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**BREACH OF NONCOMPETITION AGREEMENT BY A FORMER EMPLOYEE
(FOR NON-COMPETE AGREEMENTS EXECUTED BEFORE OCTOBER 1, 2018)¹**

Non-Competition Agreement

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

To prove breach of a noncompetition agreement, PLF must prove that each of the following four things is more probably true than not true:

1. DFT entered into a noncompetition agreement that met certain legal requirements that I will explain in a minute;
2. The agreement had a reasonably limited time and scope, and was consistent with the public interest;
3. DFT violated a part of the agreement that was necessary to protect PLF's legitimate business interest; and
4. DFT's violation of the agreement caused harm to PLF. Sometimes, the lawyers or I will use the phrase "breach of the agreement," which means the same thing as violation of the agreement.²

I will now describe these matters in more detail.

(a) Entered Into an Agreement

PLF may not enforce the noncompetition agreement unless the DFT received something of value in return for entering into the agreement. You may find that DFT received value if [he/she] received a job offer because

¹ This model instruction is limited to employment noncompetition agreements that were entered into before October 1, 2018. Such agreements entered into on or after October 1, 2018, are governed by the "Massachusetts Noncompetition Agreement Act," G.L. c. 149, § 24L; a separate model instruction applies to such agreements.

² See generally *Boulangerv. Dunkin Donuts, Inc.*, 442 Mass. 635, 639 (2004); *Analogic Corp. v. Data Translation, Inc.*, 371 Mass. 643, 647 (1976); *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287 (1974). See also *Struck v. Plymouth Mortgage Co.*, 414 Mass. 118, 122 (1993).

[he/she] was willing to sign the agreement or that DFT continued to employ PLF in exchange for PLF signing the agreement. The amount of the value is not important as long as DFT received some value, even if relatively small.

In addition, the value must result from a bargain between PLF and DFT. A bargain occurred if PLF offered the value to DFT at the time he/she entered into the agreement, and [he/she] accepted it at that time.

When people bargain for something of value, there must be an offer by one and an acceptance by the other. The offer and acceptance does not need to be written. It may be oral. You may also conclude there was an offer and acceptance from the parties' conduct at the time that DFT entered into the agreement.

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

In addition, a postemployment noncompetition agreement is not enforceable against an employee unless you find that the agreement was reasonable in time and scope and consistent with the public interest.³ What is reasonable depends upon the facts of each case.⁴ Generally speaking, a geographic restriction is reasonable so long as it restricts a former employee from doing business in a specific market or markets in which the PLF conducts business.⁵ Determining whether a time-based restriction is

³ See *Boulanger*, supra at 639.

⁴ See *Marine Contractors Co. v. Hurley*, 365 Mass. 280, 287 (1974) (“[W]hat is reasonable depends on the facts of each case.”); see also *Fraelick v. Perrett PR, Inc.*, 83 Mass. App. Ct. 698, 709 (2013) (citing another case for this same proposition).

⁵ See, e.g., *All Stainless, Inc. v. Colby*, 364 Mass. 773, 779–80 (1974); see also *Kroeger v. Stop & Shop Cos.*, 13 Mass. App. Ct. 310, 317 (1982) (observing that “[r]estraints upon the competitive activity of a key executive may range beyond the precise geographical area of activity at the time of the employee’s departure”).

reasonable requires you to consider factors such as PLF's industry and DFT's role while employed with the PLF.⁶

(c) Legitimate Business Interest

Next, PLF must prove that [he/she/it] has a legitimate business interest in enforcing the agreement. PLF may enforce this noncompetition agreement only to the extent necessary to protect PLF's legitimate business interests.⁷ In order for PLF to show this, PLF must prove that:

- the agreement protected [his/her/its] legitimate business interests in some way; and
- 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. Employers, such as PLF, however, do not have a legitimate business interest in protecting themselves from ordinary competition. PLF cannot enforce a noncompetition agreement designed solely for that purpose. For example, Coca-Cola may have a legitimate business interest in protecting its secret recipe for its cola soft drink, but not in protecting itself from competition from other cola soft drink manufacturers.

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 [he/she/it] needed to prevent DFT from using PLF's goodwill for [himself/herself] [or for a competitor]. Goodwill is an

⁶ Compare *Blackwell v. E.M. Helides, Jr., Inc.*, 368 Mass. 225, 229 (1975), and *Novelty Bias Binding Co. v. Shervin*, 342 Mass. 714, 718 (1961), and *Kroeger* supra at 318.

⁷ See, e.g., *Boulangerv. Dunkin Donuts, Inc.*, 442 Mass. 635, 639 (2004); see also *Get in Shape Franchise, Inc. v. TFL Fishers, LLC*, 167 F. Supp. 3d 173, 198–99 (D. Mass. 2016).

employer's favorable reputation in the eyes of its customers and potential customers.

PLF may show that [he/she/it] needed to protect any trade secret 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 a [INSTRUCT ONLY ON WHAT IS APPLICABLE] formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data]. A trade secret gives actual or potential economic advantage to an employer, such as PLF, to the extent it is secret. PLF must show that PLF was protecting the trade secret from being disclosed without PLF's consent at the time [he/she/it] claims DFT took [his/her/its] trade secret;⁸ or

PLF may show that [he/she/it] needed to protect any other confidential business information to which DFT had access to during [his/her] employment. 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.⁹

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

- How widely do people outside PLF's business already know the information?
- To what extent do PLF's employees know the information?
- What did PLF do to keep the information secret?

⁸ See G.L. c. 93, § 42(4).

⁹ *USM Corp. v. Marson Fastener Corp.*, 379 Mass. 90, 97 (1979) (But see *Boulangerv. Dunkin Donuts Inc.*, 442 Mass. 635, 642 (2004)).

- How valuable was the information to PLF and [his/her/its] competitors?
- How much money and effort did PLF expend to develop the information?
- How easily could other people develop or properly acquire the information?

(d) 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.¹⁰ 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.

(e) Contract Defenses

See Model Instruction on Contract Defenses.

¹⁰ 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).