

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

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LEGAL AND LEGISLATIVE UPDATE

by

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Some Relief from Confusing Non-Compete and Non-Piracy Law

Employers Must Still Provide Copies in Advance To Applicants As New Job Offers are Extended

In late May of 2012, Governor Lynch signed into law HB 1270, an act requiring employers to provide a copy of any “non-compete and non-piracy agreements” to applicants and certain employees. That new law, which went into effect in July 2012, amended RSA 275 (often referred to as “[Employee] Protective Legislation”) and required employers to prospectively provide copies of certain employment agreements to new hires prior to the actual job offer and allowing the applicants time to review and consider the restrictive covenants before accepting the job. That law also required employers with those agreements to present them to existing employees prior to a “change in job classification” which would require the employee to sign the agreement as a condition of continued employment. That law also provided that failure to disclose such agreements “prior to or concurrent with” the underlying offer would render the

agreements unenforceable. While that requirement may have seemed to be a mere formality, one which some employers already observed as a matter of standard practice, others saw this as a significant change and potential threat to the enforceability of agreements intended to protect their business interests. Perhaps more significant was the confusion created by the law as it didn't define "piracy agreements", didn't address nonsolicit agreements, nor did it address the situation involving the many employees who had already signed agreements of this type.

While courts in New Hampshire have for several years dealt with non-competition, non-solicitation and non-disclosure agreements, and in doing so have continued to narrow the scope and enforcement of these agreements, this law constituted the New Hampshire legislature's first regulation of non-compete agreements between private companies and individuals. The intended scope of the law, and in practice over the last two (2) years, however, didn't supplant the Court's traditional role in refereeing disputes of these types of agreements.

A review of the law's legislative history confirmed that some Representatives and Senators who supported the law were concerned that applicants and employees who are presented with these agreements after they are offered a new job do not truly enter into these agreements voluntarily or without duress. The employment relationship, as one legislator put it *"is like a marriage"* and *"presenting one of these agreements to someone who has already accepted a job offer without knowing about the restriction is like presenting your new bride with a pre-nuptial agreement while walking up the aisle."* It is widely understood that these agreements, by design, restrict a person's ability to work, or fully function, in their chosen field, and as is usually discovered when the agreements are sought to be enforced, employees often claim they didn't read the agreement or fully understand the terms or implications when they signed the agreement. Legislators and legal commentators have speculated that most employees don't want to make waves or put their job in jeopardy by questioning these agreements, especially at the outset of employment.

The scope of this new law had obvious and immediate repercussions for New Hampshire businesses as failure to follow these requirements could cause the agreement to be unenforceable. Also, if an employer handled the presentation of these agreements in a uniform manner, if one agreement was deemed unenforceable the employer may have lost the ability to enforce the same agreement against other former employees.

This new law seemed pretty straight-forward and therefore passed without much fanfare. However, as eluded to earlier, the law, in practice, has been confusing and difficult to implement. By way of example, the law did not define what constitutes a “non-compete and non-piracy” agreement. Thus, several questions have been raised including: What kinds of employment agreements are subject to its disclosure requirements? Second, how far in advance of an offer must an employer provide copies of any relevant agreements? Third, what degree of change in an existing employee’s job duties and/or salary triggers an employer’s duty to provide copies and does HB 1270 require re-disclosure of existing employment agreements?

As mentioned above, the terms “non-compete and non-piracy” are not defined under HB 1270, the related legislative history, or other New Hampshire statutes. A “non-compete” agreement or provision is commonly understood to include covenants which, for a specified period of time, restrict a person from competing with his/her current or former employer either by working for a competitor or setting up a competing business. These agreements often include a non-solicitation provision, in addition, or as an alternative, to non-competition covenants. Non-solicitation agreements typically provide that, for a specified period of time after the person’s employment ends, he or she cannot solicit clients, customers, or employees of his/her former employer to end their relationship, in whole or in part, with that former employer and instead form a new association with that person or a new entity. Finally, these agreements often include non-disclosure provisions which usually keep current and former employees from disclosing a former employer’s trade secrets, confidential and proprietary information to other

individuals or entities without the former employer's express authority or permission. Those provisions are usually not limited in duration meaning the employer can protect this confidential business information for as long as it remains a trade secret or it is truly confidential and protected.

Courts have disfavored non-competition agreements and over recent years consistently narrowed the scope and duration of these provisions principally because they keep people from working. Courts have also limited the scope of non-solicitation agreements in duration and as to the individuals or entities with whom the departing employee had meaningful contact in the months before the employment terminated. Finally, courts have examined whether information sought to be kept confidential under non-disclosure agreements should be afforded that protection. This new law didn't help with those definitions or distinctions. Further, other jurisdictions that have had occasion to interpret this phraseology have determined that non-competition, non-solicitation, and other anti-piracy agreements are distinct from non-disclosure agreements. Again, this law makes no such distinction, so many employers since July 2012 provided copies of all covenants not to compete, non-solicitation agreements, and other anti-piracy agreements that would have the net effect of restraining the employee's ability to earn a living after separation from that employment. While the law didn't specifically mention non-disclosure agreements, most employers treated those agreements or provisions the same way. In short, best practice necessitated full employer disclosure of any incidental employment agreements during the recruitment process but before extending the actual job offer.

