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**BREACH OF NONCOMPETITION AGREEMENT BY A FORMER EMPLOYEE
(FOR NON-COMPETE AGREEMENTS EXECUTED AFTER SEPTEMBER 30, 2018).¹**

Non-Competition Agreement

PLF claims that DFT broke an agreement not to compete against PLF once DFT no longer worked there.

To prove that DFT violated the parties' noncompetition agreement, PLF must prove that each of the following six [five, four] things is more probably true than not true:

1. < ***Only if contested.***> DFT was not entitled to overtime pay.
2. PLF terminated DFT's employment for cause.
3. < ***Only if contested.***> PLF and DFT had a written noncompetition agreement that met certain legal requirements, that I will explain in a minute;
4. The agreement had a reasonably limited time and scope, and was consistent with the public interest.
5. DFT violated a part of the agreement that was necessary to protect PLF's legitimate business interest; and
6. DFT's breach of the agreement caused harm to PLF.

I will now describe these matters in more detail.

¹ See "Massachusetts Noncompetition Agreement Act," G.L. c. 149, sec. 24L, which took effect October 1, 2018. The statute is not retroactive. This model instruction is limited to post-2018 employment noncompetition agreements.

(a) Exempt Employee

< *Only if contested.*> First, PLF must prove that, given the nature of his/her job, DFT was not entitled to overtime pay. PLF may not enforce a Noncompetition Agreement against an employee who was eligible for overtime pay².

< *Insert appropriate instruction for claimed category of exemption from overtime pay from Appendix A, below*>

(b) Reason for Employment Termination

First (second) PLF must prove that it did not lay DFT off without cause. PLF may do this in one of two ways.

One way is for PLF to prove that it terminated DFT's employment for cause—such as for some sort of misconduct or violation of PLF's workplace rules or policies. PLF may terminate an employee for cause for any reason that is reasonably related, in PLF's judgment, to the needs of his/her/its business.³

The other way is for PLF to prove DFT voluntarily quit his/her employment⁴.

² In many cases, there may be no jury issue as to a DFT's status as exempt or non-exempt, either because the parties stipulate to the DFT's status or the issue has been resolved on a motion for partial summary judgment. But some of the FLSA exemptions could raise factual issues that the jury would need to resolve, such as whether the DFT qualifies as an executive, administrative, professional, or outside sales employee. For information on the FLSA exemption from minimum wage and overtime payment, see Section 13(a)(1) of the FLSA and 29 C.F.R. Part 541. Note that an employer's reduction in force is tantamount to a lay-off and, hence, does not constitute termination for just cause.

³ *Flomenbaum v. Commonwealth*, 451 Mass. 740, 746 (2008), quoting *G & M Employment Serv., Inc. v. Commonwealth*, 358 Mass. 430, 435 (1970).

⁴ Noncompetition agreements may not be enforced in circumstances where the employee can prove constructive discharge. See Model instruction on Constructive Discharge of Employment.

(c) Compliance with Statutory Form and Timing

< ***Only if contested.***> Second [third], PLF must prove that the agreement complied with the following legal requirements. < ***Instruct only on those that apply and are contested.***>

- PLF must show that it provided DFT with a written noncompetition agreement at least ten business days [before it was to take effect] [or] [before the start of DFT's employment with PLF] [***If both may apply.*** ", whichever is earlier"].
- PLF must show the agreement expressly stated that DFT had the right to seek the advice of legal counsel before signing.
- PLF must show that it and DFT signed the agreement;
- PLF must show the agreement provided for DFT to receive a benefit in return for agreeing to it. So, PLF cannot enforce the noncompetition agreement unless the DFT received a benefit in exchange for entering into the agreement. PLF must have offered that benefit to DFT at the time [he/she] entered into the agreement, and PLF must have accepted the benefit at that time.

(d) Consideration

Third [fourth], [If DFT was a new employee when entering into the noncompetition agreement] The noncompetition agreement must include what is known as a "garden leave" clause or other consideration the PLF and DFT agreed upon. "Garden leave" is a period of time after employment ends when an employee cannot compete but continues to be paid at least 50 percent of his/her prior salary.

