Legal Update Article

Massachusetts Legislature Close to Deal on Non-Compete Law?

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The Massachusetts Legislature, after a decade of attempts, may pass restrictions on the use of non-compete covenants in the Commonwealth.

The co-chairmen of the Joint Committee on Labor and Workforce Development, Senator Jason Lewis and Representative Paul Brodeur, reportedly are optimistic that the Legislature is "closing in on a compromise to restrict the use of noncompete contracts." Jon Chesto, *Noncompete contracts in Massachusetts? Lawmakers are near a deal,* The Boston Globe, Jan. 15, 2018.

None of the six separate non-compete bills introduced in the 2017 Legislative Session has passed yet.

Areas of Agreement

Legislative negotiators reportedly are in agreement on "noncontroversial elements such as bans on using non-competes for lower wage workers." However, the details of such bans are unclear.

Of the bills, one (Senate Bill 1020) would ban non-competes altogether, and two (Senate Bills 840 and 1017) would exclude employees "whose average weekly earnings ... are less than 2 times the average weekly wage in the commonwealth" from entering into non-competes.

On the other hand, three of the bills (Senate Bill 988 and House Bills 2366 and 2371) would invalidate non-compete agreements for employees who are classified as nonexempt under the Fair Labor Standards Act (FLSA). Although these do not mention low-wage employees, the FLSA imposes a salary floor for many categories of exempt employees.

The bills under consideration generally agree that the following additional categories of workers should not be subject to non-compete covenants:

1. Undergraduate or graduate students who are engaged in short-term employment;
2. Employees who are not more than 18 years of age; and
3. Employees who have been terminated without cause or laid off.

While a bar on non-compete agreements with short-term student-employees and teenagers may not be controversial, such a limitation on employees terminated without cause or laid off could be. An employer that is financially unable to retain its full workforce, for example, would face a dilemma if what it could save through layoffs might be canceled by potential losses caused by nullification of laid off employees' non-competes. Employers in such a situation may choose to cut expenses in other ways (*e.g.,* broad wage freezes or wage cuts) that would be the opposite of one of the stated purposes of the Legislature's effort: combatting wage suppression.

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In addition, parties often disagree over how to classify a termination from employment. For instance, an employee who resigned later may claim the resignation was done under duress, was actually an involuntary termination without cause, or was "constructive discharge." Parties that agree the employer terminated the employee involuntarily often disagree over whether the employer had "cause" to do so. As such, disagreements over the nature of the termination would likely need to be decided by the courts.

Areas of Disagreement

Legislative negotiators reportedly are seeking a compromise on at least two issues:

1. The allowable length of a non-compete (the maximum under consideration is one year post-employment, with a possible additional tolling period of one year in the event of a breach); and
2. The "wording for how departing employees should receive [garden leave] payments."

A "garden leave" provision requires an employer to continue paying a former employee while the former employee is restricted from engaging in competitive activity. (For more on the practical challenges, see our article, Massachusetts Non-Compete Legislation – A Walk Through the 'Garden' ... Leave Provision.) The bills requiring garden leave each set a minimum required amount of compensation that must be paid during the post-employment restricted period.

Open Questions

Among the questions the final bill should answer are the rules for a garden leave provision. The bills requiring garden leave each note that the parties may negotiate a more generous compensation package at approximately the date of separation. None of them address whether for a more generous compensation package, the parties can agree to extend the restricted period beyond the statutory maximum or the employer can subject the employee to additional obligations not prohibited or not expressly permitted by the legislation.

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We will continue to report on developments in the Legislature's effort at non-compete reform. Employers with questions are encouraged to contact a Jackson Lewis attorney.

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