

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 NON-COMPETE 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 employment relationship under which the employee agrees to any extent that the
8 employee will not engage in activities directly or indirectly competitive with his or her employer.
9 Employee noncompetition agreements include forfeiture for competition agreements, but do not include
10 either (i) noncompetition agreements made in connection with the sale of a business, sale of assets of a
11 business, or otherwise outside of the employment relationship; (ii) forfeiture agreements; or (iii)
12 agreements by which an employee agrees to not reapply to the same employer after termination of the
13 employee.

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

18 “Forfeiture for competition agreement”: an agreement that imposes adverse financial consequences on an
19 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.

23 “Inevitable disclosure doctrine”: a doctrine by which, in the absence of an enforceable employee
24 noncompetition agreement, a former employee may be prevented from working at a competitor based on

25 the expectation that the employment would likely lead to the disclosure of a trade secret or confidential
26 information of the employer.

27 “Restricted period”: the period of time under the employee noncompetition agreement during which an
28 employee is restricted from engaging in activities competitive with his or her employer.

29 (b) To be valid, an employee noncompetition agreement must both meet the minimum requirements
30 of subsections (i) through (iii) hereof and meet, or be capable of being reformed to meet, the
31 minimum requirements in subsections (iv) through (viii) hereof.

32 (i) The agreement must be in writing and signed by the employer and employee.
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34 (ii) If the agreement is a condition of employment, the agreement together with an express
35 statement that the agreement is a condition of employment must, to the extent reasonably
36 feasible, be provided to the employee by the earlier of two weeks before the first day of
37 the employee’s employment or when any written offer of employment is sent to the
38 employee, provided that if an offer of employment is first communicated orally, the
39 employee also must either (A) simultaneously be informed that a noncompetition
40 agreement will be a condition of employment or (B) receive the required written
41 notification prior to tendering resignation from any then-current employment.
42

43 (iii) If the agreement is entered into after commencement of employment, it must be
44 supported by reasonably adequate consideration, which consideration does not include
45 the continuation of employment, and notice of the agreement must be provided at least
46 two weeks before the agreement is to be effective.
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48 (iv) The agreement must be necessary to protect one or more of the following legitimate
49 business interests of the employer: (A) trade secrets, as that term is defined in section 30
50 of chapter 266, to which the employee had access while employed; (B) confidential
51 information that otherwise would not qualify as a trade secret, including, but not limited
52 to, customer lists containing the employer’s proprietary information, product
53 development plans, product launch plans, marketing strategies, and sales plans, but only
54 to the extent that the employer has taken appropriate steps to protect such information
55 and that the employee had access to such confidential information while employed; and
56 (C) goodwill of the employer.
57

58 (v) The agreement must be reasonable in duration in relation to the interests served and the
59 duration of actual employment, and, with the exception of a garden leave clause, which
60 may have a stated term of up to two years, in no event may the stated term exceed one
61 year.
62

63 (vi) The agreement must be reasonable in geographic reach in relation to the interests served.
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65 (vii) The agreement must be reasonable in the scope of proscribed activities in relation to the
66 interests served.
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68 (viii) The agreement must be consonant with public policy.
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70 (c) To be valid for a duration of more than one year, a garden leave must provide the employee, for
71 the full restricted period and without offset for any income the employee may receive from other
72 noncompetitive activities, a minimum of the greater of: (i) compensation equal to fifty percent of

73 the employee's annual gross total compensation per annum at the time of the employee's
74 termination or (ii) \$50,000 per annum.

75
76 (d) The following restrictions are presumptively reasonable:

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78 (i) a restricted period of no more than six months;

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80 (ii) a geographic reach that is limited to only the geographic area in which the employee
81 provided services or had a material presence or influence; and

82
83 (iii) a restriction on activities that protects a legitimate business interest and is limited to only
84 the specific types of services provided by the employee within the last year of his or her
85 employment, or if the employment was for less than one year, then the specific types of
86 services provided by the employee at any time during the term of employment.

87 (e) Except as provided below in subsection (f), no employee noncompetition agreement will be
88 enforced (i) against an employee whose annual gross compensation, calculated on an annual basis
89 of the time of the employee's termination, is less than \$100,000, unless the noncompetition
90 agreement is necessary to protect trade secrets or confidential information, in which instance, the
91 noncompetition agreement will not be enforceable if the employee's annual gross compensation
92 is less than \$50,000; (ii) beyond that necessary to protect the employer's legitimate business
93 interests; or (iii) for a period exceeding one year from the date of the employee's termination,
94 except that such period may be tolled by a court if the employee's breach of the noncompetition
95 agreement was neither known to nor reasonably discoverable by the employer.

