

Down to the Wire for Proposed Non-Compete Reform Legislation in Massachusetts

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Massachusetts finally may enact non-compete reform legislation. The current session of the General Court, the state's legislature, ends on July 31, and the [House](#) and [Senate](#) have passed versions of non-compete reform legislation limiting non-compete agreements that differ on important points. If non-compete reform is to become a reality in Massachusetts, significant compromise will be necessary before July 31.

Previous Attempts to Pass Non-Compete Reform

In at least the past two legislative sessions, the General Court considered and voted on versions of non-compete reform bills, but the House and Senate were unable to pass a reconciled version before the end of the legislative session.

The movement to reform the law governing non-compete agreements gained significant momentum during the tenure of former Governor Deval Patrick. During the last legislative session, which ended in 2014, then-Governor Patrick introduced a bill banning non-compete agreements in Massachusetts. His proposal came after years of pressure from advocates who believed that non-competes hinder the ability of Massachusetts to compete with the technology industry in California, where non-competes are not enforceable.

Governor Patrick's call to ban non-compete agreements failed to gain support in the House or Senate and in the last legislative session.

House and Senate Bills

Both versions of the proposed legislation passed by the House and Senate adopt the Uniform Trade Secrets Act (UTSA) and repeal current statutes in Massachusetts that govern civil claims regarding the misappropriation of trade secrets. If UTSA is adopted by Massachusetts, New York would be the only state that has not adopted UTSA.

The key terms of the House and Senate bills are outlined below, along with the differences between the two versions.

Term	House Version	Senate Version
Required Notice to New Employees	Non-compete agreement must be given to a newly hired employee by the earlier of (i) the date on which an offer of employment is extended to the employee or (ii) 10 days before the employee's first day of employment.	Same as House version.
Consideration for Current Employees	Non-compete agreements for existing employees must be supported by "fair and reasonable consideration independent from the continuation of employment."	Same as House version.
Geographic Scope	Non-compete is reasonable in geographic scope if it is limited to the geographic areas in which the employee provided services or had a material presence or influence in the past 2 years.	Same as House version.
Permitted Length of Non-Compete	12 months, with potential for 2 years in case of breach of fiduciary duty or theft from employer.	3 months, with potential for 2 years in case of breach of fiduciary duty or theft from employer.
Garden Leave Pay (employer agrees to pay the employee during the restricted period)	Employee's highest annual <i>salary</i> during the last 2 years of employment (on a pro-rata basis) for the duration of the restricted period.	At least 100% of the employee's highest annualized <i>earnings</i> during the last 2 years of employment (on a pro-rata basis) for the duration of the restricted period.
	Provides for garden leave pay to be "mutually agreed upon" but does not define term.	Provides for garden leave pay to be "mutually agreed upon" but requires garden leave pay to be equal to or greater than 100% of the employee's highest annualized earnings during the last 2 years of employment (on a pro-rata basis).

Term	House Version	Senate Version
	No payment if the employee breaches the non-compete agreement or if the non-compete is extended due to employee misconduct.	No payment if the employee breaches the non-compete agreement or if the non-compete is extended due to employee misconduct.
Employees Exempt From Non-Compete Agreements	Non-exempt employees under the Fair Labor Standards Act;	Same as House version, with the addition of:
	Undergraduate or graduate students that partake in an internship or other short-term employment relationship;	Employees whose average weekly earnings are less than twice the average weekly wage in the Commonwealth; and
	Employees that have been terminated without cause or laid off; and	Independent contractors.
	Employees age 18 or younger.	
Reformation or “Blue Penciling”	Permitted.	Not permitted, overly broad non-compete provisions will be invalid and unenforceable.
Jurisdiction for Civil Actions	The county where the employee resides	The county where the employee resides
	or	or
	Suffolk County with exclusive jurisdiction to the Superior Court, including the business litigation section of the Superior Court.	Suffolk County, if mutually agreed upon by the employer and employee.
Effective Date	October 1, 2016.	Same as House version.
Periodic Review of Agreements With Employees	None required.	At least once every 3 years.
Notice of Intent to Enforce	None required.	Required within 10 days after the termination of the employment relationship or unenforceable, unless employee breaches his or her fiduciary duty to the employer or unlawfully takes employer’s property.

Next Steps

Legislative sessions in Massachusetts last two years, starting the first Wednesday in January of odd-numbered years and ending on July 31 of even-numbered years. In presidential election years, including this year, the Massachusetts General Court normally has taken time off for the political conventions of each party. This year, the work of the General Court is limited during the Democratic National Convention, from July 25 to July 28. While the General Court has sessions planned for the last weekend in July, the House and the Senate must act quickly to pass non-compete reform in this legislative session.

Proposed legislation can be carried over from the first to the second year in a legislative session, but cannot be carried over from one legislative session to the next. Therefore, the Senate and House will have to agree upon and pass a compromise bill before the legislative session ends on July 31, 2016, or start the lengthy process over in the next legislative session beginning on January 4, 2017. Any non-compete reform legislation proposed in the next legislative session must go through the entire formal legislative process again.

If a compromise, final version of the bill is sent to Governor Charlie Baker for his signature, he has 10 days to sign or veto the bill. If the Governor does nothing, the bill will become law without signature after 10 days, unless the legislature adjourns before the 10 days are up, in which case the bill does not become law.

While Governor Baker has announced his support for the House version of the non-compete reform bill, it remains to be seen whether a compromise bill will be passed by both the House and Senate and, if so, whether it will be in a form that Governor Baker will support.

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