

Massachusetts Lawyers Weekly

Critics blast bill banning non-compete agreements

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Employment lawyers warn that a recently filed bill calling for a ban of all non-compete agreements in Massachusetts would be a crippling blow for local businesses.

The proposed legislation, filed earlier this month by Rep. William N. Brownsberger, D-Belmont, would make Massachusetts only the second state in the country to enact such a statute. A similar law is on the books in California.

Kenneth M. Bello, a management lawyer at Bello, Black & Welsh in Boston, said that eliminating non-competes would represent "a sea change in Massachusetts. It would be another piece of legislation the business community would look at as very one-sided and negative towards their ability to operate in the commonwealth."

The bill seeks to void all employment agreements that place conditions on a person's ability to accept any type of work after a business relationship has ended.

James W. Bucking of Foley Hoag, who opposes the measure, said that several recent legislative changes, particularly with wage and hour laws, have already made Massachusetts an inhospitable place to do business.

Until now, however, Bucking said non-compete litigation, which is governed by caselaw, has not been touched.

"People talk a lot about Massachusetts not having a great business climate and having employment laws that are not employer-friendly, but when it comes to non-competes, our state courts for decades have by and large enforced them," the Boston lawyer said. "In the current economy, the last thing we need to be doing is make Massachusetts a less attractive place to do business."

While John R. Bauer of Boston, who teaches an employment law class at Northeastern University School of Law, said he would not support such a far-reaching piece of legislation, he downplayed the impact of the bill.

"California doesn't enforce non-competes, and the fact of the matter is that it hasn't proven to be end of the world there," said Bauer, who practices at Robinson & Cole. "But when push comes to shove, there are legitimate reasons why non-competition agreements should be enforced, primarily if not entirely to protect trade secrets."

Rosanna Sattler of Boston's Posternak, Blankstein & Lund, who represents high-level employees in non-compete disputes, added that a wholesale abrogation is not the answer.

"Why would you pay millions of dollars to buy a business if you knew the CEO or president could walk out the door and start the same business under a new name the next day?" she asked.

Brownsberger, who said he filed the bill in response to complaints from constituents, countered that the proposed law would impact competitors the same and therefore create a level playing field.

He said other state laws on the books would still permit businesses to maintain control over trade secrets and intellectual property.

"They simply don't need this additional protection," he said.

When asked why he chose to intervene in an area where the courts have already struck a balance between the interests of employers and employees, Brownsberger - a lawyer - said current caselaw permits enforcement of too many non-competes.

"These agreements are against public policy, and public policy is the subject of the Legislature," he said. "Yes, the courts have responded to the question of how to enforce contracts [that] have been permitted heretofore under Massachusetts law, but it's time to change that law."