Nonprofit 411: Structuring Non-Compete Agreements in the Face of Uncertainty – Best Practices for Nonprofit Leaders

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Non-compete agreements in Massachusetts have long been a source of confusion and discord in the business community. Not only can they be difficult to enforce, but recently several prominent Massachusetts commentators and lawmakers have suggested that they may stifle growth and innovation by limiting options available to talented professionals.

Reading the tea leaves on Beacon Hill regarding the future of non-compete agreements is not for the faint of heart, but recent developments suggest that the legislature may well adopt limitations (if not an outright ban) on such "restrictive covenants." The question for employers is how best to design non-compete clauses now in anticipation of possible legislative action.

Where We've Been

This past spring, Governor Patrick proposed a ban on contractual provisions that block a departing employee from working for a competitor. While the Governor's proposed legislation (which imposed a blanket prohibition similar to non-compete laws in California) was not adopted, the Massachusetts Senate compromised by passing a bill placing significant limitations on non-competes. No action was taken by the House before the end of the legislative session.

While Governor-Elect Charlie Baker did not include non-compete reform in his campaign's economic development plan released in September, he did say that he believes that there is a pathway for the legislature to produce a bill for non-competes that satisfies all parties. As a result, it is reasonable to predict that legislation imposing some limitations on the scope or duration of restrictive covenants may well make its way to the new Governor's desk.

What This Means Moving Forward

In anticipation of possible new regulations for non-competes, Massachusetts non-profit organizations should consider the following list of best practices for drafting enforceable restrictive covenants. These guidelines are drawn in part from the provisions of the bill adopted by the Senate last summer.

Duration – The agreement should specify a reasonable duration corresponding to the employer's interests that are being protected and to the duration of the original employment. The Senate bill specified six months as a reasonable time span to bar employment with a competing enterprise.

Geographic Scope – The agreement should also be reasonable in its geographic scope and specify a region that corresponds to the employer's interests. The Senate bill provided that restrictions could not exceed the geographic region in which the employee provided services or had material influence.

Activities Restricted – The agreement should only limit activities that relate to the specific legitimate business interests that are being protected and the specific types of services that the employee provided. The Senate bill stipulated that the restricted activities should only include those services performed by the employee during the last two years of his employment.

Consideration – The restrictive covenant should be supported by fair and reasonable consideration in addition to the continuation of employment, meaning that employees should be given a reasonable amount of time before the agreement becomes effective and a reasonable amount of time (for the employee) to rescind acceptance.

Legal Representation – The covenant should expressly state that the employee has the right to consult with counsel prior to signing the agreement.

Public Policy – The legislation adopted by the Massachusetts Senate last spring stipulates that the restrictive covenant must be consistent with public policy, as has long been required by courts. In determining consistency with public policy, courts look to whether the services that will be precluded are still available to the public. Restrictive covenants are rarely ruled invalid for this reason.

Your legal counsel can help you implement these principles and tailor them to the particular needs of your organization. While it is difficult to predict what will emerge from the legislature's next foray into this arena, considering these issues in designing your non-compete provisions will place you in good stead, as courts already consider many of these issues in assessing the enforceability of restrictive covenants.