

## Contract clauses called stifling Spark Capital asks Patrick to eliminate noncompete accords

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In Silicon Valley's freewheeling start-up world, not a week seems to go by without a crop of companies sprouting up. Meanwhile, Boston - with all the right ingredients for a vibrant tech community - is often bemoaned as the city that just keeps falling further behind.

Today, Boston venture-capital firm Spark Capital is starting a push to eliminate one barrier to the job-hopping and cross-pollination that is often credited as a factor in Silicon Valley's entrepreneurial culture, asking Governor Deval L. Patrick and fellow venture capitalists to eliminate the noncompete contract clauses that may prohibit an employee from moving to a competitor for months or years.

Noncompete agreements "are increasingly stifling the emergence of start-up companies in our state, forcing some of Massachusetts' most innovative entrepreneurs to take on tremendous risks, and hampering Massachusetts' ability to meet its fullest economic potential," Spark Capital's partners wrote in the letter asking the governor to take legislative action.

Noncompete agreements typically bar employees from going to work for a rival firm for a set period of time. Under Massachusetts law, they are enforceable except for specific professions, such as doctors and broadcasters. Under California law, however, such agreements are generally not valid, meaning an ambitious entrepreneur can take a chance with a new venture that may challenge the former employer without a legal cloud hanging over the move.

While a slew of factors contribute to the very different tech scenes on the East and West coasts, management and policy specialists have examined how noncompete agreements may contribute to very different culture.

A working paper from the National Bureau of Economic Research published in 2005 found that employees working in the computer industry in Silicon Valley tended to job-hop more than their counterparts in other cities with technology clusters. The paper found evidence to support the idea that California's legal climate, in which noncompete agreements are not enforceable, may contribute to the unique tech cluster in Silicon Valley.

A Harvard Business School working paper published this year also found that a 1985 legislative shift in Michigan, which made noncompete agreements enforceable, meant that inventors switched jobs less frequently.

That could mean a less-vibrant tech community. "Constraining the flow of people and thus knowledge, enforcing regions may fail to develop entrepreneurial and technologically dynamic economies," said the report, which found that inventors' mobility decreased by 34 percent after the law changed, and that exceptionally prolific inventors' mobility decreased an additional 14 percent.

Some people think those dynamics have influenced Massachusetts' tech culture - not because many employees actually end up in court fighting with former employers, but because of the added risk and complication that a new company or start-up may have to take on.

"As an investor, when I talk to an entrepreneur with a lot of gaming background or advertising background and they say they want to create a company to go after some big idea, I ask them if they've signed a noncompete . . . and I have to do this calculation of whether there's risk," said Bijan Sabet, a partner at Spark Capital. "If there would be a lawsuit or not does not matter. We like our money going to new ideas, not court extensions, not having to deal with a legal mess."

Sabet and four partners are sending a letter to Patrick today, asking the governor to seek legislation that

would make noncompete agreements unenforceable in Massachusetts. Sabet said his firm will work to eliminate the clauses from contracts with its portfolio companies.

But at [EMC Corp.](#), the data-storage company based in Hopkinton, noncompete restrictions are written into the "key employee agreements" and are an important part of protecting the company's investment in its employees, said Paul T. Dacier, executive vice president and general counsel.

"The lifeblood of EMC is based on our intellectual property, and unless you have a patent or something tangible, intellectual property is in the person's mind, and in order for us to protect our over \$1 billion investment in research and development, we need to ensure people can't take intellectual property and use it against us," Dacier said.

EMC has occasionally fought and won in court. In 2001, EMC won a widely publicized case in Suffolk Superior Court to stop a former EMC executive, Doron Kempel, from going to competitor SANGate Systems Inc. for one year.

"I definitely hear from clients that noncompetes can be a drag when it comes to attracting talent," said Chris Sanzone, a partner at Sanzone and McCarthy LLP, a Wellesley labor and employment law firm. "On the flipside, when you have a company getting started up and they get to a phase where they have a product in beta form and are getting ready to move on to the next level, they want to make sure they have their intellectual property protected."

But Rich Miner, who saw a new hire stuck in professional purgatory at his telecommunication start-up, Wildfire Communications Inc., sees the agreements as unnecessary measures that only hamper innovation, especially in an industry that changes quickly.

According to court documents, in 2000, Victor Impink, a software engineer, was barred for a year from starting a new job at Wildfire - or any other job that could compete with his former employer - by a Middlesex Superior Court judge.

"In the high-tech space, the rate of innovation is based on the spreading of ideas and the confluence of ideas. Cross-fertilization and rapid innovation is helped when people are free to move, to germinate new ideas," said Miner, group manager for mobile platforms at Google who has been hiring new employees for Google's Cambridge office without a noncompete clause.

"Why aren't there Akamai guys doing modern versions of Akamai in this state, a modern version of Avid, the next generation version of Bose," Sabet said. "You can just go down the list; why don't we have this rhythm? We've got plenty of venture-capital money in this town."

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*Correction: Because of a reporting error, a story in yesterday's Business section about noncompete clauses misattributed a quote. Bijan Sabet, a partner at Spark Capital, said, "Why aren't there Akamai guys doing modern versions of Akamai in this state, a modern version of Avid, the next generation version of Bose? You can just go down the list; why don't we have this rhythm? We've got plenty of venture-capital money in this town." ■*