

The Boston Globe

THURSDAY, APRIL 10, 2014

the news

Fi li

11

Patrick looks to eliminate noncompete agreements

By Callum Borchers
and Michael B. Farrell

GLOBE STAFF

Governor Deval Patrick on Thursday will propose sweeping legislation to make it easier for workers in technology, life sciences, and other industries to move from job to job by banning the noncompete agreements companies use to prevent employees from jumping to rivals.

The proposal is certain to inflame a battle within the state's business community between larger, established corporations that say noncompete agreements prevent former employees from spreading business secrets and venture capitalists who contend they stifle innovation and undermine the state's reputation as a haven for startups.

"We feel like noncompetes are a

WORKERS, Page A11

Governor seeks to ban noncompete contracts, citing harm to economy

► WORKERS

Continued from Page A1

barrier to innovation in Massachusetts," said Greg Bialecki, secretary of Housing and Economic Development.

The administration's proposal is modeled after California's, one of the few states to ban noncompete clauses in employment contracts. That state's business regulations essentially declare the clauses in employment contracts void, and California courts have largely declined to enforce them in legal disputes.

"When you look at California, the big and small tech companies out there have clearly figured out a way to do business without compromising intellectual property," Bialecki said. "Not only are they doing well, they're doing fabulously."

In exchange for banning noncompete agreements, Patrick wants Massachusetts to adopt the Uniform Trade Secrets Act, which prevents workers from taking companies' intellectual property to other businesses but leaves them free to join or launch competitors whenever they want. Some 46 states, including California, have adopted the Uniform Trade Secrets Act, as well as Washington, D.C.

Patrick's position on noncompete agreements has evolved dramatically over his time in office. On several occasions earlier in his term, he said he recognized pros and cons. Then last year Bialecki told a legislative committee the governor had concluded noncompete agreements hurt the state's economy. The issue has been raised before in the Legislature and gone nowhere. Now, with less than one year to go in office, Patrick is putting his name behind the controversial idea.

Spokesmen for House Speaker Robert A. DeLeo and Senate President Therese Murray declined to comment.

The noncompete clause is probably the most controversial element of legislation Patrick will unveil Thursday. He also is proposing new spending for programs to promote technology jobs and is pushing an unusual effort to retain foreign students who want to stay in Massachusetts after college or graduate school.

Many can't get a work visa through the main program, called H-1B, that the US government administers for foreign workers. The Patrick administration said it identified a provision of immigration law that grants temporary visas to participants in certain programs — hence an Entrepreneurship in Residence program, in which foreign graduates agree to work at local universities part time while developing business ventures.

The foreign worker visa program has been controversial. In Massachusetts, the visas are

mostly used by technology firms that contend they cannot find enough local workers with the necessary technical prowess. But critics of the program say the companies are exploiting the visas to find a cheaper source of labor.

Still, Patrick's visa proposal is not apt to generate anywhere near the battle on Beacon Hill that the proposed abolition of the noncompete clause will.

Typically, noncompete pacts prohibit employees from signing on with another company in the same field, often for one or two years. They are widely used in many industries. And they have a long history in Massachusetts, said Andrew Botti, an employment lawyer for companies and former chairman of the Small Business Association of New England, which previously opposed bans on noncompete clauses.

"This has been the law in Massachusetts for 200 years, and I'd say the Massachusetts high-tech economy has grown pretty well in the past 200 years," Botti said. "It's sad but true that when a lot of employ-

'This has been the law in Massachusetts for 200 years.'

ANDREW BOTTI
*a lawyer for companies,
defending the use of noncompete
agreements as a way to protect
legitimate corporate interests*

ees leave their companies they take things they shouldn't be taking. And that information is used to compete unfairly with their previous employers."

One of the state's largest technology companies, EMC Corp., opposes Patrick's plan.

"The legitimate business interests of companies in Massachusetts are well served by the longstanding case law that allows covenants not to compete," said Paul Dacier, EMC's general counsel. The Hopkinton data-storage giant has vigorously enforced noncompete agreements.

Patrick appears mindful of the concerns. His legislation would allow businesses to continue limiting certain activities by former employees, such as stealing clients; nondisclosure clauses, which prevent former employees from talking publicly about private matters, also would be unaffected.

Bialecki emphasized Patrick wants only to stop the practice of large firms blocking workers from jumping to hot new startups or striking out on their own.

The governor has been heavily lobbied by the startup community, young entrepreneurs, and their backers.

"This is just about allowing people to have the freedom and flexibility to pursue the best opportunities," said Jeff Bussgang of the venture firm Flybridge Capital Partners, who has spoken to Patrick directly.

The big concern of venture capitalists and entrepreneurs is that such clauses hamstringing Massachusetts in its competition with arch-rival California, the only state with a much larger high-tech economy.

Some economists have suggested California's freer job market — not merely its warmer climate — is a key reason why it surpasses Massachusetts. A 2010 study by professors at Yale University and Brock University in Ontario, which cited California and Massachusetts as examples, concluded that "the enforcement of noncompete clauses significantly impedes entrepreneurship and employment growth."

States that bar noncompete agreements attract more venture capital and generate more startups and patents, the researchers found.

Interestingly, several business groups whose members are among the staunchest supporters of noncompete clauses said the issue no longer is so cut and dried. The Small Business Association of New England, for example, said companies could use clearer guidelines about what restrictions can be enforced, especially because defending noncompetes can be prohibitively expensive.

The head of one of the state's biggest technology business groups, Chris Anderson of the Massachusetts High Technology Council, said his group is so far neutral on the issue. But he acknowledged a "growing sentiment" that noncompete pacts are making Massachusetts "less competitive" and that other laws on trade secrets and intellectual property may be enough to "deal with the concerns of large technology employers."

Another factor is the debacle over the short-lived tax on computer-related software and services that Patrick tried to impose last year. Faced with a sudden backlash, an embarrassed Patrick and the Legislature swiftly repealed the tax and pledged to pay more attention to the startup community.

"The tech tax sent the absolute most negative signal that you could send about how Beacon Hill understands our technology economy and what drives it," Anderson said. If the Legislature takes action to undo the noncompete law, he said, "it could help reverse that negative perception."

Callum Borchers can be reached at callum.borchers@globe.com. Follow him on Twitter @callumborchers. Michael B. Farrell can be reached at michael.farrell@globe.com. Follow him @GlobeMBFarrell.