

Non-Competition Agreements in Massachusetts Fact Sheet

By Andrew P. Botti - McLane Middleton

“Facts are stubborn things.”
-John Adams

Rationale for eliminating non-competition agreements in MA #1:

“Non-competes hinder start-ups, and thereby hurt the economy.”

FACT: Massachusetts – which enforces non-competes – was found to be the best state for start-ups in the digital economy in a US Chamber of Commerce report issue in May 2016 entitled, “Innovation That Matters.” The San Francisco Bay area (where non-competes are not enforced) was second. Two other areas where non-competes are enforced – Denver and Raleigh-Durham – ranked third and fourth, respectively.

(Source: Innovation That Matters 2016 – US Chamber of Commerce Foundation; 1776; and Free Enterprise, May 2016)

FACT: The Massachusetts Institute of Technology Industrial Performance Center issued a report in December 2015 entitled, Growing Innovative Companies to Scale, How Does Massachusetts Measure Up? The report found that of the 26 states surveyed, Massachusetts was the best when it came to growing to scale and super-scale high tech businesses.

(Source: Growing Innovative Companies to Scale, How Does Massachusetts Measure Up? Massachusetts Institute of Technology Industrial Performance Center, December 2015)

FACT: Company start-ups in California have declined nearly 50% when one compares the 2009 – 2011 period with 1978 – 1980. During the same comparative time periods, the decline in Massachusetts was 39%. The decline in the San Jose, Sunnyvale, and Santa Clara (“Silicon Valley”) area of CA was nearly 52% in the same period of time. The Austin, Texas area decline was 16%, and the Raleigh/Durham, NC area was about 35%. California does not allow non-competes.

(Source: Declining Business Dynamism in the United States: A Look at States and Metros – Robert E. Litan, The Brookings Institute, May 2014).

Manchester

900 Elm Street
Manchester, NH 03101
(603) 625-6464

Woburn

300 TradeCenter
Woburn, MA 01801
(781) 904-2700

Concord

11 S. Main Street
Concord, NH 03301
(603) 226-0400

Portsmouth

100 Arboretum Drive
Newington, NH 03801
(603) 436-2818

Boston

45 School Street
Boston, MA 02108
(617) 523-7935

FACT: A recent Kauffman Foundation study put the Cambridge-Newton-Framingham area 4th out of 25 metro regions nationally for high-tech start-up density – virtually tied with the San Jose-Sunnyvale-Santa Clara, CA region, i.e., Silicon Valley.

(Source: Tech Starts: High Technology Business Formation and Job Creation in the United States, Kauffman Foundation Research Series: Firm Formation and Economic Growth, August 2013)

Rationale for eliminating non-competition agreements in MA #2:

“The big companies make employees sign them against their will and then prevent people from getting new jobs. It’s David v. Goliath and it’s unfair.”

FACT: 86% of businesses in MA have 19 or fewer employees. They cannot afford to lose business due to unscrupulous employees. The giant companies are the exception in the state not the norm.

When announcing the recent economic development plan, the Governor himself stated that Massachusetts has 10,000 high tech companies with revenues under \$20 million, and most of those have revenues under \$5 million.

(Source: Massachusetts Housing and Economic Development Statistic; AP story of April 10, 2014, by Steve LeBlanc.)

Rationale for eliminating non-competition agreements in MA #3:

“Most employees are honest.”

FACT: In 2009 The Washington Post reported that “[n]early 60 percent of employees who quit a job or are asked to leave are stealing company data[.]” The article cited a report by the Tucson, AZ based Ponemon Institute. Nearly 80% of those surveyed admitted to taking data even when they knew their employer prohibited such action.

(Source: Data Theft Common by Departing Employees, by Brian Krebs, The Washington Post, February 2009)

Rationale for eliminating non-competition agreements in MA #4:

“The employee can’t really harm the company. It’s crying over spilt milk.”

