

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Lori Ehrlich and William N. Brownsberger

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act Relative to Noncompete Agreements.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Lori Ehrlich	8th Essex
William N. Brownsberger	24th Middlesex

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO NONCOMPETITION AGREEMENTS.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 SECTION 1. Chapter 149 of the General Laws, as appearing in the 2006 Official Edition is hereby
2 amended by inserting after section 24K the following section:-

3 Section 24L. (a) As used in this section, the following words shall have the following meanings:

4 “Employee”: an individual who is considered an employee under General Laws, chapter 149, section
5 148B.

6 “Employee noncompetition agreement”: an agreement between an employer and employee, or otherwise
7 arising out of an actual or expected employment relationship, under which the employee or expected
8 employee agrees to any extent that he or she will not engage in activities directly or indirectly competitive
9 with his or her employer after the employment relationship has been severed. Employee noncompetition
10 agreements include forfeiture for competition agreements, but do not include either (i) noncompetition
11 agreements made in connection with the sale of a business, sale of assets of a business, or otherwise
12 outside of the employment relationship; (ii) forfeiture agreements; or (iii) agreements by which an
13 employee agrees to not reapply for employment to the same employer after termination of the employee.

14 “Forfeiture agreement”: an agreement that imposes adverse financial consequences on a former
15 employee as a result of the termination of an employment relationship, regardless of whether the
16 employee engages in competitive activities following cessation of the employment relationship.
17 Forfeiture agreements do not include forfeiture for competition agreements.

18 “Forfeiture for competition agreement”: an agreement that imposes adverse financial consequences on a
19 former employee as a result of the termination of an employment relationship if the employee engages in
20 competitive activities.

21 “Garden leave clause”: a type of employee noncompetition agreement by which an employer agrees to
22 pay the employee during the restricted period. To constitute a garden leave clause, an employee
23 noncompetition agreement must (a) provide the employee, for the full restricted period on a pro rated, per
24 annum basis and without offset for any income the employee may receive from other unrestricted
25 activities, the greater of: (i) fifty percent of the employee’s highest annualized base salary within the two

26 years preceding the employee's termination or (ii) \$50,000; (b) require either that the payments are to be
27 made in a lump sum within ten business days following the cessation of the employee's employment or
28 that the payments are to be made on a pro rata basis in equal bi-weekly, or more frequent, payments
29 starting immediately after the cessation of the employee's employment; and (c) not permit an employer to
30 unilaterally discontinue or otherwise fail or refuse to make the payments, even if the employer voluntarily
31 shortens the restricted period.

32 "Inevitable disclosure doctrine": a doctrine by which, in the absence of an enforceable employee
33 noncompetition agreement, a former employee may be prevented from working at a competitor based on
34 the expectation that the employment would likely lead to the disclosure of a trade secret or confidential
35 information of the employer.

36 "Restricted period": the period of time after employment during which an employee is restricted by an
37 employee noncompetition agreement from engaging in activities competitive with his or her employer.

38 (b) To be valid and enforceable, an employee noncompetition agreement must meet the minimum
39 requirements of subsections (i) through (iv) hereof and meet or be capable of being reformed to
40 meet the minimum requirements in subsections (v) through (ix) hereof.

41 (i) The agreement must be in writing, in a separate document, and signed by the employer
42 and employee.

43
44 (ii) The agreement, if it is not a garden leave clause, must apply only to an employee whose
45 average annualized federal gross income derived from the employer during the three
46 years immediately prior to the employee's cessation of employment, or such shorter
47 period if the employment was for less than three years, is greater than \$75,000 plus
48 \$1,500 for each full year from the effective date of this section.

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50 (iii) If the agreement is a condition of employment, the agreement together with an express
51 statement that the agreement is a condition of employment must, to the extent reasonably
52 feasible, be provided to the employee by the earlier of seven business days before the
53 commencement of the employee's employment or when any written offer of employment
54 is first sent to the employee, provided that if an offer of employment is first
55 communicated orally, the employee also must either (A) simultaneously be informed that
56 a noncompetition agreement will be a condition of employment or (B) receive the
57 required written notification prior to tendering resignation from any then-current
58 employment.

59
60 (iv) If the agreement is entered into after commencement of employment, it must be
61 supported by reasonably adequate consideration, which consideration does not include
62 the continuation of employment, and notice of the agreement must be provided at least
63 two weeks before the agreement is to be effective. Consideration in the amount of ten
64 percent or more of the employee's then current annual compensation will be deemed
65 presumptively reasonably adequate.

66
67 (v) The agreement must be necessary to protect one or more of the following legitimate
68 business interests of the employer: (A) the employer's trade secrets, as that term in
69 defined in section 30 of chapter 266, to which the employee had access while employed;
70 (B) the employer's confidential information that otherwise would not qualify as a trade
71 secret; and (C) the employer's goodwill.

