



News & Trending

PUBLICATIONS & ALERTS

STATE LEGISLATURES RECONSIDER NON-COMPETES

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With companies' use of non-competes on the rise, whether to ban, restrict or encourage non-competes has garnered attention from legislatures across the country. Legislatures in four states – Massachusetts, Michigan, Washington and Wisconsin – are currently considering legislation to modify the permissible scope of non-compete agreements. In three of these states – Massachusetts, Michigan and Washington – the proposed legislation would restrict or ban non-competes, while in Wisconsin, the proposed legislation would make enforcement of non-competes easier.

Massachusetts: Massachusetts' Governor Deval Patrick has long been an advocate of an outright ban on non-competes, including promotion of a bill to ban non-competes. During the 2014 legislative session, he promoted a bill to ban non-competes, which was the subject of much debate but ultimately did not pass. (See related commentary [Massachusetts May Go Boldly](#) and [Massachusetts Update](#) on this legislation.) In January 2015, five different versions of anti-non-compete bills have been introduced or reintroduced in Massachusetts. All of these bills seek to ban, and not simply restrict, non-competes. The various bills differ on whether and to what extent they embrace nonsolicitation agreements and whether they purport to apply to contracts executed prior to the enactment of the law.

Michigan: In February 2015, a Michigan legislator introduced a bill that would ban non-competes in the employment context. The bill specifically provides for the survival of non-competes in the sale of a business and even expands the potential for the enforcement of such agreements providing authorization for judicial modification of any terms deemed to be overly broad or unreasonable.

Washington: Legislators in Washington have introduced a variety of bills aimed at banning or restricting non-competes. One bill generally follows California's statutory language and would ban non-competes except in the context of the sale of a business. A second bill would restrict the scope of permissible non-competes by: (1) banning their use for low wage positions; (2) banning their use for workers who are laid off or terminated without just cause; and (3) creating a rebuttable presumption that a restriction period of more than six months is unreasonable. A third bill is more narrow, proposing to restrict non-competes specifically in the medical field. This bill is intended to protect the physician-patient relationship and to ensure reasonable access to care.

Wisconsin: In March 2015, a Wisconsin Senator introduced a bill that would significantly change current Wisconsin non-compete law. Unlike the bills proposed in Massachusetts, Michigan and Washington, the Wisconsin bill would make it easier both to impose and to enforce employee non-competes. The bill provides that continued employment is valid consideration for a non-compete agreement and that legitimate business interests include protection of a company's substantial "prospective" client relationships; clarifies that six months is presumed to be a reasonable period of restriction; empowers Wisconsin courts to modify otherwise

unreasonable non-competes and enforce them as modified; and permits a court to award attorney fees to the prevailing party.

The bills proposed in state legislatures reflect a vigorous debate regarding whether non-competes encourage or stifle competition and innovation, and are generally considered to pit lean, high tech start-ups (who are generally against non-competes) against larger, more established companies (who generally favor non-competes). While some commentators argue that protecting company assets through the enforcement of non-competes encourages investment in innovative technologies, others maintain that allowing free, unrestricted movement of employees between companies is the best way to encourage competition and innovation. There are data to support both sides of the argument, and the passage of one or more of the pending bills may help sway the debate in one direction or the other.

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