

SURVIVOR: THE NONCOMPETE CHALLENGE

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In the long-running reality show, *Survivor*, you face constant challenges to stay in the game. It's like that in the business world, too. But nowadays, your local elected official is the one forcing you to eat grubs or go home. Massachusetts just added the latest challenge. On October 1, the Commonwealth concocted a new law that regulates noncompete agreements. This law has it all. It's foolish. It's counterproductive. And, whoops, it's so poorly written you're not really sure what it means! It makes *Survivor's* Bug Diet (and subsequent cleanse) seem like a pleasant alternative.

This put Massachusetts solidly in the running for Bad Business Law of the Decade.

The competition is tough. There's no shortage of short-sighted employment laws. I call them "press release" laws. Lawmakers whip up a law so that they can issue a press release about it. These doodles rarely go anywhere, but they do garner news conferences and fleeting headlines. U.S. Senator Elizabeth Warren and her colleagues spawned one of these press release laws in 2014—they proposed to ban virtually all noncompetes in the United States. D.C. got a bit further in 2015. It passed a law that provides up to 16 weeks of paid leave and funds it with a new tax on most employers. Still, as of today, D.C. hasn't figured out how to make this law work. Right now, the focus is on how to get rid of the prime sponsor of the law. In 2017, a San Francisco Supervisor floated the idea of taxing robots (as if robots don't have enough problems already). In May 2018, the Seattle City Council adopted a tax on hiring new employees, which was repealed—in less than 30 days—because of the law's sheer stupidity.

So how did the baked-bean state become a contender? With a half-baked law. Massachusetts gives employees a bold new benefit: 50% of their old pay while they're bound by a noncompete agreement. Whether you quit or got laid off, if you were making \$60,000, you get paid at the rate of \$30,000

per year while you're binge-watching *Game of Thrones*. Don't get too cozy. There's a loophole big enough for a flying dragon.

Instead of the 50% pay requirement, an employer can pay an ex-employee "other mutually-agreed upon consideration." As businesspeople know, and lawmakers apparently don't, hiring is rarely a negotiation. The job candidate chooses: "Yes" or "No Job." So let's listen in on the new standard Massachusetts' take-it-or-leave-it interview: "During your noncompete period, we will be paying you in Groupons. Does that sound mutually agreeable? Good. I thought so."



Uncertainty

So, is it 50% of your old pay? Or, is it coupons for artisanal, curated cheese-making lessons? Who knows what employers are required to pay during the noncompete? Certainly, no one in Massachusetts. Hence, the uncertainty.

Counterproductive

Massachusetts also prohibited noncompetes for almost all employees paid on an hourly basis—even highly skilled employees. This guts employers' incentive to educate their workforce and ultimately hurts employer and employee alike. Why put laborers through apprenticeship programs or pay to train and license truck drivers if they can freely quit and join the competition? In other words, the law is counterproductive.

Foolish

The new law also prevents businesses from enforcing noncompetes if the employer terminates an employee without "cause". "Cause" is legal shorthand meaning the employee did something really bad. But, most businesses don't want to accuse employees of misconduct and get into nasty fights. So the new law forces companies to give up their rights or puts both sides through a battle. Thus, the foolishness.

I imagine those Massachusetts lawmakers just spilled words

onto the page and were satisfied if they formed lines that looked like sentences. Right now, businesses don't know what to put in their Massachusetts noncompetes or whether they will be enforceable. Businesses don't know whether they should hire smart people or whether it is smart not to hire people.

The Legal Terrain

Because of the proliferation of all of these press release laws, you now live in a state that falls into one of three noncompete categories:

Prohibition States: Certain states, such as California, prohibit noncompete agreements altogether.

Regulation States: These states limit the duration and geographic scope of noncompete restrictions, impose other requirements and prohibit them altogether in some situations. Idaho and Utah joined Massachusetts in recently regulating noncompete agreements—in favor of employees. On the other hand, Florida has extensive regulations that, overall, favor employers and put a lot of teeth into the enforcement of noncompete agreements.

Chaos States: These states impose rules that change from moment to moment, person to person and company to company. In one court, the judge follows one rule and in another court, the judge sees it differently. If you saunter down the block, you may be under a different set of rules. Yikes! Sorta makes it hard for anyone to plan—or comply.

The Law of Unintended Consequences

On top of all the other problems, lawmakers are creating unintended harm. The prevailing trend is to ban or limit noncompetes—with the expectation that this helps the little guy and gal. Not so fast there, the Honorable I-Didn't-Think-That-Through!

Employees, businesses and society all benefit from **r-e-a-s-o-n-a-b-l-e** noncompete agreements. Just like a patent provides an incentive for research and innovation, a reasonable noncompete encourages employers to invest in employees. With the right noncompete agreement, employers will share their secrets with employees, they'll spend time and money training employees and they'll let employees develop relationships with valued customers. None of that is going to happen if employers believe they're incubators for the next generation of competitors.

But because politicians do what they do, businesses need to effectively cope. Here's how:

- **Understand the rules:** If you employ people in more than one state, you need to know the checkerboard of rules you face across the country. The differences are striking. Usually, you need to comply with the law where each employee works, regardless of where your business is headquartered.
- **Don't create a one-size-fits-all agreement:** Impose noncompetes on employees only where appropriate. Then tailor them to fit the situation. Courts are much more likely to enforce an agreement that is truly needed to protect a company. Plus, a noncompete that is not overly burdensome is much more likely to be honored by the employee, rather than challenged in court.
- **Hire somewhere else:** You may have more freedom to protect your business elsewhere. Go and do business in a state with smarter laws. I call it "geo-legal arbitrage."
- **Earn the noncompete:** Provide the training, development and customer contact that justifies the noncompete in the first place. It makes your noncompete more enforceable. And it's the right thing to do.

Staying in business shouldn't feel like eating bugs on a reality show. You already have enough challenges from the competition, the economy and your customers. But, lawmakers keep passing crazy new employment laws. Master the rules if you want to be a Survivor.

ABOUT JACK GARSON



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Jack Garson's practice focuses on Real Estate, Construction and Business law. He serves as a legal advisor for numerous local, regional and national companies. In his role as legal counsel, Jack also serves as a strategic advisor and lead negotiator. Further, Jack provides guidance on the structure of complex transactions, the resolution of business disputes, the growth and sale of companies, and the management of issues such as liability and risk reduction, employment practices, and enhancing profitability.

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In the past two years, we've grown by 50% through expansions in New York City and, most recently, Charlotte, North Carolina. This growth has provided immense value to our clients and attorneys.

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