesting a mid-stream non-compete or non-piracy agreement with an employee unless it is connected with a specific change in position.

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Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001

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