

HOUSE No. 4607

The Commonwealth of Massachusetts

By Ms. Coakley-Rivera of Springfield, for the committee on Labor and Workforce Development, on House, Nos. 1794 and 1799, a Bill relative to noncompetition agreements (House, No.). April 7, 2010.

FOR THE COMMITTEE:

NAME:	DISTRICT/ADDRESS:
Cheryl A. Coakley-Rivera	10th Hampden

The Commonwealth of Massachusetts

In the Year Two Thousand and Ten

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:

SECTION 1. Chapter 149 of the General Laws, as appearing in the 2008 Official Edition is hereby amended by inserting after section 24K the following section:-

Section 24L. (a) As used in this section, the following words shall have the following meanings: “Employee”, an individual who is considered an employee under section 148B of chapter 149 of the General Laws.

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

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

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

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

“Restricted period”, the period of time after employment during which an employee is restricted by an employee noncompetition agreement from engaging in activities competitive with his or her employer.

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

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

- (ii) The agreement must apply only to an employee whose average annualized federal gross income derived from the employer during the 3 years immediately prior to the employee's cessation of employment, or such shorter period if the employment was for less than 3 years, is greater than \$75,000 plus \$1,500 for each full year from the effective date of this section.
 - (iii) If the agreement is a condition of employment, the agreement together with an express statement that the agreement is a condition of employment must, to the extent reasonably feasible, be provided to the employee by the earlier of 7 business days before the commencement of the employee's employment or when any written offer of employment is first sent to the employee, provided that if an offer of employment is first communicated orally, the employee also must either: (A) simultaneously be informed that a noncompetition agreement will be a condition of employment or (B) receive the required written notification prior to tendering resignation from any then-current employment.
 - (iv) If the agreement is entered into after commencement of employment, it must be supported by reasonably adequate consideration, which consideration does not include the continuation of employment, and notice of the agreement must be provided at least 2 weeks before the agreement is to be effective. Consideration in the amount of 10 percent or more of the employee's then current annual compensation will be deemed presumptively reasonably adequate.
 - (v) The agreement must be necessary to protect 1 or more of the following legitimate business interests of the employer: (A) the employer's trade secrets, as that term is defined in section 30 of chapter 266, to which the employee had access while employed; (B) the employer's confidential information that otherwise would not qualify as a trade secret; and (C) the employer's goodwill.
 - (vi) The agreement must be reasonable in duration in relation to the interests served and the duration of actual employment, and in no event may the stated term exceed 1 year from the date of cessation of employment. A stated restricted period of no more than 6 months is presumptively reasonable. An agreement may permit the restricted period to be tolled by a court if the employee's breach of the employee noncompetition agreement was neither known to nor reasonably discoverable by the employer. Such tolling period will not count for purposes of the temporal standards specified herein.
 - (vii) The agreement must be reasonable in geographic reach in relation to the interests served. A geographic reach that is limited to only the geographic area in which the employee provided services or had a material presence or influence is presumptively reasonable.
 - (viii) The agreement must be reasonable in the scope of proscribed activities in relation to the interests served. A restriction on activities that protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during no more than the last 2 years of employment is presumptively reasonable.
 - (ix) The agreement must be consonant with public policy.
- (c) Notwithstanding anything to the contrary in this section, a court may, in its discretion, reform an employee noncompetition agreement so as to render it valid and enforceable.

- (d) Notwithstanding anything to the contrary in this section, a court may decline to enforce some or all of the restrictions in an otherwise valid and enforceable employee noncompetition agreement: (1) in extraordinary circumstances; (2) where otherwise necessary to prevent injustice or an unduly harsh result; or (3) based on any other common law or statutory legal or equitable defense or doctrine, or on other equitable factors that would militate against enforcement.
- (e) A court shall award the employee reasonable attorneys' fees and costs incurred in defending against the enforcement of any employee noncompetition agreement: (1) if the court declines to enforce a material restriction or reforms a restriction in material respect, unless the specific rejected or reformed restriction is presumptively reasonable as set forth above; or (2) if the court finds the employer to have acted in bad faith in connection with the enforcement of the employee noncompetition agreement. The entitlement to legal fees shall also apply to an employee who commences a lawsuit challenging his or her employee noncompetition agreement, provided that at least 2 business days prior to the filing of such lawsuit, the employee provided the former employer with specific measures that the employee would take to protect the employer's legitimate business interests, which measures are substantially adopted by a court as part of a hearing on preliminary injunctive relief. The entitlement to legal fees shall apply regardless of whether the employee pays the legal fees him or herself or if they are paid by another person or entity. A court may award attorneys' fees and costs at any time during the proceedings, including as part of a decision in connection with a preliminary injunction motion. Any such award of fees and costs shall be immediately due and payable to the employee. A court may require the employer, at any point, to post a bond or multiple bonds to cover any anticipated fees and costs.
- (f) A court may award the former employer its reasonable attorneys' fees and costs permitted by contract or statute only if: (1) the employee noncompetition agreement was presumptively reasonable in duration, geographic reach, and scope of proscribed activities; (2) the employee noncompetition agreement was enforced by the court without substantial modification; and (3) the court finds that the employee engaged in bad faith conduct.
- (g) The substantive, procedural, and remedial rights provided to the employee in this section are not subject to advance waiver.
- (h) Except as expressly provided by this section, a person defending against or otherwise opposing the enforcement of an employee noncompetition agreement, including by way of challenging the waiver of a substantive, procedural or remedial right provided in this section, shall not be subject to any contractual penalty, requirement to indemnify, tender back or any other disadvantage imposed as a consequence of such defense or opposition, and shall continue to be entitled to the rest of the benefits flowing from the contract. Any contractual provision to the contrary is void.
- (i) No choice of law provision that would have the effect of avoiding the requirements of this section will be enforceable if the employee is, and has been for at least 30 days, a resident of or working in Massachusetts at the time of his or her termination of employment. This provision may not be avoided by an involuntary transfer of the employee out of Massachusetts.
- (j) Forfeiture agreements otherwise permitted by law are enforceable only if and to the extent that: (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is directly and reasonably related to the harm caused to the employer by the employee's departure, provided that such harm threatens the continued viability of the employer. Any harm that may result from increased competition or the replacement of the employee is not considered harm for purposes of this subsection.
- (k) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections 12X, 74D, 129B, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable industry or other regulation or rules.
- (l) Nothing in this section shall expand or restrict the right of any person to protect trade secrets or other confidential information by injunction or any other lawful means under other applicable laws or agreements. Notwithstanding the forgoing, the inevitable disclosure doctrine is rejected and shall not be utilized, although an employee who has disclosed trade secrets or other

confidential information belonging to his or her prior employer may be enjoined in any respect that a court of competent jurisdiction deems appropriate.

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

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