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Non-Competition Agreements: The Material Change Doctrine is Alive and Well

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For years now, it seems that every annual “hot topics & trends” list within the legal and business community has included restrictive covenants and non-competition reform in one form or another. In certain jurisdictions, including Massachusetts, legislatures have enacted specific statutory reforms, generally viewed as being more employee-friendly.

Amongst this debate and reform, the underlying common law principles regarding the enforceability of non-competition agreements should not be overlooked. As the recent decision in *Bradley v. Bradford & Bigelow, Inc.*, Suffolk Superior Court, Civil Action No. 2084CV02504-BLS1 (Nov. 13, 2020), reminds us, these common law principles include the material change doctrine.

The facts in *Bradley* are relatively straightforward. Employee commenced employment in May 2014 as an Account Manager. At that time, he was required to sign a confidentiality agreement (which did not include non-compete or non-solicitation restrictions). Employee was promoted to Business Development Manager in May 2015, at which time he was required to sign a new employment agreement (which contained restrictions regarding the disclosure and use of confidential information and non-compete/non-solicitation restrictions). In October 2017, Employee was promoted again, to the position of Vice President of Sales, Business Development and Marketing. Consistent with this promotion came a substantial increase in compensation and responsibilities. However, Employee was not asked to sign a new employment agreement and was not asked to “re-up” non-compete/non-solicitation restrictions. The employment relationship ended in June 2020 and litigation ensued regarding the enforceability of the non-competition/non-solicitation restrictions as contained in the 2015 employment agreement.

In granting the Plaintiff Employee’s Motion for Preliminary Injunction, enjoining the Defendant from seeking to directly or indirectly enforce the restrictions contained in the 2015 employment, the Court focused squarely on the SJC’s analysis in *F.A. Bartlett Tree Expert Co. v. Barrington*, 353 Mass. 585 (1968), which recognized the material change doctrine. Specifically, the Court noted, **“The Massachusetts Supreme Court long ago held that material changes in the relationship between an employer and employee, including substantial modifications to the employee’s position, responsibilities, and compensation ‘strongly suggest that the parties had abandoned their old [employment] arrangement and entered into a new relationship.’”**

Taking into account the substantial changes to Employee's employment, including a 60% increase in compensation, as well as the Company's knowing failure to require a new employment agreement containing new restrictions, the Court found that Employee had "without a doubt, demonstrated a high likelihood of success on the merits." Further, as to the irreparable harm and balance of harm analysis, the Court found that the interests tipped in the Employee's favor, as he had worked almost exclusively within the printing industry for over 30 years and had been unable to secure new employment following the termination despite diligent efforts.

When questions arise regarding the enforceability of non-competition/non-solicitation agreements, it is always a very fact-specific inquiry. Certain factual and legal issues can be "black and white," but the reality is that most disputes, unfortunately, involve a tremendous amount of gray.

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