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Management Alert

Massachusetts Governor Proposes Sweeping Legislation Banning Non-Compete Agreements

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Last week, Massachusetts Governor Deval Patrick proposed sweeping legislation that would eliminate employee non-compete agreements in Massachusetts. While it remains to be seen whether this bill will actually become law, employers should be aware of the potential implications of this far-reaching bill, and should implement steps sooner rather than later to protect their trade secrets and confidential information should non-competes become unenforceable in the Commonwealth.

Eliminating *All* Employee Non-Competes in Massachusetts

The Governor's bill, entitled "An Act to Promote Growth and Opportunity" (HB4045), includes a provision that would invalidate *all* non-compete agreements in Massachusetts, with a few very limited exceptions, regardless of industry. This would bring Massachusetts in line with only California and North Dakota, the only other states that prohibit employee non-compete agreements.

The limited exceptions to the proposed Massachusetts statute include non-competes entered into in connection with the sale of a business (or the sale of substantially all of the assets of a business), where the restricted party owns at least 10% of the business and received significant consideration for the sale, and non-compete agreements arising outside of an employment relationship.

Additionally, the bill would not affect non-solicitation agreements (both those prohibiting solicitation of an employer's customers and those prohibiting solicitation of employees), non-disclosure agreements, forfeiture agreements, or agreements not to reapply for employment to the same employer. While the bill does not explicitly reference "garden leave" or "bench" provisions (where the employee is compensated not to compete during the restricted period), it would seem to bar such provisions, as they would presumably be deemed to prohibit or restrict an employee's ability to seek or accept other employment. This is something the legislature should clarify and/or the courts may ultimately need to consider in interpreting the bill, should it pass.

One of the most notable provisions of the bill, however, provides that the prohibition on non-compete agreements applies to agreements executed *before* the bill's effective date. Companies whose only protection of confidential and proprietary information or customer relationships consisted of non-compete agreements (which is not advisable) will have to ensure that they have appropriate protections in place moving forward.

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Adoption of the Uniform Trade Secrets Act

The bill also includes a provision adopting the Uniform Trade Secrets Act ("UTSA")—making Massachusetts the forty-ninth state to have adopted some version of the UTSA, with only New York lagging—and another provision that would repeal the current statutory provisions related to liability for trade secret misappropriation and injunctive relief (Sections 42 and 42A of Chapter 93 of the Massachusetts General Laws).

Unlike the current statutory scheme in Massachusetts, the UTSA explicitly permits injunctive relief for actual *or threatened* trade secret misappropriation (whereas under the current scheme, actual misappropriation must be established). The UTSA also specifies that damages can include not only the actual loss caused by the misappropriation, but also unjust enrichment damages.

Like the current statutory scheme, courts can award multiple damages for trade secret misappropriation: The UTSA would allow awards of exemplary damages of up to twice the amount of actual loss or unjust enrichment, where the misappropriation is willful and malicious.

The UTSA also includes a provision permitting a court to award attorneys' fees in trade secret misappropriation cases to the prevailing party if: (i) a claim of misappropriation is made or defended in bad faith, (ii) a motion to enter or terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists. Unlike the section of the bill eliminating non-competes, the section relating to the UTSA would not apply retroactively.

What Does This Mean For Your Business?

Faced with incredibly disparate opinions in the business community, and the fact that Governor Patrick's administration is in its final months, it may be that the bill in its current form will wither on the vine. Instead, previous bill sponsors may continue their hard work to find a compromise between outright elimination of non-competes and a codification of the common law, which has evolved in most instances in the Commonwealth, to enforce those non-competes that are narrowly tailored and address the employer's legitimate business needs to protect its good will, confidential information, and trade secrets.

While some studies have suggested a connection between enforcement of non-competes and limited regional growth (for example, comparing the boom of Silicon Valley, where non-competes are unenforceable, to the more tempered success of the Route 128 area in Massachusetts), other studies have noted that a variety of factors distinguish these regions, such as cultural and structural differences between the East and West Coasts. Accordingly, we anticipate that critics of this bill will point out that the Patrick administration's claim that non-competes "are a barrier to innovation in Massachusetts" may not be quite that cut-and-dried.

Notwithstanding the fact that the bill may ultimately not become law, employers with operations in Massachusetts should take steps to prepare themselves in the event the bill is passed, in which case even those agreements that were executed prior to its passage would be invalidated.

Best practices include:

- Identifying the various types of valuable information within a company and assessing the secrecy measures protecting such information.
- Drafting and enforcing robust confidentiality and invention assignment agreements that clearly define the sort of information and documents the company considers a trade secret or confidential;
- Implementing entrance interview protocols to educate employees about their non-disclosure obligations from the very start of their employment;

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- Implementing exit interview protocols to both remind departing employees of their continuing non-disclosure obligations, and also to ensure that employees return all documents and software at termination;
- Conducting regular employee education programs that create a culture of confidentiality whereby employees understand the value of protecting company data;
- Labeling confidential information as such where appropriate;
- Limiting access to trade secrets, including implementing computer access codes, passwords, identification badges, and locked files for hard copies;
- Regular evaluations of effective trade secret protection measures that take into account new technologies and trends, such as social media and cloud computing issues;
- Notifying departing employees' new employers about your concerns of trade secret disclosure (whether advertent or inadvertent) or misappropriation;
- Reviewing computer records (including email activity, USB drive usage, and phone records) to determine whether a former employee disclosed or maintained sensitive information leading up to or after termination; and
- Use of non-solicitation agreements to limit a departing employee's ability to call on your customers or other employees.

Implementing these practices will help protect your business should Governor Patrick's bill pass. In the meantime, non-compete agreements that are reasonably tailored to protect your company's legitimate business interests are still enforceable, and may add another layer of protection.

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