The Developing law of employee non-competition agreements: Correcting abuses; making adjustments to enhance economic growth

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THE DEVELOPING LAW OF EMPLOYEE NON-COMPETITION AGREEMENTS: CORRECTING ABUSES; MAKING ADJUSTMENTS TO ENHANCE ECONOMIC GROWTH

by David P. Twomey

I. INTRODUCTION:

Non-compete employment contracts prohibit employees from working for a competing employer for a set period of time after leaving their employment.[1] Today, non-compete agreements not only affect chief executive officers, managers, engineers, scientists and information technology specialists,[2] but also lower wage earners such as fast food employees and hair stylists. [3] The U.S. Department of the Treasury recently issued a report raising concerns about the misuse of non-competes across education, occupation and income groups and the resulting adverse implications for worker bargaining power, job

[1] Note. This paper deals with non-compete employment contracts. Restrictions in a contract of sale of a business prohibiting the seller from going into the same or similar business again within a certain geographic area, for a certain period of time are enforced in all states. Even California, which prohibits all employee non-compete agreements in section 16600 of its Business Professional Code has statutory exceptions that cover and protect sales of a business whether effected through the sale of the business's assets, the sale of shares in a corporation, or the sale of a partnership interest. *See* Cal. Bus. & Prof. Code § 16601 (2016) (sale of goodwill or corporation shares; agreement not to compete); id. §16602 (partners; dissolution, dissociation, or sale; agreement not to compete).

[2] *See* EMC Corporation v. Clesle, 2016 Mass. Super. LEXIS 124 (May 13, 2016).

[3] *See* Hair Club for Men, LLC v. Ehson, 2016 U.S. Dist. LEXIS 118069 (E.D. Va. May 6, 2016).

mobility and economic growth. [4] Developing law through court decisions and state legislative activity continues to weigh, balance and adjust protections for legitimate employer interests while not unduly burdening employees and the economic growth of regional economies.

II. LEGAL TRENDS IN SELECTED STATES

The Restatement (Second) of Contracts sets forth the general principles for states to enforce non-compete agreements considering: (1) whether "the restraint is greater than needed to protect the [employer's] legitimate interests; (2) the hardship to the [employee]; and (3) the likely injury to the public.[5] The employer's legitimate business interests may include confidential information, trade secrets and customer good will.[6] Overly broad geographic and time restrictions are unenforceable.[7] While the majority of states reflect the Restatement's principles, they do so guided by the rule of reason, resulting however in somewhat different, evolving formulations in different states.

A. Massachusetts Case Law: Blue Penciling Overbroad Restrictions: Banning Restrictions on Ordinary Competition for Conventionally Skilled Service Providers

When an employer discovers that a former employee is working for a competitor in violation of a non-compete agreement, through counsel it may notify the new employer and threaten litigation; [8] and, if not successful, the former employee may seek a preliminary injunction in state or federal court prohibiting the violation of the non-compete agreement.[9] Motions for preliminary injunctions are heard expeditiously by the courts and are ordinarily used to preserve the status quo pending trial on the merits. However, in non-compete cases the validity of the time limitation in the non-compete agreement is

[4] Office of Economic Policy, U.S. Department of the Treasury, "*Non-Compete Contracts: Economic Effects and Policy Implications*" www.treasury.gov, p.6 (March 2016).

[5] Restatement (Second) of Contracts § 188 (1981).

[6] DAVID TWOMEY, MARIANNE JENNINGS & STEPHANIE GREENE, BUSINESS LAW, PRINCIPLES FOR TODAY'S COMMERCIAL ENVIRONMENT. pp. 277, 278 (5th ed. 2017).

[7] *Id.*

[8] In Socko v. Mid-Atlantic Systems of CPA, Inc. 126 A. 3d 1266 (Pa. 2015) the employer notified the new employer and threatened litigation resulting in Socko's termination. Socko successfully challenged this action, with the court deciding that the agreement was unenforceable for lack of consideration because it was entered into after the commencement of Socko's employment with his former employer, Mid-Atlantic.

