TO: Client
FROM: Matthew C. Berntsen
SUBJECT: Is "continuing" employment sufficient consideration to enforce a nonsolicitation covenant (of customers and employees) in Massachusetts?
DATE: October 8, 2009

A. SHORT ANSWER

There is no clear consensus among Massachusetts courts as to whether continuing employment constitutes sufficient consideration to support a nonsolicitation covenant. While the courts generally hold continuing employment to be adequate consideration, there are both notable exceptions to the rule and cases where the court refused to enforce an agreement because the choice between signing the agreement and losing one's job constituted "practical duress." To protect against this uncertainty, employers should be sure that a nonsolicitation covenant is supported by some form of tangible consideration beyond the continued employment of the employee.

B. NONSOLICITATION COVENANTS

A nonsolicitation covenant or agreement is a contractual promise not to lure customers or employees away from a company.[1] Accordingly, many employers require employees to sign a nonsolicitation agreement to protect the employer from 'poaching' by former or current employees. Massachusetts law analyzes nonsolicitation agreements similarly to noncompetition agreements,[2] holding an agreement to be enforceable if it "(a) is necessary to protect a legitimate business interest of the

[1] Black's Law Dictionary, Nonsolicitation Agreement (8th ed. 2004).
[2] E.g. Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488, 498-99 (1986); Salomon Smith Barney, Inc. v. Barcomb, 2003 Mass. App. LEXIS 1497 (Mass. App. Ct. Jan. 3, 2003).

employer, (b) is supported by consideration, (c) is reasonably limited in all circumstances, including time and space, and (d) is otherwise consonant with public policy."[3]

C. ADEQUATE CONSIDERATION

To be enforceable, a nonsolicitation agreement must be backed by adequate consideration. This means that, because the law assumes that a person would not agree to restrict their behavior without receiving something in return, an employee signing a nonsolicitation agreement must actually receive some benefit in order for the agreement to be binding. Consideration is the benefit received by the employee[4] and can take many forms, the most common of which are explored below.

1. Initial Employment

Massachusetts courts generally agree that nonsolicitation agreements entered into at or near the start of employment have sufficient consideration as long as employment was conditioned on acceptance of the agreement.[5] Accordingly, the Court in Informix, Inc. v. Rennell found that "where there is an employment arrangement and a written confidentiality agreement was executed shortly after employment began, said agreement is part of the original arrangement and does not fail for lack of

[3] Bowne, Inc. v. Levine, 7 Mass. L. Rep. 685 (Mass. Super. Ct. 1997)
[4] Black's Law Dictionary, Consideration (8th ed. 2004).
[5] Laurence H. Reece, III, Employee Non-Competition Agreements and Related Restrictive Covenants: A Review and Analysis of Massachusetts Law, 76 Mass. L. Rev. 2, 7 (1991) (hereinafter "Reece").

consideration."[6] Ideally, however, an employer should remove all doubt as to the adequacy of consideration by communicating the requirement that an employee sign a nonsolicitation agreement before starting work early in the hiring process, and ensuring that the agreement is signed before allowing the employee to begin work.[7]

2. Continued Employment

The situation when an employee signs an agreement in exchange for continued employment – i.e. chooses to sign or be fired – is somewhat more complicated. There is no case that definitively addresses whether or not continued employment is, in and of itself, sufficient consideration to support a nonsolicitation agreement.[8] Massachusetts courts generally accept continued employment as adequate consideration,[9] and Massachusetts courts have held that continued employment was sufficient consideration for agreements signed two,[10] eight[11] and eighteen months[12] after the start of employ. Courts have even upheld agreements signed over two years after the employee-employer relationship began.[13]

[6] Informix, Inc. v. Rennell, 1993 Mass. Super. LEXIS 105 (Mass. Super. Ct. Sept. 27, 1993) (appellate history omitted).
[7] Reece at 8.
[8] EMC Corp. v. Donatelli, 25 Mass. L. Rep. 399, 2009 Mass. Super. LEXIS 120 (Mass. Super. Ct. May 5, 2009).
[9] Id.
[10] New England Tree Expert Co. v. Russell, 306 Mass. 504, 506-07 (Mass. 1940).
[11] Slade Gorton & Co. v. O'Neil, 355 Mass. 4, 6 (Mass. 1968).
[12] Econ. Grocery Stores Corp. v. McMenamy, 290 Mass. 549, 550 (Mass. 1935) (agreement found unenforceable on other grounds).
[13] Wrentham Co. v. Cann, 345 Mass. 737, 737-39 (Mass. 1963).

