aim
Leadership is our business
Associated Industries of Massachusetts
One Beacon Street, 16th Floor
Boston, MA 02108
617.262.1180 | www.aimnet.org

Non-Compete Agreements Protect Innovation

Posted by John Regan on Tue, May 13, 2014 @ 09:08 AM

The largest business association in Massachusetts announced today that it opposes efforts to ban or limit the use of non-compete agreements because the action would threaten hundreds of small companies that depend upon the agreements to protect their intellectual property.

In a letter to members of the Legislature, Associated Industries of Massachusetts (AIM) said a survey of its 4,500 members shows that non-competes are used widely in every segment of the Massachusetts economy, including manufacturing, life sciences, medical devices, finance, retail, marketing, publishing, construction, energy, professional services, transportation, food and beverage distribution, insurance and health care.

"Our business would be compromised by allowing employees and former employees to share trade secrets that have been crucial to continuing business," said the president of a small engineering firm.

Language eliminating non-compete contracts is found in a jobs bill filed recently by Governor Deval Patrick and in a bill recently reported out of the Legislature's Joint Committee on Labor and Workforce Development. No date has been set for a debate on either bill.

Brad MacDougall, Vice President of Government Affairs at AIM, said the non-compete issue is really about choice for both individuals and employers, who should be free to negotiate contracts of mutual benefit as long as the employee is a part of the process.

Employees already enjoy legal protection against overly restrictive non-compete agreements, according to MacDougall. Case law dictates that enforcement of agreements occurs only when they:

- are narrowly tailored to protect legitimate business interests;
- are limited in time, geography, and scope;
- are consonant with public policy; and
- the harm to the employer from non-enforcement outweighs the harm to the employee.

"Non-compete agreements may not be used to curtail ordinary, fair competition or to prevent employees from using their general skills. Massachusetts has a long history of case law that strikes the right balance between employee freedom of mobility and financial incentives with employer interests in protecting intellectual property (IP), trade secrets, confidential information, and goodwill," he said.

AIM maintains that proponents of doing away with non-competes have inappropriately characterized the issue as a battle between innovative technology startups and large, established companies trying to prevent

key people from moving to smaller competitors. In fact, the AIM survey finds that most companies that depend on non-competes to protect intellectual property are small firms outside the technology sector.

"We believe that intellectual property created by us could be transferred to our competition and lessen that value of the IP, which required significant investment," says a small publishing company.

A manufacturing company with fewer than 50 employees adds that eliminating non-competes "could put us out of business."

AIM also takes issue with the argument by proponents that Massachusetts must eliminate non-competes to keep pace with innovation competitor California, which for years has limited use of such agreements.

But California does allow non-competes in certain business circumstances and many California-based companies use them in those circumstances. California companies use non-compete agreements in other states where they operate, including Massachusetts.

California's restrictions have existed for years, but other states have not followed suit. Covenants not to compete are recognized and honored in 48 states. Several of those states are in fact looking to strengthen their public policy protections for IP. In 2010 for example, Georgia passed a law and then an amendment to its constitution to allow for broader enforcement and court discretion to uphold legal protections, moving towards the current Massachusetts legal model.

New York has a growing start-up community, yet enforces non-compete contracts; the law has not dissuaded the growth of a tech economy there. Indeed, reports suggest that the investment market there for start-ups now surpasses Massachusetts. Non-competes cannot be the reason.

"Massachusetts ranks among the highest in the U.S. for patent creation and venture capital investment. National surveys rank Massachusetts ahead, or competitive with, other states in the very metrics cited by proponents as the reason to ban non-competes," MacDougall said.