[9] *See* EMC Corporation v. Clesle, 2016 Mass. Super. LEXIS 124 at *7 (May 13, 2016).

clothed with immediacy. Decisions at the preliminary injunction stage become, in effect, a determination on the merits.[10]

In order to obtain a preliminary injunction a plaintiff must show: (1) a likelihood of success on the merits; (2) that irreparable harm will result from denial of the injunction; and (3) that, in light of the plaintiff's likelihood of success on the merits, the risk of irreparable harm to the plaintiff outweighs the potential harm to the defendant in granting the injunction.[11] Regarding Massachusetts technology industries, state and federal courts enforce non-compete and non-disclosure agreements to protect against inevitable or even inadvertent disclosure.[12] In *SimpliVity Corp. v. Moran,* the court allowed a preliminary injunction against Keith Moran, enjoining him from working for a competing start up, Nutanix, or any other firm in the data storage industry for a year even though he promised not to solicit the customers of his former employer, SimpliVity.[13] The court determined that he would inevitably use the SimpliVity confidential information in his brain memory in selling Nutanix's products and competing against SimpliVity. [14]

In Massachusetts, rather than declining entirely to give effect to an unreasonable non-competitive clause, a court may modify its terms so as to make it reasonable.[15] Partial enforcement is sometimes called "blue penciling" – a throwback to the days when lawyers edited written work with a blue pencil.[16] In *Perficient, Inc. v. Priore,* the court found that the two year restriction in the non-compete clause was longer than reasonably necessary to protect the employer, Perficient, from a 23 year old college graduate who had only worked for the client at issue for nine months. [17] The court revised the restrictions to a one year period.[18]

Enforcement of non-competition clauses in Massachusetts is limited to the extent they serve a legitimate business interest of the employer such as protection of trade secrets, confidential business information

[10] Horner International Co. v. McCoy, 754 S.E. 2d 852 (2014).

[11] SimpliVity Corp. v. Moran, 2016 Mass Super. LEXIS 297 at *21 (Aug. 14, 2016).

[12] *Id. See also* SimpliVity Corp. v. Bondranko, 2016 U.S. Dist. LEXIS 117448 at *10 (D. Mass. Aug. 31, 2016).

[13] *Moran,* 2016 Mass. Super. LEXIS 297 at *33.

[14] *Id.*

[15] Kroeger v. Stop & Shop Companies Inc., 13 Mass. App. Ct. 310, 312 (1982).

[16] *See* Turnell v. Centimark Corp., 796 F.3d 656, 662 (7th Cir. 2015) for a discussion of the origin of the term "blue penciling."

[17] Perficient, Inc. v. Priore, 2016 U.S. Dist. LEXIS 56704, at *20 (D. Mass April 26, 2016).

[18] *Id.* at *19.

and customer good will.[19] An employer is not entitled to a preliminary injunction to enforce a non-compete agreement against former employees who possess no more than the conventional job knowledge and skill readily obtainable from publicly available sources.[20] In *Elizabeth Grady Face First, Inc. v. Garabedian*, the employer was not entitled to a preliminary injunction on a non-compete agreement against two former employees who operated a day spa nine miles from the plaintiff's shop.[21] The court found that there was no evidence that the defendants were possessed of or exploiting bona fide trade secrets, confidential information, or customer good will belonging to the Company, rather the court stated it was evident that Elizabeth Grady's true motivation was to thwart ordinary competition from conventionally skilled service providers. The court determined that this was not permissible under Massachusetts law.[22]

B. Virginia Case Law: No Reforming Overbroad Non-Compete Agreements

Covenants that restrain trade are disfavored by Virginia courts.[23] The employer must show that the restraint in a non-compete clause is necessary to protect a legitimate business interest, is not unduly harsh in curtailing an employer's ability to earn a livelihood and is reasonable in light of sound public policy.[24] The courts analyze the restrictions in terms of function, geographic scope and duration.[25]

