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Massachusetts: Material Change in Employment Relationship Could Invalidate Prior Restrictive Covenant

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For years, commentators have viewed Massachusetts as neutral territory for the enforcement of noncompete agreements. An employer's need to protect its most important assets, including the company's strategic vision, customer base, and trade secrets, has been delicately balanced against employees' desire to shift alliances in an increasingly transient work environment. Whereas some states, such as New York, passively accept noncompetes, other states are outwardly hostile. California, for example, flatly refuses to enforce noncompetes and employers may even face steep fines if they insist that employees sign them. In this landscape, the Commonwealth was seen as more or less inhabiting middle ground. Not so anymore.

A recent decision by the Massachusetts Superior Court signals that the scale has tipped, and Massachusetts employers must not only carefully craft noncompetes in order to protect their core assets, they must also consistently maintain them. In *Lycos, Inc. v. Lincoln Jackson* (Middlesex Superior Court No. 2004-3009), the court ruled that an employee's noncompetition and nondisclosure agreement was unenforceable because her employment relationship had changed materially from the time she entered into the agreement to when she walked out the door. Because the employer had failed to renew the noncompete at each stage of the employment relationship, the former employee was able to join forces with one of her employer's biggest competitors without penalty.

Although some in the legal community were taken by surprise by the decision, the groundwork against noncompetes has been quietly in place for some time. *Lycos* follows not only a series of recent decisions, but also harkens back to much older Massachusetts' cases. Moreover, the case demonstrates judges' growing displeasure with overly broad and inconsistently applied noncompetes.

Background

Lycos hired Young Mi Chun in 2000 as a Project Manager. In that capacity, Ms. Chun's responsibilities included managing new projects, assisting in the creation of products and ensuring their smooth development. Because she had access to confidential information and trade secrets, Lycos required that Ms. Chun sign a nondisclosure, noncompete and development agreement when she began employment (the "Agreement"). The Agreement prohibited Ms. Chun from working for a competitor for twelve months after her departure from Lycos.

In July 2001, Lycos promoted Ms. Chun to Product Manager and increased her salary. At that time, she assumed supervision of three employees and became responsible for the day to day operation of Lycos' search engine. Following more changes in Ms. Chun's responsibilities, Lycos eventually promoted her to Senior Product Manager in 2004. Ms. Chun received a raise and was placed in charge of writing marketing pitches, conducting focus group tests and developing new product initiatives.

At the time of her last promotion, Lycos asked Ms. Chun to sign and return an offer letter which addressed the promotion and reminded her of the restrictive covenants in the Agreement. Ms. Chun failed to sign and return the offer. In July 2004, she resigned. Lycos immediately sought a preliminary injunction to prevent Ms. Chun from working for a competitor based on the promises she made when she signed the original Agreement.

Superior Court Ruling

The Massachusetts Superior Court denied Lycos' motion for a preliminary injunction, reasoning that the restrictive covenant was not supported by adequate consideration because Ms. Chun's employment relationship had changed from the time that she signed the Agreement. As the court

explained, "each time an employee's employment relationship with the employer changes materially such that they have entered into a new employment relationship a new restrictive covenant must be signed." Because Ms. Chun's employment relationship with Lycos varied over time with respect to her compensation, responsibilities, direct reports, and title, the court concluded that it had "changed materially." The court also found that Lycos implicitly acknowledged this material change by requesting that Ms. Chun sign an offer letter upon her final promotion (even though it failed to collect a signed copy of the letter).

In short, the court ruled that the material change in Chun's employment relationship with Lycos voided the Agreement, thus, no nondisclosure or noncompetition agreement existed between the parties. As a result, the court denied Lycos injunctive relief.

Following the Trend

The decision in *Lycos* should not have come as a surprise. It is consistent with court decisions going back as far as the 1960s. In *Bartlett Tree Expert Co. v. Barrington,* the Massachusetts Supreme Judicial Court held that the changes in a salesman's position over a seventeen-year period effectively voided a noncompete agreement. Over the years, the parties had more than once abandoned one employment arrangement and entered into a new relationship. Therefore, the salesman could not be held to the promises he had made at the beginning of his employment.

Within the last couple of years, however, the courts appear to have stepped up their campaign against hastily constructed noncompetes and careless implementing procedures. In three Massachusetts cases, preliminary injunctions were denied because of the employer's failure to renew the covenants upon a material change in the employment relationship. In one case, the employer successfully implemented a noncompete agreement twice; on the third promotion, however, the signing of a new agreement was overlooked. As a result, the employee along with two of his coworkers were able to leave the company to work for a direct competitor.

Recommendations for Employers

Lycos, therefore, serves as a warning flag for employers and demonstrates the unfortunate consequences of failing to renew an employee's restrictive covenants when the employment relationship changes over time. Based on this decision, employees who have assumed new positions or responsibilities since entering into a noncompetition, nonsolicitation or nondisclosure agreement may no longer be bound by those restrictive covenants.

To avoid this unfavorable result, employers should think about the following:

Set up an automatic process upon every job promotion or job change. Welcome the employee into your office, congratulate them on their hard work, and consistently place a renewed noncompete agreement in front of them. Alternatively, you can remind employees of their prior obligations any time an employee's job changes. This reminder should be in writing and signed by the employee.

However, be wary of having employees re-sign agreements without any material change in employment or any corresponding change in job benefits. There are signs that continued employment even for at-will employees may no longer be sufficient consideration for signing a noncompete.

Identify a specific list of the company's assets that need protection. Massachusetts courts have increasingly scrutinized employer's claims of trade secrets. All restrictive covenants should be narrowly tailored.

Similarly, identify the employees who should be covered by noncompetes. Not all employees should be covered. More importantly, one company-wide standard form does not fit for different job titles and responsibilities.

Employers are encouraged to consult with counsel concerning any questions they may have about the validity of an employee's noncompete or about implementing better practices in creating noncompetes.

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