[For current DFTs asked to sign noncompetition agreements during the pendency of their employment.] Continued employment by DFT, by itself, is not enough to support a noncompetition agreement. There must be a garden leave clause or other agreed benefit that the PLF and DFT included in the noncompetition agreement.

(e) Reasonable Limitations on Scope and Time and Consistent with the Public Interest

Fifth [sixth], PLF must prove two things about the agreement < *Instruct only on contested elements.*> First, that the agreement had a reasonably limited time and scope and, second, that the agreement was consistent with the public interest.⁵

As to the First thing, the law gives you guidance about what limitations in time and scope are reasonable:

- The term of the agreement must be twelve months or less [unless you find that DFT breached a fiduciary duty or took property belonging to PLF without permission, in which case the restriction extends to two years];
- You may assume that the geographic area covered by the noncompetition agreement was reasonable if it the agreement affects only the geographic areas in which DFT provided services or had a significant presence during his/her last two years of employment; and
- You may assume that the scope of prohibited activities is reasonable if it affects only those types of services DFT provided during his/her last two years of employment.

(f) Legitimate Business Interest

Next, PLF must prove that it has a legitimate business interest in enforcing the agreement. PLF may enforce his/her/its noncompetition agreement only to the extent necessary to protect PLF's legitimate business interests.⁶

⁵ See, e.g., *Boullanger v. Dunkin Donuts, Inc.*, 442 Mass. 635, 639, 646 (2004). Whether a noncompetition agreement obstructs public interest is a question of fact. See *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 102-103 (1979); *All Stainless, Inc. v. Colby*, 364 Mass. 773, 781 n. 2 (1974); *Economy Grocery Stores, Corp. v. McMenemy*, 290 Mass. 549, 553 (1935); *Sherman v. Pfefferkorn*, 241 Mass. 468, 474-475 (1922).

⁶ See, *Id.*; see also *Get in Shape Franchise, Inc. v. TFL Fishers, LLC*, 167 F. Supp. 3d 173, 198-99 (D. Mass. 2016).

So, as to this legitimate business interest requirement, PLF must prove two things:

- that the agreement protected PLF's legitimate business interests in some way; and
- that DFT violated a provision of the agreement that was necessary to protect PLF's legitimate business interests.

An employer has a legitimate business interest in protecting its goodwill, trade secret information and confidential business information. However, employers, such as PLF, do not have a legitimate business interest in protecting themselves from ordinary competition. PLF cannot enforce a noncompetition agreement designed solely for that purpose.

Let me explain in greater detail when an employer has a legitimate business reason to protect goodwill, trade secret information and confidential business information. < *Instruct only on what is applicable.* >

PLF may show that it needed to prevent DFT from using PLF's goodwill for[himself/herself] [or for a competitor]. Goodwill is an employer's favorable reputation in the eyes of its customers and potential customers.

PLF may show that it needed to protect any trade secret information to which DFT had access during the period of [his/her] employment, and to prevent DFT from disclosing that information to third parties. A "trade secret" means information such as < *as applicable* > a formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data. A trade secret provides actual or potential economic advantage to an employer, such as PLF, to the extent it is secret. PLF must show that at the time it claims DFT took PLF's trade

secret, that PLF was protecting the trade secret from being disclosed without PLF's consent.⁷

Or PLF may show that it needed to protect any other confidential business information to which DFT had access to during [his/her] employment from disclosure to third parties. Confidential information may consist of customer or supplier lists, marketing studies and strategies, future plans for expansion, or new merchandising techniques. The employer must at all times have treated the information as confidential and protected it from disclosure.⁸

In determining whether particular information qualifies as a trade secret or other confidential business information, you should consider:

- the extent to which the information is already known outside the PLF's business;
- the extent to which employees within PLF's business know the information;
- the nature and extent of measures PLF took to guard the secrecy of the information;
- the value of the information to PLF and to its competitors;
- the amount of effort or money PLF expended in developing the information; and
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

(g) Causation

Finally, PLF must show it is more probably true than not true that DFT's violation of the agreement caused it to suffer harm.