Unlike Massachusetts courts, Virginia courts have no authority to "blue pencil" or otherwise reform or rewrite overly broad restrictions in a non-compete contract.[26] In *Home Paramount Pest Control v. Shaffer* the non-compete provision prohibited Shaffer from "engag[ing] indirectly or concern[ing] himself... in any manner whatsoever" in pest control "as an owner, agent, servant, representative, or employee and/or as a member of a partnership and/or as an officer, director or stockholder of any corporation, or in any manner whatsoever."...[27] Because the non-compete provision did not confine the "function' element to those activities Shaffer actually engaged in for the

[19] *See* Elizabeth Grady Face First, Inc. v. Garabedian et al, 2016 Mass. Super. LEXIS 34 at *5 (Mar. 25, 2016).

[20] *See id.* at *7.

[21] *See id.* at *13.

[22] *Id.* at *11.

[23] Hair Club for Men, LLC v. Ehson, 2016 U.S. Dist. LEXIS 118069 at *7 (E.D. Va. Aug. 31, 2016). *See also* Modern Environments, Inc. v. Stinnett, 263 Va 491 (2002).

[24] *Id.*

[25] Simmons v. Miller, 261 Va. 561,581 (2001).

[26] Landmark Tech, Inc. v. Canales, 454 F. Supp. 2d 529 (E.D. Va. 2006).

[27] Home Paramount Pest Control v. Shaffer, 282 Va. 412, 416 (2011).

employer, the court found the non-compete provision was overbroad and unenforceable.[28]

In *NVR Inc. v. Nelson* the court determined that the geographic scope of the non-compete provision was indefinite and could possibly extend to at least fourteen states.[29] Accordingly, the court found the geographic scope of the non-compete provision overbroad and thus not valid.[30]

C. Washington State Case Law Protecting Low Wage Workers

Like most other states, Washington law disfavors restraints on trade regarding covenants not to compete and other restrictive covenants such as non-solicitation clauses.[31] This is especially true when low wage, at-will employees are involved. In *Genex Cooperative, Inc. v. Contreras*, the court refused to enforce a non-compete clause against a low-level agricultural worker with an employment-at-will relationship with the employer. [32] It determined that the restrictive covenant was unreasonable because the at-will employee may be terminated without any cause and then be prohibited from seeking new employment in his line of work.[33] Regarding another former Genex bovine inseminator, the court stated that it appeared to the court that the employer actually used restrictive covenants to eliminate competition or to strong-arm employees to accept ever-dwindling wages and restrict their freedom to work.[34] The court determined that the non-competition agreement was unenforceable as a matter of law and would not be reformed.[35]

D. Illinois Law: Protecting Low Wage Workers

Illinois follows the general rule that covenants not to compete are valid if they are reasonable in purpose and scope and are supported by adequate consideration.[36] In 2016 the state took action against a fast

[28] *Id.* at 418.

[29] NVR Inc. v. Nelson, 2017 U.S. Dist. LEXIS 21829 at *21 (Feb. 14, 2017).

[30] *Id.*

[31] *See* Knight, Vale & Gregory v. McDaniel, 37 Wash. App. 366, 370 (1984).

[32] Genex Cooperative, Inc. v. Conteras, 2014 U.S. Dist. LEXIS 141417 at *21 (E.D. Wash. Oct. 3, 2014).

[33] *Id* at *18.

