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Recent Decisions Provide Guidance on Drafting Noncompetition Agreements under Massachusetts Law

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Your Vice President of Sales announces that she is leaving to work for your biggest competitor. She signed a noncompetition agreement when she joined the company five years ago as a junior sales associate. Can you get an injunction preventing her from competing with your company? In Massachusetts, the answer may depend on the applicability of the "material change doctrine."

The material change doctrine, as it has developed under Massachusetts law, essentially provides that if an employment relationship changes significantly after an employee enters into a noncompetition agreement with his or her employer, the agreement is considered void and unenforceable. Although this doctrine has not been uniformly accepted, Massachusetts courts seem to be increasingly willing to apply it. In light of this doctrine, many Massachusetts courts have suggested that employers must enter into a new noncompetition agreement with an employee each time that there is a material change in the employment relationship if the employer wishes to protect its goodwill, trade secrets, and/or confidential information on an ongoing basis.

The recent case *Interpros, Inc. v Athy*, Civil Action No. 13-0214-F (May 5, 2013), illustrates the impact of the material change doctrine. In this case, the defendant signed a noncompetition agreement in 1997 when he was hired as a branch manager for the plaintiff/employer. In the subsequent 15 years, the defendant rose through the ranks and, ultimately, became the company's Chief Operating Officer. He then left to join an alleged competitor. When his former employer sued to enforce the noncompetition agreement, however, the court held that it was void and unenforceable because of the various material changes that had been made to the employment relationship over the years, e.g., the increase in the employee's duties, responsibilities, and compensation.

Although the court readily found the agreement in *Interpros* to be void, it is not always clear whether a change in an employment relationship will be considered "material," thereby requiring a new noncompetition agreement under the material change doctrine. Over the years, courts have identified a number of factors to consider as part of this analysis, including:

- Whether there have been significant changes in the employee's title or the scope of the employee's duties. *See, e.g., AFC Cable Systems Inc. v. Clisham*, 62 F.Supp.2d 167 (D.Mass. 1999) (noncompetition provision invalidated because employee changed from a "sales consultant" to a "sales manager").

- Whether there have been changes in the employee's compensation package (particularly decreases in compensation). *See, e.g., Mancuso-Norwak Ins. Agency, Inc. v. Rogowski-Verrette Ins. Agency, LLC*, 30 Mass.L.Rep. 455 (Mass.Super.Ct. 2012) (decrease in commission rate from 40 percent to 20 percent voided noncompete).

As a result, employers are often left guessing as to whether and when they need to enter into new noncompetition agreements with their employees. Another recent case—*A.R.S. Services, Inc. v. Morse*, No. MICV 2013-00910 (Mass.Super.Ct. Apr. 5, 2013)—suggests that there may be a solution to this conundrum.

In this case, A.R.S., the employer, sought to enforce a noncompetition agreement against a former employee. The former employee signed the noncompetition agreement when he first started working at A.R.S. as a branch manager. He subsequently was promoted to general manager and then director of operations. His compensation also fluctuated through the years. Accordingly, the employee argued that the noncompetition agreement was void under the material change doctrine.

The Massachusetts Superior Court disagreed. The agreement stated that its terms "shall continue to apply and be valid notwithstanding any change in [the employee's] duties, responsibilities, position, or title." The court viewed this language as embodying the parties' understanding that "the agreement was intended to be enforceable notwithstanding a potential change in employment responsibilities." Because the court saw no reason to ignore the express language in the agreement, it rejected the employee's argument, enforced the noncompetition agreement, and granted A.R.S.'s motion for a preliminary injunction against the former employee.

It is important to note that this is just one decision from one trial-level court, and it is not binding precedent. That said, the *A.R.S. Services* decision demonstrates that appropriate language in a noncompetition agreement may avoid the application of the material change doctrine under Massachusetts law and permit employers to enforce their noncompetition agreements against employees who have been promoted, demoted, or experienced other significant changes in their employment relationship after they signed their noncompetition agreements. Of course, drafting an enforceable noncompetition agreement requires exercising due care over a host of factors. Therefore, we recommend that employers work with experienced employment counsel to craft agreements that are appropriate for their industry and workplace.

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