However, some courts have not agreed.[14] Further, some courts choose to skirt the issue of adequate consideration, holding that agreements signed under threat of losing one's employment are unenforceable because the employee lacked a meaningful decision, with the situation constituting "practical duress."[15] Accordingly, employers should be sure to convey some other tangible benefit to an employee to ensure satisfaction of the consideration requirement.[16]

a. Continued Employment Exception: Employment for a Fixed Term

Where an employee is employed for a term or can only be fired with cause, continued employment likely does not constitute adequate consideration for entering into a nonsolicitation agreement because the employee is likely entitled to continued employ even if they refuse to sign.[17] In such a situation an employer should be doubly sure to provide the employee with tangible consideration in exchange for entering into the agreement.

b. Ensuring Adequate Consideration for a Current Employee

Employers should provide employees signing agreements after the start of employ with some form of tangible consideration to ensure enforceability of the agreement. Examples of adequate consideration include dropping criminal charges

[14] E.g. IKON Office Solutions, Inc. v. Belanger, 59 F.Supp. 2d 125, 131 -32 (D. Mass. 1999) (applying Massachusetts law).
[15] Sentry Ins. v. Firnstein, 14 Mass. App. Ct. 706, 709 (Mass. App. 1982); First E. Mortg. Corp. v. Gallagher, 2 Mass. L. Rptr. 350 (Mass. Super. Ct. 1994).
[16] James M. Hughes, Employee Non-Competition Agreements: A Review of Massachusetts Law, 63 Mass. L. Rev. 27, 30 (1978) (hereinafter "Hughes").
[17] Id. (citing Middlesex Neurological Assocs., Inc., 3 Mass. App. Ct. 126, 129 (1975)).

against an employee,[18] the acceleration of accrued benefits even where the agreement was signed on last day of employ,[19] a raise, new title or responsibilities, additional fringe benefits or "anything else of value to the employee."[20] Further, Massachusetts law holds that "consideration is unnecessary when an instrument is under seal."[21]

D. CONCLUSION

Were a court to refuse to enforce an agreement, employers should ensure that any agreement is supported by adequate consideration given the substantial financial and competitive risk that they face. Massachusetts courts do not consistently hold that continuing employment by itself constitutes adequate consideration, and so an employer seeking to bind an employee with an agreement signed after the start of employment should be careful to support any such agreement with some form of tangible consideration above and beyond continued employment.

[18] Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714, 716-17 (Mass. 1961).
[19] Marine Contractors Co., Inc. v. Hurley, 365 Mass. 280, 283 (Mass. 1974).
[20] Hughes at 30.
[21] Marine Contractors, 365 Mass. at 285; see also Mass. Genn. Laws ch. 4, § 9A (2009).

BIBLIOGRAPHY

Mass. Genn. Laws ch. 4, § 9A (2009)

IKON Office Solutions, Inc. v. Belanger, 59 F.Supp. 2d 125 (D. Mass. 1999)

Marine Contractors Co., Inc. v. Hurley, 365 Mass. 280 (Mass. 1974)

Slade Gorton & Co. v. O'Neil, 355 Mass. 4, 6 (Mass. 1968).

New England Tree Expert Co. v. Russell, 306 Mass. 504, 506-07 (Mass. 1940).

Wrentham Co. v. Cann, 345 Mass. 737 (Mass. 1963)

Novelty Bias Binding Co. v. Shevrin, 342 Mass. 714 (Mass. 1961)

Econ. Grocery Stores Corp. v. McMenamy, 290 Mass. 549 (Mass. 1935)

Salomon Smith Barney, Inc. v. Barcomb, 2003 Mass. App. LEXIS 1497 (Mass. App. Ct. Jan. 3, 2003)

Alexander & Alexander, Inc. v. Danahy, 21 Mass. App. Ct. 488 (1986)

Sentry Ins. v. Firnstein, 14 Mass. App. Ct. 706 (Mass. App. Ct. 1982)

Middlesex Neurological Assocs., Inc., 3 Mass. App. Ct. 126 (1975)

EMC Corp. v. Donatelli, 25 Mass. L. Rep. 399, 2009 Mass. Super. LEXIS 120 (Mass. Super. Ct. May 5, 2009)

Bowne, Inc. v. Levine, 7 Mass. L. Rep. 685 (Mass. Super. Ct. 1997)

Informix, Inc. v. Rennell, 1993 Mass. Super. LEXIS 105 (Mass. Super. Ct. Sept. 27, 1993)

First E. Mortg. Corp. v. Gallagher, 2 Mass. L. Rptr. 350 (Mass. Super. Ct. 1994)

James M. Hughes, Employee Non-Competition Agreements: A Review of Massachusetts Law, 63 Mass. L. Rev. 27 (1978)

Laurence H. Reece, III, Employee Non-Competition Agreements and Related Restrictive Covenants: A Review and Analysis of Massachusetts Law, 76 Mass. L. Rev. 2 (1991)

Black's Law Dictionary (8th ed. 2004)