[34] *Id.*

[35] *Id.*

[36] For a discussion of Illinois law on adequate consideration *see* McInnis v. OAG Motorcycle Ventures, LLC, 35 N.E.3d 1076, 1083 (Ill. App. 2015) (employment alone of an at-will employee is not considered adequate consideration to support enforcement of a non-compete clause; an employer's promise of continued employment may be an illusory benefit where the employment is at-will; the court determined that continued employment for super motorcycle salesman Chris McInnis of eighteen months was

food franchise for requiring low wage workers to sign non-compete agreements. Illinois Attorney General Lisa Madigan filed a lawsuit on June 8, 2016 against Jimmy John's Sandwich Shops seeking injunctive and other equitable relief contending:

> ... that Jimmy John's use of non-compete agreements for at-will, low wage workers limits the ability of employees to find new employment, ... hinders upward mobility of workers looking for higher wages or advancement with new employment using skills obtained in their current employment, and suppresses wages for employees who have limited negotiating power with both current and potential new employers when they are limited by a non-competition agreement. ...[37]

All store employees are employees at-will, and all store employees in Illinois were required to sign a non-competition covenant, [38] which stated in part:

> **Non-Competition Covenant.** Employee covenants and agrees that, during his or her employment with Employer and for a period of two (2) years after... he or she will not have any direct or indirect interest in or perform services for (whether as an owner, partner, investor, director, officer, representative, manager, employee, principal, agent, advisor, or consultant) any business which derives more than ten percent (10%) of its revenue from selling submarine, hero type, deli-style, pita and/or wrapped or rolled sandwiches and which is located within three (3) miles of either (1) _____ [Insert address of employment], or (2) any such other JIMMY JOHN'S Sandwich Shop operated by JJF, one of its authorized franchisees, or any of JJF's affiliates....
>
> **Costs and Attorney's Fees.** Employee agrees to reimburse Employer and JJF for all costs and expenses, including attorney's fees, that Employer or JJF incur to enforce this Agreement against Employee.[39]

On December 7, 2016 the parties announced a settlement with Jimmy John's, in which the company, among other things, is required to notify all current and former employees that their non-compete agreements are unenforceable and that Jimmy John's does not intend to enforce them. [40]

insufficient consideration).

[37] Complaint, Illinois v. Jimmy John's Enterprise, LLC., 2016 CCH 07746 at 17.

[38] *Id.* at 5.

[39] *Id.* at Exhibit A.

[40] *"Illinois Attorney General Madigan Announces Settlement With Jimmy John's For Imposing Unlawful Non-Compete Agreements,"* http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.

Effective January 1, 2017 the Illinois Freedom to Work Act bans the use of non-compete agreements for those earning less than $13.50 per hour.[41]

E. California: Continuing Its Ban on Non-Competes

California does not follow the general rule that covenants not to compete are valid if they are reasonable in purpose and scope. California Business and Professions Code section 16600 states, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade or business of any kind is to that extent void.[42] The policy behind California's rule as expressed by the California Supreme Court states:

> Every individual possesses as a form of property the right to pursue any calling, business or profession he may choose. A former employee has the right to engage in a competitive business for himself and to enter into competition with his former employer provided such competition is fairly and legally conducted.[43]

However, agreements not to disclose an employer's trade secrets during or after the term of employment are fully enforceable.[44]

Even though non-compete agreements are not enforced in California, still California employers often require that workers sign non-compete agreements there, with some 19 percent of workers currently working under unenforceable non-compete agreements. [45]

Applying to contracts entered into after January 1, 2017, California law now prohibits the litigation outside of California of most employment-related issues including non-compete and trade secret matters affecting California based employees. [46]

[41] Illinois Freedom to Work Act, Public Act 099- 0860, Effective, January 1, 2017.

[42] CAL. BUS. & PROF. CODE §16600 (2017).

[43] Cont'l Car-Na-Var Corp. v. Mosely, 24 Cal.2d 104, 110 (Cal. 1944).

[44] *See, e.g.* Muggill v. Reuben H. Donnelly Corp. 62 Cal.2d 239 (Cal. 1965).

[45] Office of Economic Policy, U.S. Department of the Treasury "Non-compete Contracts Economic Effects and Policy Implementations" (March 2016) p. 12.

