Non-Compete Reform in Massachusetts: 2018 Could be the Year

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On October 31, 2017, the Joint Committee on Labor and Workforce Development held a hearing on six separate bills to regulate non-competition agreements within the Commonwealth. While the bills differ somewhat in substance, each bill looks to substantially limit the term, scope, and in the case of one bill, the legality, of non-competes in Massachusetts. After nearly a decade of failed attempts to pass legislation regarding non-competes, will 2018 be the year of Massachusetts Non-Compete Reform?

Massachusetts General Law does not have a single overriding statute that governs non-competes. Rather, there are statutes specific to certain industries that govern non-competes. For example, M.G.L. c.112, §35C establishes that licensed social workers are not bound by contract or law to refrain from practicing in another geographic area for any period of time after termination of the partnership. Similarly, M.G.L. c.112, §12X establishes the same for physicians registered to practice medicine, M.G.L. c.112, §74D for registered nurses and M.G.L. c.149, §186 for those in the broadcast industry.

Currently, non-competes are enforceable in Massachusetts provided they are necessary to protect a legitimate business interest, reasonably limited in the time and geographic area, and consonant with the public interest. In determining whether to uphold a non-compete, the court considers the specific facts of each case, including the nature of the employee's role, the company's business need to restrain the employee from working for a competitor, the duration and type of non-compete, and whether anything changed in the employee's employment between when the employee signed and when the employee sought to compete.

Massachusetts courts generally disfavor non-compete agreements, and non-competes are generally interpreted in favor of the employee because (1) the employee has a weaker bargaining position; and (2) courts do not want to take away an employee's livelihood. In the face of this reality, it is advisable for employers to narrowly tailor their non-competes and only use them with certain types of employees. However, many companies do use them across the board and that can harm their argument that they have a legitimate business interest.

If new legislation passes, employers should reassess their use of non-competes for particular classes of employees and, to the extent they are using them for all of their employees, reconsider whether this practice makes any sense at all. Presuming any of the proposed legislation becomes law, here are some of the key provisions to be on the lookout for:

- Term Limitation – Five of the six bills contain a durational requirement, ranging from three months to one year post-termination. The sixth bill seeks to eliminate all non-compete agreements, regardless of term.
- Agreements subject to Ongoing Review – In four of the six proposed bills, employers must review all non-competes with their employees at least once every three years for them to remain valid and enforceable. In a fifth bill, non-competes must be reviewed at least once every fifth year.
- Garden Leave – In three of the six proposed non-compete bills, a "garden leave" requirement is imposed on employers who would seek to prevent former employees from immediately jumping to a competitor. This provision requires an employer to continue paying a former employee while the former employee is restricted for engaging in competitive activity. The primary purposes of these provisions are: (1) to support employee mobility by reducing the instances when employers seek enforcement of non-compete covenants; and (2) to reduce or eliminate any financial harm that a non-compete covenant might pose to the affected former employee.
- Restricted Persons – In each of the proposed bills, non-compete agreements would not be enforceable against, among other categories of workers: (1) employees who are not exempt under the Fair Labor Standards Act, 29 U.S.C. §§ 201-209, (2) undergraduate or graduate students engaged in short-term employment, (3) employees terminated without cause or laid off, (4) employees who are 18 or under, and (5) non-employees who perform services for less than one year.

While it is difficult to predict, given the significant overlap that exists among a number of these bills, there exists a distinct possibility that the 2017-2018 legislative session will bring Non-Compete Reform to Massachusetts after all.