FACT: In smaller companies, employees tend to wear many hats out of necessity. They are exposed to a lot more proprietary information than they would be in much larger companies. In a recent example of ex-employee mischief, a former salesman left a small high-tech start-up company for a much bigger competitor. The small company had developed a revolutionary new medical imaging technology. Its former salesman brought the technology to his new employer who was going to offer it free to its customers as an adjunct product.

(Source: Life Image, Inc. v. Brown, 29 Mass.L.Rptr. 427, Superior Court 2011)

Rationale for eliminating non-competition agreements in MA #5:

“Non-competes are bad for business and hinder employment growth. It’s common sense.”

FACT: In 2010 the statewide unemployment rate in California was 12.3%. In Silicon Valley the unemployment rate was 11.8%. These figures were much worse than the national average of 9.7%. In three areas where non-competes are routinely used and enforced, the unemployment rate at the same time was: 9.1% in Massachusetts; and 8.0% in the Research Triangle of North Carolina.

(Source: United States Bureau of Labor Statistics)

FACT: A recent study concluded as follows: “our results indicate that California’s unique legal structure is negatively associated with research productivity ...the legal structure in California that places no restrictions on post-employment activities hinders firm’s research and development activities. We believe this occurs because firms cannot protect the tacit knowledge held by employees...Our results here suggest that smaller firms are particularly affected by the legal structure in California.”

(Source: Non-competition Agreements and Research Productivity in the Biotechnology Industry, Joseph E. Coombs, Texas A&M University, and Porcher Taylor, University of Richmond.)

FACT: Another study from 2000 looked at the effect of non-competes on four high-tech regions: California, Massachusetts, North Carolina/Research Triangle and Texas. The conclusion: The success of the four areas as high tech “boom towns” shows that there is no correlation between enforcing non-competes and the amount of venture capital investment and venture capital transactions.

(Source: A Comparison of the Enforceability of Covenants Not to Compete and Recent Economic Histories of Four High Technology Regions, Jason S. Woods, University of Virginia Journal of Law and Technology.)

FACT: Massachusetts recently ranked first in competitiveness by the Beacon Hill Institute of Suffolk University. The categories examined included human resources, technology, and business incubation, among others.

(Source: The Boston Business Journal, Annual Analysis Puts Massachusetts in top spot nationally for competitiveness, by Eric Convey, 2014.)

FACT: Massachusetts has upheld such restraints in trade at least since 1811.

(Source: Pierce v. Fuller, 8 Mass. 223 (1811).)

FACT: At any given time hundreds – if not thousands – of non-competes expire per their own terms – usually one year.

(Source: *MA Superior Court Case Law/All Counties.*)

Rationale for eliminating non-competition agreements in MA #6:

“We’re not getting our fair share of venture capital!”

FACT: In 2013 Massachusetts venture capital firms raised more than triple the amount raised in 2012. Massachusetts venture capital firms raised nearly one third of all venture funding in 2013.

(Source: *Venture Capital Firms Booming in Massachusetts, The Boston Globe, January 14, 2014, by Mike Farrell; Thomson Reuters and National Venture Capital Association.*)

Rationale for eliminating non-competition agreements in MA #7:

“We don’t need non-competes if we have the Uniform Trade Secrets Act.”

FACT: The vast majority of the states which enforce non-competes also have the Uniform Trade Secrets Act in place. MA already has a trade secrets statute which allows for multiple damages and attorneys’ fees.

(Source: *G.L. c. 93*)

Rationale for eliminating non-competition agreements in MA #8:

“We don’t need non-competes if we have confidentiality and non-solicitation agreements.”

FACT: These agreements are not as good as non-competes when it comes to protecting proprietary information. Many cases enforcing non-competes recognize that an ex-employee either intentionally or inadvertently will utilize proprietary information in their new job with a competitor. And, one cannot “un-ring a bell.” The entire purpose of a non-compete is to protect proprietary information at least until competitors are likely through legitimate means to have become aware of same. Competitors should not be allowed a competitive advantage by avoidance of the costs of invention and discovery.

