EDITORIAL/OPINION

Viewpoint: Noncompete 'reform' movement marks the death of an era

Jul 26, 2018, 12:56pm EDT

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I have been practicing law for nearly 30 years and have handled a variety of noncompete cases in our Superior Court system. We are very lucky in Massachusetts to have a fine, well-balanced and thoughtful judiciary. In my experience, they take the enforcement of noncompetes very seriously, and will not hesitate to reform or change the agreement if they think it is too harsh or unfair to the departing employee. This has been the case for well over 200 years now.

There is no factual link between enforcement of noncompetes and economic statistics, as the opponents of these agreements like to argue. Massachusetts currently has the lowest unemployment rate in a decade — 3.5 percent — as well as one of the highest job force rates ever. This is 0.5 percent better than California's unemployment rate — a state where noncompetes are outlawed. These statistics belie the notion that noncompetes hurt the Massachusetts economy. Just the opposite is true. Over 80 percent of companies in Massachusetts have 19 or fewer employees. Often, the owners of these businesses have had to make tremendous personal and financial sacrifices to get them up and running, such as mortgaging their primary residences and missing family events.

My own father — an aeronautical engineer — was laid off from a large defense contractor in 1970 as the Vietnam war wound down. He had about $500 in the bank and three young mouths to feed. He could not find another job, so he started his own engineering consulting business from the kitchen of our home. He grew it well, and ran it for over 30 years. He never used noncompetes, and never had a problem with any former employee taking trade secrets when they left. This was a choice he made on his own.

Unfortunately, this is not the case in many circumstances. The cases are legion where ex-employees take trade secrets and confidential information to directly competing businesses in violation of their written noncompete agreements. In such instances, the employer has the option to enforce the noncompete, let it go, or negotiate a working deal with the new employer, just as the employee has the option of abiding the contract or ignoring it. And the courts have the tremendous power to change the terms of the agreements if they find them unreasonable, oppressive or unfair in scope and duration.

This freedom to choose when it comes to enforcement actions, employee compliance and judicial scrutiny has been under attack for nearly a decade by parts of the Legislature and certain special interest groups, despite the fact that the system has worked well and served those most concerned about preserving intellectual property rights.

I've been involved for nearly a decade now in the fight to leave the well-working common law as it is. My involvement started when I was chairman of the Smaller Business Association of New England. I learned firsthand from smaller business owners that they relied on noncompetes to protect their lifelong investments, and the fruits of their labor — often highly technical trade secrets and unique products. Many businesses, I learned, are of the mind that, "If it ain't broke, don't fix it."

Recently proposed legislation, such as S. 2625, would change the legal landscape forever when it comes to noncompete use and enforcement, essentially rendering nugatory over 200 years of working jurisprudence. Smaller companies will not be able to afford to pay ex-employees for a year-long "sit out" period, or lose the option of enforcement of a noncompete if they lay off an employee without cause. These provisions would effectively make the use of noncompetes and their enforcement a crapshoot, wiping out centuries of legal precedent derived from strict and thoughtful judicial review based upon centuries-old and well established equitable principles.

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