



DEUTSCH WILLIAMS CLIENT ADVISORY

The dynamic between employers and employees is bound to change in the area of non-competition agreements. For months, the Massachusetts House and Senate have considered legislation that would restrict the scope and enforceability of such agreements. A compromise bill has been drafted and is on its way to full hearing by both legislative bodies later this year. Given political pressures to promote economic growth, passage of a new law is very likely, though its exact timing and parameters are unclear.

As drafted, the law would apply only to non-competes signed on or after January 1, 2010. However, it would dramatically affect such agreements and the opportunity for employers to negotiate or impose restrictions. It would change expectations and practices in the case of both existing and new employees. Any Massachusetts employer that has agreements in place - or competitive interests worthy of protection - should give renewed attention to written restrictions.

Massachusetts courts gradually have chipped away at non-compete agreements by scrutinizing both their duration and geographic scope and the position and role of the restricted employee in the employer's business. In general, when they are challenged, agreements are limited to terms that reasonably limit an employee's use of intellectual property. Court decisions have not created bright lines to identify classes of employees who may be restricted or terms that may be imposed. That could change. The current draft bill would:

- require employers to give notice to prospective employees of any requirement to sign a non-compete early enough that the applicant could decline the job offer before leaving her current employer
- formalize court holdings that agreements must be necessary and reasonable in time, geography and substance
- limit agreements to one year, in the absence of certain additional compensation to the employee
- make agreements unenforceable against employees who earn less than \$50,000 and enforceable only to protect confidential information (not goodwill) for employees who earn between \$50,000 and \$100,000
- create safe harbors for agreements that meet certain time and substance limits or that promise certain additional compensation

- award attorney fees to an employee when his employer's agreement is declared unenforceable in whole or in part

Businesses need to consider the trend of judicial rulings as well as eventual legislation when they create and implement agreements. Many employers also would benefit from a broader strategy to protect trade secrets and confidential information in a changing legal environment.

Likewise, individuals who are employed or are considering offers of employment would be wise to understand that environment when negotiating with their employers or confronted with contractual demands.

Deutsch Williams has extensive experience drafting, reviewing and litigating the enforceability on non-competition agreements, as well as non-solicitation clauses and business sale contracts (which the draft bill would not restrict).

Please contact us if you would like to arrange a consultation.