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- 73 (vi) The agreement must be reasonable in duration in relation to the interests served and the
74 duration of actual employment, and, with the exception of a garden leave clause, which
75 may have a stated term of up to two years, in no event may the stated term exceed one
76 year from the date of cessation of employment. A stated restricted period of no more
77 than six months is presumptively reasonable. An agreement may permit the restricted
78 period to be tolled by a court if the employee's breach of the employee noncompetition
79 agreement was neither known to nor reasonably discoverable by the employer. Such
80 tolling period will not count for purposes of the temporal standards specified herein.
81
- 82 (vii) The agreement must be reasonable in geographic reach in relation to the interests served.
83 A geographic reach that is limited to only the geographic area in which the employee
84 provided services or had a material presence or influence is presumptively reasonable.
85
- 86 (viii) The agreement must be reasonable in the scope of proscribed activities in relation to the
87 interests served. A restriction on activities that protects a legitimate business interest and
88 is limited to only the specific types of services provided by the employee at any time
89 during no more than the last two years of employment is presumptively reasonable.
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- 91 (ix) The agreement must be consonant with public policy.
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- 93 (c) Notwithstanding anything to the contrary in this section, a court may, in its discretion, reform an
94 employee noncompetition agreement so as to render it valid and enforceable. If a court shortens
95 the duration of a garden leave clause, the court may, in its discretion, impose a pro rata reduction
96 on the duration or amount of the required payments.
- 97 (d) Notwithstanding anything to the contrary in this section, a court may decline to enforce some or
98 all of the restrictions in an otherwise valid and enforceable employee noncompetition agreement
99 (1) in extraordinary circumstances; (2) where otherwise necessary to prevent injustice or an
100 unduly harsh result; or (3) based on any other common law or statutory legal or equitable defense
101 or doctrine, or other equitable factors that would militate against enforcement.
- 102 (e) A court shall award the employee reasonable attorneys' fees and costs incurred in defending
103 against the enforcement of any employee noncompetition agreement (1) if the court declines to
104 enforce a material restriction or reforms a restriction in material respect, unless (i) the specific
105 rejected or reformed restriction is presumptively reasonable as set forth above or (ii) the
106 agreement is a garden leave clause; or (2) if the court finds the employer to have acted in bad
107 faith in connection with the enforcement of the employee noncompetition agreement. The
108 entitlement to legal fees shall also apply to an employee who commences a lawsuit challenging
109 his or her employee noncompetition agreement, provided that at least two business days prior to
110 the filing of such lawsuit, the employee provided the former employer with specific measures that
111 the employee would take to protect the employer's legitimate business interests, which measures
112 are substantially adopted by a court as part of a hearing on preliminary injunctive relief. The
113 entitlement to legal fees shall apply regardless of whether the employee pays the legal fees him or
114 herself or if they are paid by another person or entity. A court may award attorneys' fees and
115 costs at any time during the proceedings, including as part of a decision in connection with a
116 preliminary injunction motion. Any such award of fees and costs shall be immediately due and
117 payable to the employee. A court may require the employer, at any point, to post a bond or
118 multiple bonds to cover any anticipated fees and costs.
- 119 (f) A court may award the former employer its reasonable attorneys' fees and costs permitted by
120 contract or statute only if (1) the employee noncompetition agreement was presumptively

121 reasonable in duration, geographic reach, and scope or proscribed activities; (2) the employee
122 noncompetition agreement was enforced by the court without substantial modification; and (3)
123 the court finds that the employee engaged in bad faith conduct.

124 (g) The substantive, procedural, and remedial rights provided in this section are not subject to waiver.

125 (h) Except as expressly provided by this section, a person defending against or otherwise opposing
126 the enforcement of an employee noncompetition agreement, including by way of challenging the
127 waiver of a substantive, procedural, or remedial right provided in this section, shall not be subject
128 to any contractual penalty, requirement to indemnify, tender back, or any other disadvantage
129 imposed as a consequence of such defense or opposition, and shall continue to be entitled to the
130 rest of the benefits flowing from the contract. Any contractual provision to the contrary is void.

131 (i) No choice of law provision that would have the effect of avoiding the requirements of this section
132 will be enforceable if the employee is, and has been for at least thirty days, a resident of or
133 working in Massachusetts at the time of his or her termination of employment. This provision
134 may not be avoided by an involuntary transfer of the employee out of Massachusetts.

135 (j) Forfeiture agreements otherwise permitted by law are enforceable only if and to the extent that:
136 (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is directly and
137 reasonably related to the harm caused to the employer by the employee's departure, provided that
138 such harm threatens the continued viability of the employer. Any harm that may result from
139 increased competition or the replacement of the employee is not considered harm for purposes of
140 this subsection.

141 (k) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections 12X,
142 74D, 129B, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable industry or
143 other regulation or rules.

144 (l) Nothing in this section shall expand or restrict the right of any person to protect trade secrets or
145 other confidential information by injunction or any other lawful means under other applicable
146 laws or agreements. Notwithstanding the forgoing, the inevitable disclosure doctrine is rejected
147 and shall not be utilized, although an employee who has disclosed trade secrets or other
148 confidential information belonging to his or her prior employer may be enjoined in any respect
149 that a court of competent jurisdiction deems appropriate.

150 (m) This section shall not apply to or alter existing law concerning: (1) covenants not to solicit
151 employees of the employer; (2) covenants not to solicit or transact business with customers of the
152 employer; (3) restrictive covenants made in connection with the sale of a business or the assets of
153 a business; (4) agreements by which an employee agrees to not reapply to the same employer
154 after termination of employment; or (5) the payment of wages.

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156 SECTION 2. This act may be referred to as the Noncompetition Agreement Act and shall apply to
157 employee noncompetition agreements entered into on or after January 1, 2010.