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CLIENT ALERT: Massachusetts Legislature Fails to Implement Non-compete or Trade Secret Law Reform

July 31, 2014 marked the end of the 2013-2014 Massachusetts legislative session, and the end of another year of failed efforts to reform the laws governing non-compete agreements and trade secret protections. As in prior years, reform efforts did not gain sufficient momentum to implement any changes in those laws. This means that, for the foreseeable future, Massachusetts employers retain the ability to utilize non-compete agreements to protect their intellectual property and valuable business relationships.

Non-Compete Law Reform

Massachusetts non-compete law is based upon common law, or prior decisions of the courts. Under the common law approach, non-compete disputes are examined on a case-by-case basis. This gives courts flexibility to handle each situation according to its specific facts, but it makes the resolution of such disputes less predictable. Massachusetts has never had a non-compete statute.

Efforts to reform Massachusetts non-compete law began in 2009, when the first of a series of bills was introduced that sought to ban non-compete agreements similar to the law in California. Despite being introduced as a new bill every year since 2009, the California-style ban on non-compete agreements has never received sufficient support in Massachusetts. As a result, a variety of compromise bills have been proposed each year. All of these compromise attempts permitted the continued use of non-compete agreements, but sought to stiffen regulation of them in various ways, including such proposed changes as:

- Prohibiting non-compete agreements for non-exempt employees;
- Prohibiting non-compete agreements for employee who earn less than $75,000 per year;
- Requiring that non-compete agreements be provided to an applicant at least 5 days in advance of accepting an offer of employment (New Hampshire has a statute that contains a similar requirement);

- Establishing a rule that non-compete prohibitions of up to 6 months were presumptively reasonable (a different version of a prior bill proposed establishing a 12-month period as presumptively reasonable);
- Requiring payment of additional consideration for non-compete agreements signed by existing employees (a different bill required a minimum 10% salary increase);
- Including a "red pencil" provision in the law, which requires courts to strike an entire overbroad non-compete provision instead of modifying it to an acceptable restriction (i.e., "blue penciling," which is currently the norm in Massachusetts);
- Requiring former employers to pay the legal fees of a former employee if a court modified a material restriction of the non-compete agreement;
- Requiring that the non-compete agreement be in writing and signed by both parties;
- Expressly permitting the use of "garden leave" provisions (where the former employer continues the pay of the former employee during some portion of their non-compete period);
- Specifically rejecting the "inevitable disclosure" doctrine (where, in the absence of a non-compete agreement, a former employee may still be prevented from working for a competitor based on the threat that the former employee would inevitably rely on his former employer's confidential information while performing his new job duties).

None of the non-compete agreement reform efforts over the years have sought to limit employers' use of non-solicitation or non-disclosure of confidential information agreements.

Notably, non-compete law reform efforts seemed to gain the most momentum this past legislative session in comparison with prior years. There were more legislative hearings on Beacon Hill than in prior years, and Governor Patrick and his economic development chief, Gregory Bialecki, both advocated publicly in support of a total ban on non-compete agreements. The issue garnered significantly greater media attention as well. Despite all of the increased attention, the Legislature failed to negotiate a compromise of the various pending non-compete agreement bills, all of which lapsed at the end of the legislative session. By its inaction, the Legislature declined to make any changes to non-compete law in Massachusetts.

Trade Secret Law Reform

The Legislature also considered a bill last session which would have adopted a version of the Uniform Trade Secrets Act ("UTSA"). Forty-eight other states have already adopted some form of the UTSA; New York and Massachusetts, the last two holdouts, have their own separate laws governing trade secret protection. The potential change-over to the UTSA from the current set of Massachusetts trade secret statutes will not be as significant a change as described above concerning non-compete law reform. Perhaps one of the biggest differences is that the UTSA permits recovery of attorney fees to the prevailing plaintiff, while Massachusetts trade secret law does not (unless the unlawful activity rises to the level of unfair or deceptive trade practices under M.G.L. ch. 93A). There are numerous other differences too intricate to review here.

What Does This Mean For Employers?

Employers should appreciate that the tenor of the reform efforts focuses on reducing overuse of non-compete agreements and the imposition of excessively broad restrictions by employers. It is always a good idea for employers to evaluate their non-compete program periodically. Employers should ensure that their non-compete agreements are *reasonably* drawn to protect confidential information, trade secrets, and business relationships. Employers should examine the restrictions that they need for such protection, and consider whether some employees need restrictions that are different than others. For example, an employer may not need to impose the same restrictions on an entry-level sales associate that it needs for its business development director. It may also be possible to obtain sufficient protection through the use of non-solicitation and non-disclosure agreements only, without a non-compete provision. The more thoughtful an employer is about its non-compete program, the more effective and enforceable its non-compete agreements will be.

Future Reform Efforts

We fully expect that non-compete and trade secret law reform efforts will resume again during the 2014-2015 legislative session. We will continue to monitor the progress of these reform efforts, and will provide updates here on our website.

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