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EMPLOYMENT & LABOR

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The Future of Noncompetition Agreements in Massachusetts and Beyond

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The landscape of employee noncompetition (noncompete) agreements is in flux: most states allow such agreements and many states have enacted legislation that governs them. In Massachusetts, the legislature has considered proposed noncompete bills in each of the past eight years, but has yet to enact any such legislation. On January 20, 2017, a new noncompete bill was filed in the Massachusetts Senate, so it is clear that this issue remains active and that the Massachusetts legislature will continue to consider significant regulation of noncompete agreements in 2017. Additional regulation is being contemplated at the federal level. Employers need to ensure that any noncompete agreements they are using or considering are enforceable and effective, and be confident in their assessment of the impact of any such agreement applicable to a prospective employee.

A noncompete agreement is a contract between an employee and his or her employer in which the employee promises not to compete with the employer for a specific period of time and usually within a prescribed geographical area if/when the employment relationship terminates. A noncompete agreement also may restrict an employee from soliciting or accepting business from clients of the former employer for a period of time after termination of employment. In most cases, the employer requires the employee to sign the noncompete agreement when the employee is first hired or receives a promotion, and it is a condition of employment.

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Often, the terms of the noncompete agreement apply irrespective of the reason the employment ended − if the employee is fired, if the employee quits or even if the employee is laid off due to a reduction in force.

The impact of a noncompete agreement can be significant to (1) the worker whose employment has ended and who is attempting to secure a new job and (2) prospective employers seeking to hire an employee who is limited by a noncompete agreement. From the employee's perspective, noncompetes can reduce job mobility and bargaining power; from the prospective employer's perspective, noncompetes can negatively constrict the labor pool from which potential employees may be hired and result in stifled innovation.

So why allow noncompetes at all?

NONCOMPETES: THE UPSIDE

Generally, large businesses are proponents of noncompetes because they protect companies from competitors trying to lure away top employees who may possess valuable trade secrets and proprietary information. There are studies that suggest the theft of trade secrets robs the U.S. economy of approximately $300−$500 billion each year.

Proponents of noncompetes also argue that such agreements help prevent companies from investing time and money in training new workers only to see them leave for a competitor. Protecting trade secrets, confidential information and goodwill is essential for a business to thrive and to protect the jobs of its existing and future employees. Thus, even though the use of noncompete agreements may come at a cost, they are often worth that cost. This is evidenced by the current trend indicating an increased use and/or enforcement of noncompetes and a corresponding rise in litigation involving employees being sued by former employers for breach of these agreements.

THE LEGISLATIVE SCENE

Forty-seven of the 50 states allow noncompete agreements, at least in some form. Many states have enacted statutes that allow but regulate noncompete agreements. Federal legislation has been proposed to limit their use in low-wage fields. Certain jurisdictions that allow noncompetes but have no legislation regulating the terms, conditions or use of such agreements are considering limiting the use of noncompete agreements through legislative change. Massachusetts is one such jurisdiction.

The Massachusetts Senate bill that was filed on January 20, 2017, includes many of the proposed regulations that have been considered previously. Although there are many significant aspects to the bill, certain highlights are worth noting. For example, if enacted, the legislation would generally limit noncompetes to 12 months. In addition, employers would be required to give employees and prospective employees advance notice of any noncompete requirement, and for employers seeking to institute a noncompete post-hire, consideration beyond continued employment would be required. The bill includes terms of geographic scope and scope of proscribed activities that would be considered presumptively reasonable and could be helpful to employers seeking to prophylactically ensure the validity of a proposed noncompete. Although these and many other provisions of the proposed legislation were previously considered but not enacted, it is expected that the debate will

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continue and that some form of noncompete regulation will eventually be enacted in Massachusetts. The questions of when legislation will be enacted and what specific terms will be adopted, however, remain unanswered.

Thus, as the law in Massachusetts currently stands, a noncompete agreement is enforceable only if it is necessary to protect a legitimate business interest; reasonably limited in time, space and subject matter; and consistent with the public interest. These terms and conditions all are subject to interpretation by the courts. Although there is legislation addressing noncompete agreements in a number of particular circumstances, for the present Massachusetts has no single statute regulating the terms of such agreements.

THE CURRENT STATE

At some point in their careers, almost 40 percent of all workers in the United States have signed a noncompete agreement. Currently, noncompetes apply to approximately 20 percent of all U.S. workers. Employers need to closely monitor the evolving legislation pertaining to the allowable scope of noncompetes at the state and federal levels. Without question, the debate surrounding this issue is far from over.

Wilson Elser's national team of Employment & Labor attorneys are knowledgeable as to the benefits and limitations of restrictive covenants and are available to work with national clients to evaluate the risks and benefits of using a restrictive covenant with employees in various jurisdictions throughout the country.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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