

NON-COMPETE AGREEMENTS IN MASSACHUSETTS

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Even in a down economy, companies often face the voluntary departure of key employees. One of the most prevalent issues related to this phenomenon is the issue of enforcing non-compete agreements for departed employees, or non-compete provisions contained within employment contracts. In Massachusetts there have been recent efforts to enact legislation to severely limit the enforceability of non-compete agreements. Although those legislative efforts stalled at least for this legislative year, it reflects the overall view shared by Massachusetts courts that such agreements should be scrutinized through a pro-employee lens. This is not to say non-competes are unenforceable in Massachusetts, but careful consideration needs to go into such agreements at the front end to help best avoid any enforceability issues later when it counts.

With this in mind, here is a list of points to address when preparing non-competes:

1. Timing and notice

One of the most highly debated provisions in the proposed Massachusetts legislation was a provision requiring 7 days advance notice of a non-compete provision to a prospective employee before employment commenced, or with the offer letter, whichever was earlier. This proposed legislation differed significantly from older Massachusetts case law which allowed for the enforcement of non-compete agreements signed well after an employee began employment. In those cases, the courts determined that continued employment was sufficient consideration for the loss of future employment rights. Courts are now less likely to be persuaded by this argument. As a practical matter, the further into the employment relationship that the employee signs a non-compete, without additional consideration other than the continuation of at-will employment, the less likely such agreements will be enforced.

It is advisable to present any proposed non-compete agreement to a potential employee at the same time that the offer of employment is made.

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2. Tread lightly

Don't ask employees to sign non-compete agreements unless their future competition would be materially harmful to your business. Not every employee will meet this standard. Further, it is not always appropriate to use the same non-compete agreement, containing the same terms, for all employees. Why this is a mistake is because it will dilute one of the key ingredients to successfully enforcing a non-compete: that it is sufficiently narrow in scope to protect a legitimate business interest. If the court scrutinizing a non-compete for the VP of Sales discovered that secretaries and other personnel without access to sensitive company information were subject to the same non-compete terms, it will dilute your chances to enforce the non-compete. To borrow from products liability parlance, this would be likely trigger "non-compete fatigue."

3. Customize versus standardize

Related to the previous point is to customize non-compete agreements to meet the special needs of particular employees or classes of employees. For example, a non-compete for the VP of sales, who is privy to information regarding customers, pricing, marketing strategies, etc., may need to provide different protections than the agreement designed for the VP of research and development. The more specific the non-compete is in describing the particulars of how that employee would harm the company if he or she competed unfairly against the company, the more likely courts will be persuaded to enforce it.

4. Scope

The area most scrutinized by courts is whether the duration of the non-compete period and the geographic area it devines are reasonable in scope. Massachusetts courts have upheld a non-compete lasting two (2) years, but the recent trend is for a shorter time limits. Guidance can be found in proposed Massachusetts legislation which limited the outer limits of duration for non-competes to one (1) year. It is advisable to implement the shortest time possible. So if you determine that six (6) months is sufficient to protect the company's interest should a particular employee leave, then use only six (6) months in the non-compete and resist the temptation to put more.

5. Exit strategy

One other consideration to keep in mind is whether you will enforce a non-compete against an employee the company terminates. When the company terminates an employee, particularly in a down economy, extra scrutiny should be placed on assessing whether enforcing a non-compete is really necessary. Ask yourself this question: "If the employee was not valuable enough to retain, particular an underperforming employee, how much harm could they really pose to the company?" It goes without saying there are going to be such employees where enforcing non-competes will be critical, but it is worthwhile to consider. To emphasize the point, it would be critical to enforce a non-compete against Tom Brady, it would be much less damaging to enforce a similar agreement against Jeff Rowe (undrafted third string quarterback).

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6. Details

As the saying goes, the devil is in the details. Non-compete agreements are contracts and should be carefully crafted. Issues such as remedy, forum, enforcement and attorneys' fees are often significant issues when these agreements are disputed and should be anticipated in their drafting. Employers should exercise caution before reusing an old non-compete agreement that has not been subject to recent legal review.

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