96 (f) If an employee noncompetition agreement is valid, a presumption that it is enforceable shall arise
97 in two contexts: (1) where an employee subject to a noncompetition agreement resigns and the
98 employer elects within two business days of receipt of the employee's written resignation to pay
99 the employee in conformance herewith during the restricted period; or (2) where the parties have
100 agreed in advance to a garden leave clause. Such presumption shall apply for the full term of the
101 restricted period, up to two years for a garden leave clause and up to one year for any other
102 employee noncompetition agreement, but shall apply only if (i) the noncompetition agreement or
103 garden leave clause sets forth a definitive term of the restricted period, although a tolling
104 provision will not affect the definitiveness of an otherwise definitive term; and (ii) the employer
105 agrees to provide the employee, for the full restricted period and without offset for any income
106 the employee may receive from other noncompetitive activities, a minimum of the greater of: (A)
107 compensation equal to fifty percent of the employee's annual gross total compensation per annum
108 at the time of the employee's termination or (B) \$50,000 per annum. Payment of such
109 compensation may, at the option of the employer, be made in (i) a lump sum within ten business
110 days following the termination of the employee's employment or (ii) on a pro rated basis in equal
111 bi-weekly, or more frequent, payments. This presumption of enforceability can be overcome if
112 the employee is able to prove by a preponderance of evidence that the employee noncompetition
113 agreement fails to comply with the requirements of subsection (b). If a court shortens the
114 duration of a garden leave clause or other noncompetition agreement for which the presumption
115 of enforceability is sought, the court may, in its discretion, impose a corresponding reduction on
116 the duration or amount of the required payments. An employer may not unilaterally discontinue
117 or otherwise fail or refuse to make the payments required by this subsection (f), even if the
118 employer voluntarily shortens the restricted period.

119 (g) Notwithstanding anything to the contrary in this section, a court may decline to enforce some or
120 all of the restrictions in an otherwise enforceable employee noncompetition agreement (1) in

121 extraordinary circumstances; (2) where the employee was terminated by the employer after a term
122 of employment shorter than the restricted period; (3) where otherwise necessary to prevent
123 injustice or an unduly harsh result; or (4) based on any other recognized legal or equitable
124 defense.

125 (h) A court shall award the employee reasonable attorneys' fees and costs incurred in defending
126 against the enforcement of any employee noncompetition agreement (1) that the court determines
127 to be grossly over reaching; or (2) the restrictions of which are reformed or found unenforceable
128 in any material respect, unless (i) the reformed aspects of the agreement were presumptively
129 reasonable under subsection (d) above or (ii) the agreement is a garden leave clause that complies
130 with subsection (f) above; or (3) if the court finds the employer to have acted in bad faith in
131 connection with the enforcement of an employee noncompetition agreement. A court may award
132 attorneys' fees and costs at any time during the proceedings, including as part of a decision in
133 connection with a preliminary injunction motion, and as often as the court deems necessary to
134 protect the employee. Any such award of fees and costs shall be immediately due and payable to
135 the employee. A court may require the employer, at any point, to post a bond or multiple bonds
136 to cover any anticipated fees and costs.

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

141 (j) A person challenging an employee noncompetition agreement shall be deemed to be defending
142 against enforcement of the noncompetition agreement within the meaning of subsection (h) above
143 and shall not be subject to any contractual penalty, requirement to indemnify, tender back, or any
144 other disadvantage and shall continue to be entitled to the rest of the benefits flowing from the
145 contract. Any contractual provision to the contrary is void.

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

152 (l) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections 12X,
153 74D, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable industry or other
154 regulation or rules.

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

161 (n) This section shall not apply to or alter existing law concerning: (1) covenants not to solicit
162 employees of the employer; (2) covenants not to solicit or transact business with customers of the
163 employer; (3) restrictive covenants made in connection with the sale of a business or the assets of
164 a business; or (4) agreements by which an employee agrees to not reapply to the same employer
165 after termination of employment.

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167 SECTION 2. This act shall apply to employee noncompetition agreements entered into on or after January
168 1, 2010.