The New Hampshire legislature originally envisioned HB 1270 as protecting certain employees who were offered new employment, left their previous job or turned down other opportunities based on those assurances, and were presented with a "non-compete and anti-piracy agreement" on their first day or shortly after commencing the employment. Amendments to the bill extended those protections to an offer of change in job classification. Testimony by the

bill's sponsor indicates that the law was tailored narrowly to remedy these "duress" situations. Accordingly, employers provided copies of agreements prior to, or contemporaneous with, an offer of change in job classification to a current employee or offer of employment to a future employee.

The degree of change in an existing employee's job duties that would constitute a "change in job classification" was then and remains unclear. This ambiguity was partially resolved by statements of Rep. William Infantine of the House Labor, Industrial, and Rehabilitative Services Committee in connection with amendments to HB 1270. In its original form, the law applied only to "offers of employment." The amendment expanded the law's scope beyond new hires to include "internal promotions subject to a non-compete or non-piracy agreement." H.C. 18, 1071 (N.H. 2012). The legislative history suggests that an "offer of change in job classification" does not encompass scheduled salary increases for any given employee. It also suggests that HB 1207's duties are only triggered when an existing employee moves into a position that required a "non-compete and anti-piracy agreement" from a position that did not require it. This interpretation of the law was supported by the testimony of the bill's sponsor, expressing respect for the role of the courts in resolving disputes over employment agreements and the narrow scope of the law. *Hearing on HB 1270 Before the H. Comm. On Labor, Indus., and Rehabilitative Services*, 162nd Gen. Court (N.H. 2012) (testimony of Keith Murphy, Rep.) ("I would advise against using this bill as a vehicle to legislate non-compete agreements in all aspects. The bill is intentionally very narrowly tailored to address only cases of duress."). That is all well and good but after 18 months in place employers, because of continuing confusion, lobbied for a full repeal of the law.

Efforts to eliminate employer notice requirements of non-compete and non-piracy agreements surfaced this session with the introduction of Senate Bill 351. This bill, as introduced, was aimed at repealing existing law, RSA 275:70. Critics of RSA 275:70 voiced concerns about the existing law's undermining New Hampshire's ability to attract and retain jobs in technology and research and development. The BIA, the High Tech Council and various Chambers of Commerce and industry groups supported a full repeal of RSA 275:70. Critics also cited to the vagueness of key terms in the law that leave employers uncertain as to how to comply with the law. After hearing testimony, the Senate Commerce Committee passed the bill in an amended form that would require employers to notify employees of non-compete agreements when making offers of new employment to prospective employees, but would remove the requirement in existing law that non-compete agreements be provided to existing employees who are changing job classifications within the organization. The bill is pending approval by the Governor.

What this bill didn't do was address the agreements presented to promoted employees over the last 2 years because it wasn't retroactive. It also didn't define "piracy" or specifically address nonsolicitation agreements. However, it did acknowledge the existence and continued enforcement of those types of agreements. That was in the context of confirming the consequences of when employers fail to provide applicants advance copies of non-compete and non-piracy agreements. Failure to properly present those agreements could still result in those agreements being deemed unenforceable. The proposed amendment to the law provides a welcomed clause:

...but all other provisions of any employment, confidentiality, nondisclosure, trade secret, intellectual property assignment, or any other type of employment agreement or provision shall remain in full force and effect.

This means, even if non-competition or non-piracy contracts or provisions are deemed unenforceable, confidentiality, trade secrets and other employment agreements

(presumably including but unfortunately still not specifically referencing non-solicit agreements) would still be potentially enforceable.

Finally, because the timing of the presentation of these agreements is still critically important to a post-employment enforcement action, employers would be wise to have applicants and employees who receive these agreements to sign an acknowledgment of receipt of the document. The language of that receipt should include something like:

SAMPLE

*I _____ [name] acknowledge the receipt of
_____ [title of the document] presented to be today
_____ [date] by _____ [name] of
_____ [employer]. I understand that I need to read this
document before signing it and if I have any questions about the terms of this document, I
will ask _____ [name] before signing the document.*

This is just the most recent development in an ever-changing area of workplace law. As this law is adopted it will likely be tested in the courts or amended in the next session. Either way hopefully, there will be more definition and guidance on these restrictions and required steps.

Stay tuned.

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Please note: This outline is intended as general guidance and not specific legal advice. Your legal counsel should be consulted with specific questions or for advice on how to proceed with these matters.