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VIEWPOINT

Innovation over Non-Competes

BY ERIC ESPERNE

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At a recent meeting between Governor Patrick's economic development staff and Boston area tech industry leaders, the topic—educating and keeping a talented young workforce in Massachusetts—quickly turned into a spirited town hall style meeting on the now age-old question “What does California have that we don't have?”

If a consensus arose, it was that Mass doesn't package and sell itself enough to the next generation, and that the high rate of mergers and acquisitions doesn't allow the Mass tech industry to lay a foundation from which to build itself up. Many differences between CA and MA were also raised, like climate, numbers of engineering grads, and non compete agreements.

Beginning with a December, 2007, blog on techdirt.com, and continuing with a recent front page article in Mass High Tech, there is a renewed discourse about whether the two states' differing laws on non compete agreements create an inequity that draws tech talent and companies to the Gold Coast. For those who don't already know, California law voids non-competes while in Mass they are valid within limits.

Outlawing non competes in Mass is highly controversial because the state is also trying to attract larger employers who,

as a rule, use non competes in their hiring practices. Those that are against outlawing non competes make the points that these agreements are necessary to protect property and investment, and that Mass courts don't want to enforce them anyway.

The impact of non compete agreements on business is mostly hidden but nevertheless very real and harmful. Non competes are not about enforcement but about intimidation. And they provide a blunt, destructive weapon for keeping intellectual property out of the hands of others.

When tech employees interview with other companies, at some point during the interview they will be asked if they are under a non compete and may have to sign a statement to the effect that they aren't. If the company hires them anyway or the employee misrepresents things, the employee will be asked by the original employer where he is going. If he refuses to answer he often gets escorted to the door without two weeks pay, and the company eventually finds out through the grapevine anyway.

The company's legal department sends letters to both the employee's new company and the employee hinting at or outright threatening legal action. The employee if faced with hiring his own lawyers in defense, and individuals rarely ever have that kind of money. Most likely, the company that just hired the employee

w i l l immediately sever the relationship. So the non compete gets enforced without anyone going anywhere near a court, and the employee gets left out in the cold.

Non compete injunctions are based on the proposition that if you kill the messenger you kill the message. Keeping an employee out of the job market is much easier and much less expensive than bringing legal actions based on infringement claims.

Non competes are also preemptive strikes: They take effect before there is any proof that intellectual property rights have in fact been compromised. Certainly there is nothing preventing former employees from secretly selling documents and information, arms dealer style, or from relocating to the opposite coast or to another country to escape the non compete. That is, if the employee's real intention is to steal intellectual property. Non competes beg the question of how often stealing patents or trade secrets is the true motive behind a job move.



There are more honest and positive ways for companies to protect their interests without adding to the unemployment figures or killing innovation in American business. They are not necessarily expensive, can drive improvement in overall management, and work equally well for large and small companies.

Companies can start by writing employment contracts that agree to pay commissions to employees who find licensees for work-for-hire products and ideas. The licensees receive the license grant from the employer as the employer's intellectual property. In essence, the arrangement is a referral sales program with employees acting as the channel sales agents for their employer. This arrangement reduces the incentive to change jobs to secret away proprietary or confidential info, and it acknowledges the collaboration

that goes on within technology communities, whether geographic or virtual, that is necessary to fuel economic growth. Companies can also restructure employee compensation from a strict salary basis to a project completion basis. Employees receive a portion of their compensation at the end of the project, after the employer has had the opportunity to initiate procedures for establishing intellectual property protections and is in a position to go to market and exploit the work product. Non competes become an issue mostly when an employer feels exposed because an employee is leaving before the product has been commercialized. Most employees depend on a regular pay check, so restructuring pay is best limited to higher compensation, key employees.

Believing that companies will implement alternative strategies in the short term,

while non competes are still available to them, is a stretch. Governor Patrick's administration would be well advised to take a two prong approach of 1) promoting alternatives to non competes, and 2) campaigning for the abolition of non competes through legislation, using language on par with the California statute.



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