

Uncertain Fate of Non-competes in Massachusetts: Senate Passes Compromise; Legislation Heads to Conference Committee Negotiations

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On July 1, 2014 the Massachusetts Senate voted for a compromise on employee non-compete agreements, and the Joint Economic and Emerging Technology Committee heard testimony on the same issue. Governor Deval Patrick spurred debate on the topic in April, when he proposed banning the agreements in his economic development proposal, and as Tuesday's packed hearing room at the Massachusetts State House illustrated, the subject continues to generate fierce interest.

Proponents of the ban argue that non-compete agreements, which limit employees' ability to work for their employers' competitors, stifle innovation and burden the Commonwealth's unemployment services. Critics hold that non-compete agreements are important tools to help protect companies' legitimate business interests.

Although the Senate had initially declined to take up the issue in its economic development bill, on Tuesday it voted 32-7 in favor of a [non-compete compromise](#) offered by Sen. William Brownsberger (D-Belmont). The provision would limit the duration of such agreements to six months, prohibit their use for hourly employees, and mandate that employers present employees with agreements either when a formal offer of employment is first made, or at least five business days before the employee's start date. The amendment does not alter covenants not to solicit employees of the employer or solicit business with customers of the employer, or nondisclosure agreements, among other things.

The Senate amendment would also put in place the Uniform Trade Secrets Act (UTSA) to further protect companies' proprietary information, making Massachusetts the 49th state to adopt a version of the law. UTSA was published by the Uniform Law Commission in an effort to provide a legal framework to provide remedies for trade secret misappropriation, which is addressed at the state level. Under UTSA, remedies for potential wrongs include injunctive relief, damages, and attorney's fees.

In the House, Rep. Lori Ehrlich (D-Marblehead) is championing a compromise that, like the Senate's version, would limit the duration of non-competes to six months and exempt most hourly workers from such agreements. Rep. Ehrlich's compromise also has a provision that would institute "red penciling." As labor attorney Russell Beck explained when he testified at Tuesday's committee hearing with Rep. Ehrlich, this would mean that if a non-compete agreement includes an element that is deemed unreasonable, a court cannot alter the agreement, and must void it in its entirety. Currently, Arkansas, Nebraska, South Carolina, Virginia, and Wisconsin enforce similar red pencil laws.

At the Joint Economic and Emerging Technology Committee hearing, committee members, led by co-chairs Sen. Gale Candaras (D-Wilbraham) and Rep. Joseph Wagner (D-Chicopee), heard testimony from a diverse group of approximately 40 individuals, including legislators, entrepreneurs, venture capitalists, professors, and scientists.

Among those who testified were Secretary of Housing and Economic Development Greg Bialecki, MIT Sloan Professor of Technological Innovation, Entrepreneurship and Strategic Management Matthew Marx, and co-founder of Android, Inc. and Google Ventures partner Rich Miner.

While an overwhelming majority of the testifiers supported a complete non-compete ban, Secretary Bialecki signaled that Governor Patrick's administration would be willing to find middle ground on the issue, so long as the compromise represented substantial reform, as there is concern that non-compete agreements are being used in some inappropriate situations. The Secretary also highlighted the fiscal cost to the Commonwealth when talented individuals are prevented from working, or when promising graduates from Massachusetts's higher education institutions move to other states — most notably California — where non-competes are not allowed.

The start-up and venture capital community emphasized the administration's position. Founding partner of VC firm Highland Capital Partners Paul Maeder argued that non-competes are hindering the formation of technology clusters, and preventing Massachusetts from competing with California's tech industry. Marx concurred, saying he has advised students to consider leaving the state to avoid non-compete agreements.

Because the Senate's economic development bill includes language on non-competes and UTSA, and the House's does not, this issue must be resolved in conference committee. Proponents of the ban are hopeful that the Legislature will take action on the item before the fast-approaching end of the legislative session on July 31, 2014.

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.

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