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Uncertain Future for Non-Compete Agreements in Massachusetts: Legislators Seek Compromise

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On June 23rd, the Massachusetts Joint Committee on Labor and Workforce Development met to consider legislation relating to the legality and enforcement of non-compete agreements. The committee considered five bills on this topic, with the two most prominent being House Bill 1701 and Senate Bill 957, two proposals that prohibit the enforcement of non-compete clauses while permitting nondisclosure and non-solicitation agreements. Senate Bill 169 was also under consideration, which adopts a version of the Uniform Trade Secrets Act, which standardizes a company's legal right to protect their intellectual property.

The potential policy directions discussed at these hearings ranged from moderate reform to a complete ban on non-compete agreements in Massachusetts, the latter largely supported by start-up and venture capital groups. In the reform category, one popular idea involved requiring the employers to disclose if accepting employment would require signing a non-compete at the time of the job offer, rather than on the first day of work. Supporters argue that this would avoid situations where workers may have already terminated their current employment or turned down other offers only to discover that they were ultimately required to sign a non-compete.

Key Testimony:

Legislator Testimony:

The Sponsors of HB 1701 and SB 957, Representative Lori Ehrlich and Senator William Brownsberger, testified in support of their legislation. Representative Ehrlich noted the human tragedy of workers laid off from a job who were still bound by a non-compete agreement. She emphasized that Massachusetts is losing growth opportunities and a high-skill workforce as a result, particularly to Silicon Valley since California has made non-competes unenforceable. She emphasized that her bill would keep other important trade secrets measures in place that would allow companies to protect themselves without the need for non-competes. Senator Brownsberger expressed his full support for Representative Ehrlich's testimony and only added that he hoped the Committee would report the bills quickly so they did not run up against time restraints like in past session.

Interest Group Testimony:

The bulk of the testimony at the hearing came from venture capital firms and the start-ups in their portfolios, many of them represented by the New England Venture Capital Association. This group strongly supports legislation that propose bans on non-competes. They outlined the harm they saw from the widespread use of non-compete agreements; discussed how non-competes kept start-up employees with good ideas from leaving their jobs; and argued that Massachusetts is missing an opportunity for the emergence of new innovative companies to drive growth in the tech sector. C.A. Webb, the Executive Director of the New England Venture Capital Association closed out the testimony by announcing the formation of the "Fair Employment Alliance", an interest group solely focused on advocating for a ban on non-compete agreements in Massachusetts.

Conversely, Mark Gallagher, Executive Vice President for Public Policy and Communications at the Massachusetts High Technology Council, was a strong voice for moderation and pushed back against the idea of an all-out ban on non-compete agreements. From the perspective of his members, the current slate of proposed legislation does not strike the right balance between employer protection and employee rights. He considers this a fact-driven, data-intensive issue and therefore recommended that it would be prudent to appoint a commission to find the right balance between employer and employee interest.

In a slightly different vein, Frank Mancini, of the Massachusetts Association of Insurance Agents, expressed strong reservations about non-compete legislation because of his fear that client-stealing agreements common among insurance agents might be rendered unenforceable. Non-compete agreements themselves are not his primary concern, as they are not that common within the insurance industry. Insurance firms, however, make it a point to protect their client lists as workers leave via 'anti-

pirating' agreements that keep former employees from immediately soliciting past clients. Mr. Mancini expressed strong concerns that legislation considered by the Committee could unintentionally ban these types of agreements.

Other testimony included Timothy Pratt of Boston Scientific who expressed satisfaction with the current laws on non-compete agreements and applauded the current balance between employer and employee rights; Brad MacDougall of the Associated Industries of Massachusetts who also argued for keeping the current non-compete laws; and Kevin Johnson on behalf of the Institute of Electrical and Electronics Engineers in favor of banning non-compete agreements.

Legislative Outlook:

There is support within the legislature to consider some form of compromise between those who wish to ban non-competes in their entirety and those who want to keep the current laws unchanged. Speaker DeLeo, who opposed Governor Patrick's 2014 effort to ban non-competes and elected not to include them in the economic development bill at that time, said after the Committee hearing that he hoped this year's efforts would allow the two sides to come together and compromise. Senator Dan Wolf, co-chair of the Joint Committee on Labor and Workforce Development, expressed a similar view. Governor Baker expressed the same concern during his campaign and recently his aides confirmed that he would be open to bills revising non-compete laws. The legislation appears on hold for the time being as lawmakers encourage stakeholders to find a measure that can balance intellectual property concerns with worker flexibility.

ML Strategies will continue to monitor developments related to non-compete agreements. If you have any questions, please contact an ML Strategies government relations professional.

Authors