



Massachusetts Taxpayers Foundation

MASSACHUSETTS
HIGHTECHNOLOGYCOUNCIL

The Chamber®
Greater Boston Chamber of Commerce

July 13, 2016

The Honorable Stanley C. Rosenberg
President of the Senate & Members of the State Senate
The State House
Boston, MA 02133

Dear Senate President Rosenberg and Members of the Senate:

We are writing to express our priorities and positions on a variety of issues included in legislation to address non-competition agreements. On behalf of the state's business associations representing every industry and size of company throughout the Commonwealth, we urge the legislature to strike the right balance on this issue as it considers S.2418.

As a part of our good faith effort to reach a workable compromise, we are willing to collectively support certain further restrictions including those enumerated below, which largely appear in H.4434, provided they are part of an overall legislative package that fairly balances the needs of employers and employees:

- Non-compete agreements shall be one year in duration, as articulated in the House version. This is a matter of supreme importance to our members, and one which we believe represents a fair and thoughtful compromise;
- A “garden leave” provision as included in the House Bill that requires the employer to pay 50% of the employees’ prorated salary during the restricted period, or other mutually-agreed upon compensation. This would ensure employers that compensate employees at the time they sign non-competes would not have to pay them again during the restricted period, providing necessary flexibility to employers and employees;
- Maintaining and clarifying the ability of a court to reform a non-compete agreement, as clearly articulated in the House bill. This will allow courts to reform or alter non-compete contracts to ensure that both parties are treated fairly;
- Those subject to non-compete agreements would have to be given prior notice of the need to sign the agreement, as well as the opportunity to consult with legal counsel, as included in the House Bill;
- The non-compete would extend to a second year should an employee unlawfully take property belonging to the employer, as included in the House version.

We have serious concerns with other provisions contained in the non-compete legislation, such as:

- Enforcing a non-compete agreement to employees terminated without cause, which ultimately will also challenge the state’s employment rule of “at will”;

- Inability for a non-compete to remain enforceable for employees that are laid off or terminated without a cause, even when garden leave or other consideration is mutually agreed to;
- A confusing effective date that leaves in doubt the status of pre-existing non-compete agreements;
- Confusing language that directly links consideration of non-compete compensation to other legal documentation that relate to other forms and separately negotiated long-term compensation including retention, performance based compensation upon hiring or severance agreements;
- Language that ties to annual earnings for garden leave that would capture far more than base pay and could include sign on bonuses or other forms of longer term retention or performance compensation;
- Broad list of prohibitions including the use of employees covered under the Fair Labor Standards Act and language that would exempt employees making less than \$130,000 annually and independent contractors. Further language that would prohibit non-exempt employees from being subject to a non-compete, which in many instances could be an inside sales employee who may be considered non-exempt, but yet have full access to and help a company create goodwill and usually have access to true confidential information;
- Language requiring the review of non-competes every 5 years;
- Disallows the use of choice of law provision, which California law does not prohibit;
- Arbitrary rules for selecting the court where a claim may be brought;
- Language that bans the use of “forfeiture for competition agreements” which do not preclude subsequent competitive employment and would create opportunities where an employee voluntarily leaves a job and will still be able to work for a competitor and still receive various types of compensation including deferred bonuses from the previous employer;
- Language that would prohibit the use of arbitration agreements under which an employee would prospectively agreement to arbitrate non-compete disputes.

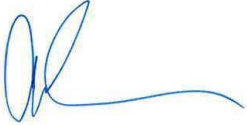
To reflect these positions and concerns, we collectively support Amendments #1 through # 5, and oppose Amendments #7 and #8.

We continue to believe that there is little evidence that the use of non-compete agreements harms Massachusetts’ position as a globally recognized leader in innovation. Massachusetts and/or Boston is at the top of national rankings of innovation, start-ups, and tech. In fact, Bloomberg recently named Massachusetts AND California as the most innovative states in the country. Given that California bans some, but not all non-compete agreements, they are clearly not a determining factor. Employers believe selective use of non-competes protects the significant investments that allow their companies to be global leaders in their industries and to create jobs in the commonwealth.

We respectfully urge the Senate to recognize that Massachusetts employers need flexibility and legal options to protect intellectual property. We believe the non-compete legislation passed by the House achieves those goals and represents a good faith effort on behalf of the business community to negotiate the right balance on this issue.

Thank you for your consideration.

Sincerely,



Christopher Anderson
Massachusetts High Technology Council



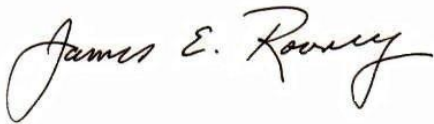
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