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Could out-of-state rulings on non-compete agreements hurt your business?

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This summer's battle in the Massachusetts Senate over the enforceability of non-compete agreements highlights the importance of understanding how best to protect your business' proprietary and trade secret information.

As unlikely as it seemed a mere year ago, the Boston Globe reports that the Commonwealth may join states like California and North Dakota in banning or severely restricting employers from imposing restrictive covenants on their employees.

As this struggle pitting venture capitalists and entrepreneurs against established manufacturers and major tech companies unfolds, employers in New York are left wondering whether their non-compete agreements will become the subject of similar legislative scrutiny in the future.

Although admittedly disfavored by the courts, non-compete agreements remain a powerful tool for New York businesses concerned with protecting their proprietary information and resources. One way New York employers can increase the likelihood of enforcing their non-compete agreements against would-be competitors is to select an appropriate choice of law provision.

A recent New York appellate court decision makes clear that a court may refuse to apply a choice-of-law provision if it finds that the chosen law offends the public policy of the state in which the court sits.

In Brown & Brown, Inc. v. Johnson and Lawley Benefits Group, LLC, the New York court ruled that Florida's law on non-compete agreements is "truly obnoxious" to New York public policy and cannot be applied against a New York employee of a Florida-based company.

Brown & Brown ("B&B"), based in Florida, hired defendant Theresa Johnson in 2006 to provide actuarial analysis for the insurance intermediary plaintiff. Ms. Johnson signed an employment agreement that contained three restrictive covenants, including a non-solicitation clause that prohibited Johnson from soliciting or servicing any client of B&B's New York offices for two years after the termination of her employment. By its express terms, the agreement was governed by Florida law.

Following her without-cause termination by B&B in February 2011, Ms. Johnson sought and obtained employment with Lawley Benefits Group, LLC. B&B subsequently sued Ms. Johnson.

The New York appellate court eventually held that the choice-of-law provision was unenforceable because it was "truly obnoxious' to New York public policy. Unlike Florida law, New York requires a court to perform a balancing

of equities test when deciding the enforceability of a non-compete agreement.

If the hardship on the employee outweighs the harm to the employer in allowing the employee to compete, the agreement is not enforceable in New York. By contrast, under Florida law, courts are required to construe restrictive covenants in favor of the party seeking to protect its legitimate business interests, and in evaluating the reasonableness of the covenant the court cannot consider hardship to the employee.

Applying New York law, the court held that the non-solicitation covenant could not be enforced. As if to further justify the “fairness” of its decision, the Brown & Brown court noted that courts in Alabama, Georgia and Illinois have also concluded that Florida law conflicts with the public policy of their respective states.

The takeaway for employers and their counsel is the need to stay abreast of the most current non-compete legislation and jurisprudence around the country. Although a non-compete agreement may be perfectly enforceable in one jurisdiction, its very essence may be viewed as “truly obnoxious” in another state.

Given the dynamic nature of this sector of employment law, it is crucial to consult with experienced counsel who understands your business and the legitimate business interests you need to protect to stay ahead of your competition.