Massachusetts High Court Says Non-Solicitation Agreements with Forfeiture Clauses Aren't Subject to Strict Non-Compete Restrictions

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The Massachusetts Supreme Judicial Court just clarified that non-solicitation agreements aren't subject to the Commonwealth's strict noncompetition law just because they contain forfeiture provisions, handing businesses a crucial win when it comes to enforcing restrictive covenants. Here's what happened in the June 13 *Miele v. Foundation Medicine* decision, what it means for your business, and what you should do now.

What Happened?

- Susan Miele signed a restrictive covenant agreement when she joined Foundation Medicine (FMI) as an executive in 2017.
- The agreement included a non-solicitation clause barring her from recruiting FMI employees for a year after her departure.
- When she left the company in 2020, she signed a transition agreement that incorporated the non-solicitation clause and added a forfeiture provision: if she breached the non-solicitation agreement, she would forfeit or must repay over $1 million in benefits.
- After leaving FMI in 2021, Miele allegedly recruited several FMI employees to her new company. FMI invoked the forfeiture clause, stopped transition payments, and demanded repayment of benefits already paid.
- Miele sued FMI for breach of the transition agreement, arguing that FMI had no right to withhold her benefits. FMI counterclaimed, asserting that Miele had breached both the transition agreement and the underlying restrictive covenant, and sought a court order declaring it did not owe her any further benefits.

A lower court partially ruled in Miele's favor, ruling that the forfeiture provision was subject to the state's strict noncompete law – the Massachusetts Noncompetition Agreement Act (MNAA) – and therefore unenforceable. Although the MNAA excludes non-solicitation agreements, the court found that the inclusion of a forfeiture clause transformed the agreement into a "forfeiture for competition agreement" under the Act.

Supreme Judicial Court Hands Employers a Win

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The Supreme Judicial Court reversed.

- The SJC explained that the MNAA excludes non-solicitation agreements from its definition of "noncompetition agreement," and that "forfeiture for competition agreements" are a subset of non-competition agreements.
- Because the forfeiture clause was triggered by a breach of the non-solicit, the court said the MNAA did not apply.
- The SJC rejected Miele's argument that the broader definition of "competitive activities" in the MNAA should include solicitation, emphasizing that the law is clear: non-solicitation agreements are not subject to the MNAA.

What Does This Mean for Massachusetts Employers?

This decision is a win for Massachusetts employers. It clarifies that non-solicitation agreements with forfeiture clauses are not subject to the MNAA's strict requirements, which include providing garden leave or other consideration and limiting the duration and geographic scope of restrictions. The MNAA applies only to non-competition agreements and excludes non-solicitation agreements, non-disclosure agreements, and certain other restrictive covenants.

What Should Employers Do Now?

While non-solicitation agreements are not subject to the MNAA, they must still be reasonable in scope and duration under Massachusetts law. Courts will enforce non-solicitation agreements if they are necessary to protect a legitimate business interest and are not overly broad. Here's a checklist for Massachusetts employers considering state law and this decision:

Review Your Agreements

- Make sure your non-solicitation agreements are clearly distinguished from noncompetition agreements. Avoid language in non-solicitation agreements that could be construed as restricting competition or that mimics noncompetition provisions.
- Ensure that "50 state" non-competition agreements are not used in Massachusetts unless they comply with the MNAA.

Train HR and Managers

- Make sure HR and managers understand the difference between noncompetition and non-solicitation agreements, and the legal requirements for each.
- Provide training on how to handle employee departures and enforce restrictive covenants.

Consider Garden Leave for Non-competes

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- If you use non-competition agreements, remember that the MNAA requires garden leave or other mutually agreed-upon consideration.
- Make sure your noncompete agreements meet all the MNAA's technical requirements.

Monitor Legal Developments

- Stay informed about any changes in Massachusetts law or new court decisions that could affect your restrictive covenants.

Consult Legal Counsel

- When in doubt, consult employment counsel to ensure your agreements are enforceable and compliant with current law.

Conclusion

We will continue to monitor developments in Massachusetts restrictive covenant law and provide updates as new court decisions or legislative changes arise, so make sure to subscribe to Fisher Phillips' Insight System to receive the latest updates directly to your inbox. If you have questions about your agreements or want to develop a proactive plan to protect your business, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Defection and Trade Secrets Practice Group.

Related People

Gabriel S. Gladstone
Of Counsel
617.532.6932
Email

Service Focus

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