



## You “Tolled” Me My Non-Compete Only Lasts a Year!!

Insights

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Imagine that an employee resigns. He begins breaching his 12-month non-compete, and you promptly seek judicial relief. After allowing the parties to conduct expedited discovery and conducting a lengthy preliminary injunction hearing, the judge assigned to your case takes seven months to issue his decision. The judge finds the non-compete to be enforceable and rules that a preliminary injunction should be granted. Will the preliminary injunction run for 12 months from the date of the judge’s decision? Or will it be limited to the 5 months remaining in the term of the non-compete? According to the United States Court of Appeals for the 1st Circuit (applying Massachusetts law), the answer may depend on the language set forth in your contract.

In *EMC Corporation v. Emanuel Arturi*, the 1st Circuit upheld a federal Massachusetts court decision denying injunctive relief because the time restriction in the non-compete expired. The fact pattern before the Arturi court was not as scintillating as that outlined above, but the import remains the same.

Arturi left EMC in December 2009. EMC filed for a preliminary injunction in November 2010. On December 15, 2010, the court denied the request for a preliminary injunction on the ground that the one-year non-compete had expired. Upholding the district court’s decision, the 1st Circuit cited a previous opinion in which it reversed a lower court that issued an injunction after a non-compete expired. In its prior decision, the 1st Circuit reversed the lower court even though the employer timely requested a preliminary injunction, and – more surprisingly – even though the district court spent 14 months considering the motion. The 1st Circuit explained that its discretion was constrained by a Massachusetts state law that holds: “when the period of restraint has expired, even when the delay was substantially caused by the time consumed in legal appeals, [injunctive] relief is inappropriate and the injured party is left to his damages remedy.” (A copy of the Arturi decision is available in pdf format below.)

So what if the delay is caused by fraud or concealment? Suppose an employee resigns and tells you that he is burned out. He says it’s time to move back home, explore his options, and perhaps go back to school. You breathe a sigh of relief thinking that this departure will not present thorny issues regarding non-compete agreements and misappropriation of trade secrets. After all, this employee is leaving the industry altogether. Over the next 8 months, however, you notice that a certain segment of your business has steadily declined. One day, one of your clients mentions that your former employee is doing well. One question leads to another, and quickly you figure out that the former

employee did not leave the industry. He joined one of your competitors and has been systematically breaching his restrictive covenants over the past eight months. Assuming his 12-month non-compete is enforceable, can you get an injunction to enforce the covenant for another 12 months? Or are you limited to an injunction for the 4 months remaining in the term of the non-compete?

The 1st Circuit suggests the outcome may depend on the language set forth in your contract. Employers can require contracts that provide “for tolling the term of the restriction during litigation, or for a period of restriction to commence upon preliminary finding of a breach.” The appellate court also suggests the “door is at least open” to arguments that injunctive relief should be granted in the case of “a defendant who had taken affirmative steps to conceal his acts of breach.”

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