

## NON-COMPETE COVENANT ENFORCEABLE AGAINST MASSACHUSETTS RESIDENT SEEKING TO WORK OUTSIDE OF MASSACHUSETTS

By: Anthony Augeri  
Email: [aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)  
Phone: 978.475.9100

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One question that many clients often inquire of their lawyers is whether a non-compete provision of an employment agreement is enforceable beyond state borders. Most often this question arises when high level executives or management “jump ship” to a company that, although not located in the same state, is still a direct competitor. In what many see as a watershed case, the Massachusetts Superior Court has issued an injunction to enforce a non-compete covenant in an employment contract signed in Massachusetts, despite the fact that former employee was to begin work for a competitor located in California. In *EMC Corp. v. Donatelli*, Judge Stephen E. Neel of the Business Litigation Session of the Superior Court held that a non-compete covenant signed by Donatelli is an enforceable contract and not unreasonably broad where it prohibits direct or indirect competition with EMC for a period of 12 months from the day of termination. The court reached this result despite the fact that Donatelli, the former EMC employee, intended to work for a company in California (Hewlett-Packard Company), and despite the fact that California law expressly prohibits such non-compete covenants.

Briefly, Donatelli started with EMC in 1987, working at the company’s headquarters in Hopkinton, Massachusetts. At the time he left EMC to join Hewlett-Packard, Donatelli was the Executive Vice President of EMC’s Storage Division. The Storage Division accounts for 80% of EMC’s revenue, and Donatelli oversaw the development of the company’s key storage products. In 1992, Donatelli signed an agreement which contained a covenant not to compete directly or indirectly against EMC for a company that develops, markets, manufactures, or sells products or services competitive with EMC products for a period of 12

### Labor, Employment & Employee Benefits

**Mark Broth, Chair**  
603.695.8558  
[mbroth@devinemillimet.com](mailto:mbroth@devinemillimet.com)

**Aaron Gilman**  
978.475.9100  
[agilman@devinemillimet.com](mailto:agilman@devinemillimet.com)

**Newton Kershaw**  
603.695.8571  
[nkershaw@devinemillimet.com](mailto:nkershaw@devinemillimet.com)

**Karen Levchuk**  
603.695.8618  
[klevchuk@devinemillimet.com](mailto:klevchuk@devinemillimet.com)

**Patricia McGrath**  
603.695.8537  
[pmcgrath@devinemillimet.com](mailto:pmcgrath@devinemillimet.com)

**Anthony Augeri**  
978.475.9100  
[aaugeri@devinemillimet.com](mailto:aaugeri@devinemillimet.com)

**Margaret O'Brien**  
603.695.8631  
[mobrien@devinemillimet.com](mailto:mobrien@devinemillimet.com)

**Anne Scheer**  
603.410.1708  
[ascheer@devinemillimet.com](mailto:ascheer@devinemillimet.com)

**Laurel Van Buskirk**  
603.695.8565  
[lvanbuskirk@devinemillimet.com](mailto:lvanbuskirk@devinemillimet.com)

**Anne Trevethick**  
603.695.8725  
[atrevethick@devinemillimet.com](mailto:atrevethick@devinemillimet.com)

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

months after the end of his employment. Seven years later, Donatelli resigned from EMC. One week later, he began work at Hewlett-Packard. A Hewlett-Packard press release announced that Donatelli would serve as executive vice president of enterprise servers, storage, and networking products. That same day, Donatelli filed an action in California seeking to enjoin EMC from enforcing the non-compete covenant because such provisions are unenforceable under California law. EMC immediately filed an action in Massachusetts seeking to enjoin Donatelli from, among other things, working for Hewlett-Packard for the period of time described in the non-compete.

The Superior Court focused on the fact that Donatelli was not a California resident who happened to work for a Massachusetts company, but was in fact a Massachusetts resident at the time of his termination. The Court reasoned that Massachusetts' interest in the relationship between employer and employee was paramount to California's interest and that an otherwise meritorious motion for injunctive relief should not be denied solely because another state may not enforce the injunction should the Massachusetts employee later move to that state. As Judge Neel surmised; "[a] Massachusetts employee, unlike his California counterpart, upon signing [a non-compete] covenant has reason to expect that it will be enforced." The Court also dismissed Donatelli's argument that the covenant was unenforceable because it was not supported by consideration on the basis that access to company trade secrets was valid consideration. The Court did allow limited discovery on the issue of whether Donatelli's new responsibilities at Hewlett-Packard would in fact place him as a competitor with EMC, as Donatelli argued they would not.

Although this is not an appellate level decision, Judge Neel is well respected as is the Business Litigation Session of the Superior Court. Although it is speculation at this time, many commentators already predict that Massachusetts Appellate Court will follow Judge Neel's reasoning and adopt this ruling. What this decision means for employers is that they can now expect to at least find Massachusetts' courts receptive to obtaining injunctive relief against former employees who work for competitors outside of Massachusetts and are subject to such non-compete and other restrictive covenants, particularly former key high level executives and management. It still appears, though, that remote or "telecommuting" employees of Massachusetts' companies that are subject to non-compete covenants but that are residents of other states and jump to a competitor outside of Massachusetts will be on better footing to avoid such covenants than Massachusetts residents in similar circumstances to Donatelli.

#### Office Locations:

111 Amherst Street  
Manchester, NH 03101  
T 603.669.1000  
F 603.669.8547

300 Brickstone Square  
Andover, MA 01810  
T 978.475.9100  
F 978.470.0618

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



While the Massachusetts court has issued an injunction, the next significant legal issue is whether that injunction will be enforced by the California courts. This question raises complicated Constitutional and choice of law issues, which will effect whether Massachusetts contract law will take precedence over the California prohibition of non-competes.

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