Developments on the Massachusetts non-compete front

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There has been a flurry of activity on Beacon Hill in recent years concerning the law of post-employment restrictive covenants in Massachusetts, where common law has for well over a century favored the enforcement of well-crafted non-competition agreements.

Many Massachusetts companies are familiar with the use of non-competes, particularly when it comes to the employment of sales personnel. Since early 2009, however, there has been a movement within the Massachusetts Legislature to completely revamp the existing non-compete legal landscape.

These efforts within the Legislature attempted to move Massachusetts more in the direction of California when it comes to the enforceability of non-competition agreements.

It now looks like that will happen. On the final day of the legislative session, the House approved H. 4868, an appropriations bill that was approved earlier by the Senate. The bill is now on its way to the governor, who is expected to sign it into law. The non-compete reform section contains the following provisions:

1. The agreement must be in writing and expressly state that the employee has the right to legal consultation prior to signing;

2. The agreement must be provided to the employee 10 days before commencement of employment;

3. If the agreement is entered into after commencement of employment, it must be supported by additional consideration; continued employment is not enough;

4. The agreement must be tailored to protect one or more of the following legitimate business interests of the employer: trade secrets, confidential information or the employer's goodwill;

5. The stated post-employment restrictive period may not exceed 12 months;

6. The employer must pay the employee for the 12-month "sit out" period "at least 50 percent of the employee's highest annualized base salary paid" within the two years preceding termination.

Moreover, H. 4868 proscribes entirely the enforcement of non-compete agreements under the following circumstances: nonexempt employees under the Fair Labor Standards Act; undergraduate or graduate students in an internship; employees terminated without cause or laid

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Formerly, the reason or reasons for an employee's termination had nothing whatsoever to do with whether a non-compete agreement was enforceable. Moreover, there was no requirement that a former employer pay a discharged employee for the non-compete time period. This type of so-called "garden leave" was optional and used only by larger business entities that could afford to do so. Because more than 80 percent of Massachusetts businesses employ 19 or fewer people, the mandatory garden leave payment likely will not be affordable for the vast majority of Massachusetts businesses.

> Businesses should give serious thought to utilizing alternative covenants — such as non-solicitation provisions — in their employment agreements.

A non-compete reform bill that was not approved by the House — S. 1017, filed on Jan. 20, 2017, entitled, "An Act Relative to the Judicial Enforcement of Noncompetition Agreements" — was even more restrictive in scope and applicable less certain conditions applied involving employee theft, which could extend the period for up to two years.

Also, S. 1017 mandated that "[n]o later than 10 days after the termination of an employment relationship, the employer shall notify the employee in writing of the employer's intent to enforce the non-competition agreement. If the employer fails to provide such notice, the noncompetition agreement shall be void."

The bill also contained a more onerous paid garden leave provision requiring that the employee receive at least 100 percent of the employee's highest annualized earning paid within the last two years preceding termination.

Many of these non-compete reform bills — like H. 4868 — proposed the simultaneous adoption of a form of the Uniform Trade Secrets Act, which is presently the law in most states. The legislation on its way to the governor for approval allows for injunctive relief "upon a showing that information qualifying as a trade secret has been or is threatened to be misappropriated." Any such injunction may also condition future use of the trade secret "upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited."

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