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Massachusetts And The Impending Death Of Noncompetes Part II: De Facto Enforcement Of Noncompetes

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William A. Nolan
Partner
Columbus
Managing Partner

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Last week I wrote about Massachusetts legislation to ban noncompetes. As I wrote, from our position of representing businesses, we do not have an inherent preference for or against noncompetes because there are business interests on either side of the issues (as the Massachusetts debate illustrates). Rather, our job is to guide clients through the changing and varied rules across the states about noncompetes. However, I do feel that opponents of noncompetes often make statements about the prevalence of noncompetes, the decline of noncompetes, and the effect of noncompetes on the economy that are not always supported by data. The statements may be right and they may be wrong, I just can't always tell from the information provided. Reader Cimarron Buser reached out with some thoughtful comments about the post that I will summarize briefly, then invite him or any reader to comment further to elaborate as desired. I quoted an article where the author said he had "heard" about a noncompete preventing a teenage camp counselor from switching camps. Mr. Buser sent me an e-mail and a link to an article about such a noncompete – signed by his daughter! As I understand it, the enforceability of the noncompete was not actually litigated, but another employer declined to hire young Ms. Buser because of a noncompete with another camp. The article includes comments from the employer who required the noncompete with their point of view, including that the noncompete restricts employment only within a 10-mile radius. I don't know enough about the specifics to comment about the substance; certainly we can agree that a noncompete for a 19-year-old summer employee is unusual. But the point I want to highlight for readers from Mr. Buser's correspondence is that noncompetes are sometimes *de facto* enforced outside of court because a prospective employer does not want to deal with the headache of possible litigation. That is certainly true. Indeed, there are employers who know their noncompetes may not be enforceable in whole or in part and/or have no intention of spending money to litigate over them, and they simply hope that employees and/or subsequent employers are sufficiently intimidated to observe them. That is certainly an option, and as a matter of public policy it seems reasonable to legislatively try to address that scenario in particular. I think the article suffers from some of the anecdotal-ism referred to in my original post, but it's by a very highly regarded legal journalist (and I'm certainly not suggesting there is anything inaccurate in it, I just question whether the examples therein are representative of the universe). We certainly welcome the dialogue.