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## **Banning non-competes may not happen after all, but employment attorneys see an upside to having the conversation**



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With the end of the legislative session looming at the end of July and little support among lawmakers for Gov. [Deval Patrick](#)'s proposal to eliminate non-compete agreements, some employment attorneys in Boston have begun to think the measure has little chance of advancing this year.

[Patrick](#)'s proposal has made non-compete agreements a real conversation in the business community. This is not the first legislative session in which the fate of non-compete agreements has been considered, lawyers said, but it is the one in which the discussions have reached such a high pitch.

For employment attorneys, the heightened interest this year in non-competes has created opportunities to talk with their employer clients about non-compete agreements and other measures they have in place to protect proprietary information. In recent months, their clients have been reaching out frequently with questions, and wondering if a total ban on non-compete agreements is possible.

"They're asking, 'What do we do in the interim?' It shouldn't be about non-competes. That would be a holistic approach to protecting your IP assets," said [Katherine Perrelli](#), a partner with [Seyfarth Shaw](#).

Employment attorneys are in an interesting position in the discussion about non-competes since most of them represent clients on both sides of the issue – and both employers and employees. [Cheryl Pinarchick](#), a partner with Murphy & King in Boston, for one, said she talks to executives who are bound by non-compete agreements and are considering career

moves. They ask her whether they should "sit tight for another month" in the event the governor's proposed ban does pass.

"I might be able to save myself some headaches that way," Pinarchick said, recounting conversations she's had with those clients.

While they differ on the value of non-compete agreements, most employment attorneys said that the use of non-compete agreements has, in some cases, gone too far. They pointed, for example, to recent news stories about summer camps that are requiring camp counselors to sign non-compete agreements.

"It's ridiculous at this point. It used to be that non-competes were reserved for very special types of positions. But they're getting put into a lot of employment agreements without a lot of thought as to whether it's necessary," said Pinarchick.

Attorneys generally agreed that non-compete agreements are the right tool but only in the right situations.

"I think they makes sense if they're reasonably tailored. Companies need to be strategic in the way they implement them," said Perrelli.

Problems arise for companies, attorneys agreed, when they use non-compete agreements broadly, and cover employees at all levels of companies – for example, those making less than \$100,000 a year, Perrelli said. The court is less likely to enforce non-compete agreements for employees at the lower levels, she said.

Judges have great latitude in how they enforce non-compete agreements, said [Andrew Botti](#), an attorney with The McLane Law Firm, which has an office in Woburn.

"There is already built into the system a checks and balances about whether an employer might be overreaching," said Botti, who is a board member of Associated Industries of Massachusetts, which opposes efforts to ban or limit non-compete agreements. As the former chairman of the Smaller Business Association of New England, Botti said, he has a long history with legislative discussions about non-compete agreements.

Perrelli said she has been talking to her employer clients about instituting a wide range of obligations and agreements for employees, such as password protections for documents on servers and confidentiality training programs, including for new hires.

"Creating a culture of confidentiality," as Perrelli put it.

[Brian Birke](#), an attorney with Adler Pollock & Sheehan P.C. in Boston, suggested employers consider non-solicitation provisions and forfeiture agreements, which require employees to forfeit things like bonuses or stock options if they decided to leave.

"There are other ways to incentivize people to stay in your employ and protect your assets," Birke said.

Adopting a Uniform Trade Secrets Act in Massachusetts, which is what Gov. Patrick proposed to replace non-compete agreements, would provide some protection to employers, if non-compete agreements were eliminated, attorneys said. A Uniform Trade Secrets Act would prevent workers from leaving companies and taking intellectual property. However, it would not preclude them from working for competitors or starting new companies.

But Perrelli said "the cases under the (Uniform Trade Secrets Act) are difficult to prove. There are heightened evidentiary standards. And I don't know that it will save companies on litigation costs. In fact, it may heighten them."

As for banning non-compete agreements entirely as a way to bolster Massachusetts' innovation economy, employment attorneys generally did not see the point. Perrelli, for one, said she felt there so many components that go into economic cycles, it is difficult to pin the blame on non-compete agreements.

"I have a hard time coming to that conclusion," she said.

And California, where non-compete agreements are banned, is actually a less attractive place for her corporate clients to do business, she said – precisely because non-compete agreements are not allowed.

"Anybody you talk to about having a company based in California, you hear war stories about doing business (there)," she said.

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