(Source: *Analogic Case, 371 Mass. 643 (1976).*)

Rationale for eliminating non-competition agreements in MA #9:

“Venture capital firms do not like non-compete agreements.”

FACT: Non-compete clauses are prevalent among high tech companies in which venture capitalists invest. “For example, Kaplan and Stromberg (2003) find that venture capital firms required 90 per cent of the founders of the companies they financed to sign non-compete agreements.”

(Source: *Handbook on Law, Innovation and Growth*, EE Publishing 2011, Edited by Robert E. Liler.)

Rationale for eliminating non-competition agreements in MA #10:

“Getting rid of non-competes will help the little guy.”

FACT: New Hampshire is only a few miles away. The large employers in MA have the means and motive to leave what is already considered an over-regulated business environment. Large-scale job loss ripples through any economy.

(Source: *Fidelity Will Move 1,100 Jobs Out of Mass.*, by Curt Nickisch, WBUR, March 2011.)

Rationale for eliminating non-competition agreements in MA #11:

“Adopting the Uniform Trade Secrets Act will add clarity to a confusing area of the law.”

FACT: It will take years for the Massachusetts judicial system to interpret the statute’s meaning and proper application. The common law parameters governing the area of enforcement of restrictive covenants are actually quite clear. Equity allows some flexibility, as it should.

(Source: “*The life of the law has not been logic; it has been experience.*” Oliver Wendell Holmes, *The Common Law*, 1881.)

Rationale for eliminating non-competition agreements in MA #12:

“Non-competes promote litigation and keep people out of work.”

FACT: A typical non-compete enforcement action lasts a matter of weeks – at most – due to the expedited court procedure available to those involved in such a case. And judges in MA have the power to reform the terms of the non-compete contract if they feel it is unfair in some way. Often, this dynamic leads to a settlement that all can live with.

(Source: *EMC Corporation v. Donatelli*, 25 Mass.L.Rptr. 399, Superior Court 2009.)

About Andrew P. Botti

Andrew represents corporations, smaller businesses, and family owned and operated enterprises in complex business and employment-related disputes. He advises management and business owners/operators on shareholder disputes, employee discrimination and commercial litigation matters. He has tried numerous cases to verdict in both state and federal court, and has appeared before various administrative and legislative agencies such as the Massachusetts Commission Against Discrimination. Andrew has also testified before the Joint Committee on Labor and Workforce Development of the Massachusetts legislature regarding the efficacy of “An Act Relative to Non-competition Agreements,” and has been actively involved in the debate over recent efforts to eliminate non-competes in their entirety.



Andrew has been appointed to the Massachusetts Economic Development Planning Council by Governor Charlie Baker. The Council’s mission is to develop a written comprehensive economic development policy for Massachusetts, and construct a strategic plan for its implementation.

In December 2014, Andrew was appointed by Governor-Elect Charlie Baker to the Baker-Polito Transition Team Subcommittee on Jobs and the Economy. In this capacity, Andrew helped prepare findings and recommendations for the new administration.

Andrew is currently a member of the Board of Directors of AIM, the Associated Industries of Massachusetts. Founded in 1915, AIM is the oldest and largest statewide association working to serve and foster the business interests of Massachusetts employers. He formerly served as Chairman of the Board of SBANE, the Smaller Business Association of New England, from 2009 - 2011. SBANE was founded in 1938 to promote and foster the interests of smaller businesses throughout the 6 state region.

Andrew received his J.D. from Northeastern University (1991) and B.A. from Columbia University (1983). Previously he was a Partner at Colucci Norman, LLP in Beverly, MA as well as a Partner, Donovan Hatem LLP in Boston, MA.

Andrew can be reached in the McLane Middleton’s Woburn office at (781) 904-2692 or andrew.botti@mcclane.com.