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OPINION

Today's Business: Legislature signals changes to come on non-compete agreements

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David A. Slossberg; Contributed photo

The enforceability of non-compete agreements has been a source of tension in our courts for some time. These are agreements between businesses and their employees, preventing employees from working for a competitor, most often for approximately one year after their employment ends, in a defined geographic area.

In enforcing non-competes, judges have sought to balance the needs of businesses to prevent competitors from unfairly gaining confidential and protected knowledge of its former employees, with understandable reluctance to interfere with a worker's ability to earning a living. That balancing act has led to decisions in our courts limiting both the time period and geographical reach of non-competes, and creating standards for assessing whether the manner in which the business obtained the non-compete was fair.

After decades of court precedent concerning non-competes, during this last session the Connecticut legislature began to consider in earnest a statute to codify rules around non-compete agreements in the state. While not passed, the dominant draft legislation portends things to come. Thus, businesses should consider the proposed legislation as guidance in preparing and enacting non-competes, as this can only strengthen a businesses' ability to enforce these agreements.

The proposed law includes a comprehensive framework for implementing non-competes that is intended to provide clear guidance to employers, while protecting the interests of employees. Under this framework, non-compete agreements generally are limited to one year, with an exception allowing them to be extended up to two years as long as the employer provides its employee their usual compensation during that period. This formulation emphasizes the reasonableness of a one-year non-compete, but allows an employer to pay fair compensation for the longer period, thereby offsetting the potential harm to an employee who may be unable to work during that time.

Under the legislation as proposed, the agreement must be necessary to protect a legitimate business interest that could not be protected by less restrictive means, and cannot be more restrictive than necessary with regard to duration, geographic area, type of work and type of employer. The agreement must be in writing, provided to the employee with at least 10 days to consider whether to sign. It would have to be signed separately from any underlying employment contract and contain certain enumerated rights, including the right to seek counsel and report the agreement to the attorney general.

If a non-compete is added to an existing contract, it must contain suitable consideration independent from continuation of employment. Employers would be prohibited from including a forum-selection clause with a venue outside Connecticut or otherwise interfering with public policy.

Additionally, under the current draft legislation, no employer could require an employee to sign a non-compete unless that employee earns three times the minimum wage (five times the minimum wage for independent contractors). The employer cannot include a geographic area or type of work restriction if the employee has not performed those particular services within that area within the past two years.

While any future legislation may be modified before enacted, based on the work in this last legislative session, businesses and employees have a glimpse of what the state of Connecticut may consider to be sound public policy around non-competes. Given the importance of non-competes in protecting against unfair competition when key employees leave for a competitor, forward-looking businesses should consider the prevailing winds when enacting these agreements.

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