[46] CAL. LAB. CODE § 925 (2016) states:

(a) An employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would do either of the following:

(1) Require the employee to adjudicate outside of California a claim arising in California.

(2) Deprive the employee of the substantive protection of California law with respect to a controversy arising in California.

III. ADJUSTING NON-COMPETE LAW TO ATTRACT NEW HIGH TECH VENTURES: MASSACHUSETTS AND CALIFORNIA APPROACHES

Derived from the U.S. Department of the Treasury's recent report on *"Non-Compete Contracts: Economic Effects and Policy Implications,"*[47] a recent White House paper summarized the position that non-compete agreements can affect the mobility of workers, clearly affecting a region's growth as follows:

> When firms in a given industry are clustered, it makes it easier for their workers to share expertise and discoveries, some of which may not be protected by trade secret or intellectual property legal provisions. Economists refer to geographic clustering effects of factors like a large, deep pool of skilled workers, a more competitive market of suppliers, and information spillovers across workers and firms as "agglomeration effects."
>
> While not necessarily in the interest of an individual firm, more rapid dissemination of ideas and technology improvements can have significant positive impacts for the larger regional economy in terms of innovation, entrepreneurship, and attracting more businesses and jobs to a region. Non-competes that stifle mobility of workers who can disseminate knowledge and ideas to new startups or companies moving to a region can limit the process that leads to agglomeration economies. Overly broad non-compete provisions could prevent potential entrepreneurs from starting new businesses in similar sectors to their current employer, even if they relocate.[48]

The research history for the positions set forth in the White House paper on information spillovers across workers and firms as "agglomeration effects" goes back to Professor Ronald Gilson's 1999 article comparing the growth of California's Silicon Valley and the Route 128 corridor outside of Boston.[49] The post-employment non-compete agreements applicable to Massachusetts employees presented a barrier to the second-stage agglomeration economy that sustains a high technology district by allowing it to reset its product life cycle, an economy that did not develop on Route 128 but did in Silicon Valley.[50]

With the idea of becoming more competitive with California in terms of venture capital investments in new high tech enterprises and to continue to invigorate its start-up community, Massachusetts legislators recently set out to enact comprehensive legislation relating

[47] *Supra* note 45, p. 22.

[48] *"Non-compete Agreements: Analysis of the Usage, Political Issues and State Responses"* The White House, May 5, 2016. p. 22.

[49] Ronald J. Gilson, *"The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete"*, 74 N.Y.U.L. REV. 575 (1999).

[50] *Id.* at 607.

to non-compete agreements. In the summer of 2016 it proposed passage of the Massachusetts Non Competition Agreement Act,[51] containing the following major revisions:

- The non competition agreement must be provided to the employee by the earliest of a final offer of employment or 10 business day before starting work.[52]
- If signed after employment it must be supported by fair and reasonable consideration in addition to continued employment.[53]
- It must be tailored to protect legitimate business interests such as, trade secrets, confidential business information and good will.[54]
- It must not exceed one year in duration.[55]
- It must be reasonable in geographic territory, limited to areas where the employee provided services in the last 2 years of employment.[56]
- It must be reasonable in scope of prescribed activities, relating to work activities the affected employee has performed over the last 2 years of employment.[57]
- It may be judicially reformed.[58]
- It will not apply to employees who have been terminated without cause or laid off, or to student interns. [59]

The proposed legislation contained a "garden leave" provision which would require an employer to pay a worker a half year's salary if the worker could not take a new job due to the one year non-compete provision.[60]

Interest groups and legislators ran out of time with the ending of the legislation session on July 31, 2016 without the necessary

[51] H.B. 4434, § 24 L. (June 27, 2016) https://masslegislature.gov/bills/189/H.B.4434.html.

[52] § 24L (b)(i).

[53] § 24L (b)(ii).

[54] § 24L (b)(iii).

