Management Alert

Massachusetts Legislature Considers Revised Non-Compete Bill

On January 20, 2011, Massachusetts State Representatives Lori Ehrlich, William Brownsberger, and Alice Hanlong Peisch re-filed the Massachusetts non-compete bill, aptly entitled "An Act Relative to Noncompetition Agreements." The bill was originally submitted in late 2009 as House No. 1799, and since that time has undergone significant review, comment, and revision. While much of the bill remains the same, its sponsors made changes to address several concerns the business community had expressed about particular provisions. There is no current timeline for a vote on the bill, but we do expect there to be ample opportunity to provide additional input.

What Remains the Same As the Prior Bill?

The bill applies to non-compete agreements in the context of employment, including forfeiture for competition agreements (agreements that impose adverse financial consequences if an employee engages in competitive activities). However, the bill specifically excludes non-solicitation agreements (both of customers and employees); non-compete agreements outside the employment context, such as those that are executed in the sale of a business; forfeiture agreements (agreements that impose adverse financial consequences as a result of termination regardless of whether the employee engages in competitive activities); and agreements not to reapply for employment. The bill does not apply to non-disclosure or confidentiality agreements.

In essence, the bill codifies the existing common law rules, which provide that non-compete agreements are enforceable only if they are reasonable in duration, geographic reach, and scope of proscribed activities necessary to protect the employer's trade secrets, confidential information, or goodwill, and are consonant with public policy. In addition, the bill does not change current Massachusetts law permitting courts to reform or modify unreasonable non-compete agreement provisions.

The bill requires non-competes to be in writing, signed by both parties, and "to the extent reasonably feasible," they must be provided to the employee at least seven business days in advance of employment. If the agreement is executed after the commencement of the employment relationship, the employee must be provided with notice and "fair and reasonable" consideration (beyond continued employment).

The bill restricts non-compete agreements to one year, except for "garden leave" clauses (agreements by which the employer agrees to pay the employee during the restricted period), which may last up to two years.

The bill mandates the payment of attorneys' fees to employees if a court refuses to enforce "a material restriction or reforms a restriction in a substantial respect," or if it finds that the employer acted in bad faith. Attorneys' fees are not mandated, however, if a particular provision is "presumptively reasonable," as defined by the statute, or if the employer made "objectively reasonable efforts to draft the rejected or reformed restriction so that it would be presumptively reasonable," even if a court refuses to enforce or reforms the provision. An employer may be entitled to its legal fees if it prevails only if they are

otherwise permitted by statute or contract, the agreement is presumptively reasonable, the non-compete was enforced, *and* the employee acted in bad faith.

What Has Changed From the Prior Bill?

Perhaps the most significant change in the current version of the bill is that it no longer restricts the use of non-compete agreements to employees making more than $75,000 per year. Instead, the bill calls for courts to consider the economic circumstances of, and economic impact on, the employee. This is important because there are many companies doing business in the Commonwealth, oftentimes start-ups, that employ individuals who are paid less than $75,000 per year, but who are otherwise provided with potentially lucrative equity interests, stock options, or the like. The departure of these employees to a competitor can cripple a start-up company and can even cause hardship to well-established companies that may utilize these other types of non-monetary compensation and pay key employees less than $75,000. This salary benchmark was also a concern for companies that employ part-time or seasonal employees, and staffing agencies, to name a few, which may not meet the $75,000 salary benchmark in a calendar year.

Another change in the bill relates to the award of mandatory attorneys' fees to employees. While this provision remains in the bill, as discussed above, an employer can avoid paying fees if the court determines that it undertook "objectively reasonable efforts to draft the rejected or reformed restriction so that it would be presumptively reasonable," even if unsuccessful. This provision, however, does not provide clear guidance to employers as to the parameters of such "objectively reasonable efforts," and remains a significant departure from existing law that litigants pay their own attorneys' fees, win or lose.

Like some other states, including California, the bill, in its prior and current versions, explicitly rejects the inevitable disclosure doctrine (which holds that even in the absence of an enforceable non-compete agreement, a former employee may be prevented from working for a competitor based on the expectation that the employment would inevitably lead to the disclosure of trade secrets or confidential information of the former employer). The newest version of the bill, however, recognizes that employers may nevertheless protect themselves using other laws and agreements, including applicable trade secrets laws and non-disclosure agreements.

Other changes from the last version of the bill include: (a) non-competes executed after the commencement of employment no longer must be accompanied by a 10% increase in salary to be presumptively reasonable; now, they must simply be supported by "fair and reasonable consideration"; (b) non-compete agreements no longer need to be separate documents; (c) garden leave clauses are permitted; and (d) the scope of restrictions placed on forfeiture agreements has been limited.

Finally, it is important to note that the bill is not retroactive, and will not apply to agreements entered into before January 1, 2012.

Seyfarth Shaw plans to monitor and participate in the legislative process and will report on the status and evolution of this bill on our blog, Trading Secrets, at www.tradesecretslaw.com. If you have any questions or would like to provide input on the bill, please contact the Seyfarth Shaw attorney with whom you work or any Trade Secrets, Computer Fraud & Non-Compete attorney on our website (www.seyfarth.com/tradesecrets).

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