⁷ See G.L. c. 93, § 42(4)

⁸ *USM Corp. v. Marson Fastener Corp.*, 379 Mass. 90, 97 (1979); *but see Boulanger v. Dunkin Donuts Inc.*, 442 Mass. 635, 642 (2004).

(h) Harm

If the PLF is entitled to recover on [his/her/its] claim of violation of a postemployment noncompetition agreement, you may award the PLF damages for the profits [he/she/it] has lost, if any, as a result of DFT's acts.⁹ In determining the amount of any such award for lost profits, first, determine the amount of sales PLF would have achieved but for the DFT's competition with PLF. Then, deduct any costs and expenses that you find that the PLF would have incurred in making those sales.

(i) Contract Defenses

See Model Instruction on Contract Defenses

Appendix A—Overtime Exemption Instructions

< If there is a dispute as to whether DFT is exempt from overtime, insert the appropriate instruction from the following list into the first element above.>

(1) Executive Employee Exemption Claim

To qualify for the executive employee exemption, PLF must prove the following things are more probably true than not true:

- The DFT was paid on a salary basis at a rate not less than \$684 per week¹⁰;
- The DFT's primary responsibility was to manage PLF's business;
- The DFT regularly directed the work of at least two or more other full-time employees or their equivalent; and
- The DFT had the authority to hire or fire other employees, or to make suggestions and recommendations to which PLF gave

⁹ See, e.g., *Mailman's Steam Carpet Cleaning Corp. v. Lizotte*, 415 Mass. 86, 869 (1993); see also *Frank D. Wayne Assocs., Inc. v. Lussier*, 16 Mass. App. Ct. 986, 988 (1983).

¹⁰ This amount is the threshold as of January 1, 2022. Check the Department of Labor website to determine if the threshold amount has changed.

particular weight as to the hiring, firing, advancement, promotion or any other change of status of other employees.

(2) Administrative Employee Exemption Claim

To qualify for the administrative employee exemption, PLF must prove the following things are more probably true than not true:

- The DFT was compensated on a salary or fee basis at a rate not less than \$684 per week;
- The DFT's primary duty was to perform office or non-manual work directly related to the management or general business operations of PLF or PLF's customers; and
- The DFT's primary duty involved the exercise of discretion and independent judgment with respect to matters of significance.

(3) Professional Employee Exemption Claim

To qualify for the professional employee exemption, PLF must prove the following things are more probably true than not true:

- The DFT was compensated on a salary or fee basis at a rate not less than \$684 per week;
- The DFT's primary duty was to perform work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the regular exercise of discretion and judgment;
- The advanced knowledge was in a field of science or learning; and
- The advanced knowledge is customarily acquired through a lengthy course of specialized intellectual instruction.

(4) Creative Employee Exemption Claim

To qualify for the creative employee exemption, PLF must prove the following things are more probably true than not true:

- The DFT was compensated on a salary or fee basis (at a rate not less than \$684 per week; and

- The DFT's primary duty was to perform work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(5) Computer Employee Exemption Claim

To qualify for the computer employee exemption, PLF must prove the following things are more probably true than not true:

- The DFT was compensated either on a salary or fee basis at a rate not less than \$684 per week or, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The DFT was employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The DFT's primary duty consisted of: a) The application of systems analysis techniques; b) The design, development, creation, testing or modification of computer systems or programs; or 4) A combination of the aforementioned duties.

(6) Outside Sales Exemption Claim

To qualify for the outside sales exemption, PLF must prove the following things are more probably true than not true:

- The DFT's primary duty was making sales¹¹ or obtaining orders or contracts for services; and
- The DFT customarily and regularly worked away from the employer's place or places of business.

¹¹ See Section 13(a)(1) of the FLSA, 29 C.F.R. Part 541.