[55] § 24L(b)(iv).

[56] § 24L(b)(v).

[57] § 24L(b)(vi).

[58] § 24L(d). A May 19, 2016 version of the proposed legislation, H.B.4323, had stated in subsection (d) that a non-compete agreement may not be judicially reformed.

[59] §24L(c).

[60] § 24L(b)(vii). The subsection also contained the option of "other mutually-agreed upon considerations between the employer and the employee" but this option did not soften the opposition to the bill. *Id.* The chief executive of the Greater Boston Chamber of Commerce, Jim Rooney commented, "It creates a dynamic in which one employer would have to basically pay someone for not working... this does not feel right." See Jon Chesto, "Bill to Limit Non-compete deals includes a surprise catch". https://www.bostonglobe.com/business/2016/05/16/bill-limiting-noncompete-agreements-advances-with-contentious-provision/bfGSYp0oCW6UVSQH4LMaBM/story.html

compromises needed for the Massachusetts House and Senate to pass new legislation. The "garden leave" provision was difficult for employers and some legislators to accept.[61] Proponents are now waiting to go forward in next year's legislative session.

The vibrancy of California's Silicon Valley innovation economy due in part to information sharing facilitated by worker mobility unfettered by non-compete agreements is well established.[62] It has been encumbered somewhat however, by practices where major employers including Google and Apple allegedly agreed with each other not to hire away each other's employees, a factor contradicting the mobility of employees in high tech firms in Silicon Valley.[63]

Metropolitan Boston has enormous core strengths in technology derived from MIT, Harvard, its other major universities and its world class research based hospitals. Boston leads the world in start-up activity in biotech, and there is solid growth in tech industries as well.[64] Moreover, there is a surge in innovation in Intelligence Systems, where start-ups are building out infrastructure for practical applications of Intelligence Systems.[65] Appropriate adjustments to its non-compete legal infrastructure will enhance Boston's future growth.

IV SUGGESTED GUIDANCE AND CONCLUSIONS

A case can be made to ban employee non-compete agreements like California, North Dakota and Oklahoma,[66] however all other states provide some measure of enforcements of non-compete agreements to protect legitimate business interests of employers.[67] Recent court decisions previously presented have exposed the misuse of non-competes and their adverse impact on employees ability to bargain for better pay and find new better paying jobs. Aware of the abuses and accepting in part the California experience that banning non-competes

[61] *See* Jon Chesto, "Bill Limiting Non-compete Agreements Advances With Contentious Provisions" https://www.bostonglobe.com/business/2016/05/16.

[62] *See supra* note 45, p. 22.

[63] *See* U.S. v. Adobe Systems, Inc.; Apple Inc.; Google Inc.; Intel Corp.; Intuit Inc. and Pixar, 2011 U.S. Dist. LEXIS 83756 at *5 (D. D.C. Mar. 17, 2011) where defendants agreed that they participated in at least one agreement in violation of the Sherman Act and each defendant was enjoined from attempting to enter into, any agreement with any other person to in any way refrain from soliciting, cold calling, recruiting, or otherwise competing for employees of the other person. *See also* Steve Musil "Apple/Google offer $415 million to Settle Anti-pouching Suit – SNET", Jan. 15, 2015, www.CNET.com.

[64] Todd Hickson "The Boston Tech Startup Ecosystem Is Making a Strong Comeback", April 8, 2016, www.forbes.com.

[65] *Id.*

[66] RUSSELL BECK, EMPLOYMENT NONCOMPETES A STATE BY STATE SURVEY (July 31, 2016).

[67] *Id.*

advances the innovation economy of a region, many states are looking to update their non-compete laws. Some trends may be found in the cases previously set forth in this paper.