"The commonwealth is often ranked higher than California on the Kaufman Foundation's "economic dynamism" measure, and also holds its own in the areas of fastest growing firms and initial public offerings. Non-compete agreements protect that culture of innovation."

aim
Leadership is our business
Associated Industries of Massachusetts
One Beacon Street, 16th Floor
Boston, MA 02108
617.262.1180 | www.aimnet.org

May 13, 2014

Senate President Therese Murray & Speaker of the House Robert A. DeLeo
Members of the Senate & House of Representatives
State House
Boston, Massachusetts

RE: AIM members strongly oppose banning non-compete agreements

Dear Madame President, Mr. Speaker and Members of the General Court:

The member employers of Associated Industries of Massachusetts (AIM) strongly oppose legislative proposals to ban or limit the use of non-compete agreements in the Commonwealth.[1] Language eliminating non-compete contracts is found in the "jobs bill" recently filed by the governor and in a bill recently reported out of the Committee on Labor and Workforce Development.

A recent survey conducted by AIM indicates that hundreds of member companies consider the protection of intellectual property (IP) and the retention of non-compete agreements to be a priority. These companies range from small family businesses to multinational corporations. They also represent every segment of the Massachusetts economy - manufacturing, bio/pharma/life science, medical devices, finance, retail, marketing, publishing, construction, energy, professional services, transportation, food and beverage distribution, insurance, and health care.

The non-compete issue is really about choice for both individuals and employers, who should be free to negotiate contracts of mutual benefit as long as employees are a part of the process.

Employees already enjoy legal protection against overly restrictive non-compete agreements. Case law dictates that enforcement of agreements occurs only when they are narrowly tailored to protect legitimate business interests; limited in time, geography, and scope; consonant with public policy, and the harm to the employer from non-enforcement outweighs the harm to the employee.

Non-compete agreements may not be used to curtail ordinary, fair competition or to prevent employees from using their general skills. Massachusetts has a long history of case law that strikes the right balance between employee freedom of mobility and financial incentives with employer interests in protecting IP, trade secrets, confidential information, and goodwill.

AIM members have consistently opposed elimination or restriction of non-compete contracts since the issue was first raised in 2007. Our members have told us that changes to current practice will have a significant

[1] H.4045, H.1715, H.1729, H.4045, and S.846

negative impact on their investment decisions here.

Massachusetts is an economy fueled by research, development and innovation. The state ranks among the highest in the U.S. for patent creation and venture capital investment. National surveys rank Massachusetts ahead, or competitive with, other states in the very metrics cited by proponents as the reason to ban non-competes. Massachusetts is often ranked higher than California on the Kaufman Foundation's "economic dynamism" measure, and also holds its own in the areas of fastest growing firms and initial public offerings.

Non-compete agreements protect that culture of innovation.

Proponents often cite California as a warmer, magical place because it bans non-compete agreements. We note however that;

- California allows non-competes in certain business circumstances and many California-based companies use non-competes in those circumstances.
- Many California based companies use non-compete agreements in other states where they operate, including Massachusetts.

California's restrictions have existed for years, but other states have not followed. Covenants not to compete are recognized and honored in 48 states. Several of those states are looking to strengthen their public policy protections for IP. In 2010 for example, Georgia passed a law and then an amendment to its constitution to allow for broader enforcement and court discretion to uphold legal protections, moving towards the current Massachusetts legal model.

New York has a growing start-up community, yet enforces non-compete contracts; the law has not dissuaded the growth of a tech economy there. Indeed, reports suggest that the investment market there for start-ups now surpasses Massachusetts. Non-competes cannot be the reason.

Even supporters of the non-compete ban acknowledge that such an action would unleash a wave of protracted legal action, including litigation. Contrast that with the fact that most non-compete situations now are resolved quickly without litigation, usually based on assurances from the new employer about what the new employee is doing. Hundreds, if not thousands of non-competes expire per their own terms.

AIM believes that any "jobs bill" should focus on improving the economic landscape, eliminating burdensome regulation and addressing a critical skills shortage, not banning non-compete agreements.

Thank you for taking AIM's views into account. Please feel free to contact me if you have any questions or need any further information.

Sincerely,

Bradley A. MacDougall
Vice President – Government Affairs
Associated Industries of Massachusetts