A. Misuse of Non-compete By Employers

The Jimmy Johns Sandwich Shops non-competes are a clear abuse of a legal framework meant to protect employers legitimate business interests, by limiting the mobility of its at-will low wage workers and locking them into their current employment.[68] While Jimmy Johns asserts that it does not enforce these agreements, the clear agreement language calling for the employer to assess all costs and attorney fees on employees to enforce the agreement, has a chilling and restrictive effect on employees and is a misuse of the non-compete framework.[69]

The *Genex Cooperative, Inc.* enforcement cases from Washington state identified the misuse of restrictive covenants by an employer to eliminate competition and to strong arm at-will, low wage agriculture employees to accept ever-dwindling wages and restrict their freedom to work.[70]

In the *Elizabeth Grady* Massachusetts case the court refused to grant a preliminary injunction because the employer's true motivation was to thwart ordinary competition from conventionally skilled service providers.[71] The trouble and expense of the litigation itself was an abuse suffered by low wage workers and should be corrected by legislation.

B. Strict Applications of the Non-compete Agreements Regarding Functions, Geographic Scope and Duration.

Avoiding competition is not a legitimate business interest, while protecting business plans and methods and other confidential information can properly support a non-compete agreement. Reasonable restrictions on occupational functions (job duties) and geographic and duration restrictions vary depending on each individual businesses circumstances and the employees in question. Unreasonable restrictions will not be well received by a court at the preliminary injunction stage as seen in the two Virginia cases previously presented, one involving an overbroad "function" and the other overbroad in geographic scope.[72] Virginia courts have declined

[68] Madigan, *supra* note 40.
[69] *Id.*
[70] *Genex*, 2014 U.S. Dist. LEXIS at *18.
[71] *Elizabeth Grady*, 2016 Mass. Super LEXIS 34 at *11.
[72] NVR Inc. 2017 U.S. Dist. LEXIS 21829 at * 21.

to "blue pencil" overbroad non-compete agreements.[73] In the *Genex* case the court stated it had the equitable power to modify an unreasonable covenant to enforce its basic purpose but refused to do so based on the facts of record in the case before it.[74]

Employers should not risk relying on the courts to blue pencil overbroad non-compete agreements and should customize non-competes for the various categories of high level employees in its workforce as to functions, geography and duration.[75]

C. Garden Leave

"Garden leave" should not have been an obstruction to reaching legislative accord on a non-compete bill as happened in Massachusetts. Such unusual contractual arrangements are best left to the contracting parties to work out.

In a "garden leave clause" in an employment contract, the employee must give a certain amount of notice to the employer in advance of the employee's resignation from employment. In exchange, the employer does not require the employee to come into work during the period of the leave, and the employee will receive full wages and benefits, and can spend his or her time "in the garden".[76] During the leave the employee cannot work for a competitor. However, on leave the employee also cannot access confidential records and will be unable to directly solicit clients or co-workers.[77] Given the costs to the employer of paying salary and benefits during the period of garden leave, the employer must carefully identify the type of employee that warrants a garden leave, such as senior executives, key technical employees and employees who have access to confidential information. Enforceability of garden leaves are also in doubt.[78]

[73] *See* Lanmark Tech. Inc., v. Canales, 454 F.Supp 2d 524, 529 (E.D. Va. 2006). Better Living Components, Inc. v. Coleman, 62005 WL 771592 at *5 (Va. Cir. Ct. Apr.6, 2005).

[74] *Genex*, 2014 U.S. Dist. LEXIS at *17.

[75] *See* Wis. Stat. § 103465, where the state of Wisconsin applies an "all or nothing" reading of noncompete agreements.

[76] *See* Jeffrey S. Klein and Nicholas Pappas, *"Garden Leave" Clauses in Lieu of Non-competes*, www.NYLJ.com, vol. 241 No. 24 (Feb 5, 2009).

[77] *Id.*

[78] *See* Bear, Stearns v. Sharon, 550 F.Supp. 2d 174 (D. Mass. 2008) where such a clause was denied enforcement because the balance of hardship weighed to the individual employee and his clients.