

Critique of House Bill 2296, "An act relative to the prohibition of noncompetition agreements." Sponsoring Legislator: Harrington –R (Groton).

This proposed law provides in pertinent part:

"Except as provided in this section, any contract that serves to restrict an employee or former employee from engaging in a lawful profession, trade, or business of any kind is deemed unlawful."

The broad language of this proscription would in effect do away with all types of postemployment restrictive covenants, including non-solicitation, anti-piracy and non-compete agreements. It would clearly result in a sea change of the existing Massachusetts law in this area. If enacted as law, this simple sentence would effectively abrogate any post-employment restrictions which an employee may argue tends to hamper his or her ability to work outside the confines of present employment.

The language is broad enough to make unlawful even non-solicitation covenants which are meant to protect a business owner's customers/goodwill from departing salespersons. Thus, salespersons that may have either been handling certain customers for a former employer, or otherwise learned the identities of customers through their previous employment, would be free to solicit said customers after their employment terminates.

One could easily argue that this language also prohibits any type of agreement which would restrict a former employee's pilfering of key employees from his or her former employer. The former employee could argue that he or she could not continue in a certain profession without the assistance of, for example, key personnel that they may have trained at their former employer's place of business.

This language would clearly prohibit any type of post-employment non-competition covenants. As a result, even the protection one would expect to realize from a nondisclosure agreement would be greatly diminished. Employers would simply not be able to prohibit key personnel and/or salespeople and the like from working for direct competitors in the same or very similar positions.

The only exceptions are:

- (1) Circumstances involving the selling of the good will or substantially all the operating assets of a company. The seller can agree with the buyer "to refrain from carrying on a similar business within the specified geographic area in which the business is sold," as long as the buyer carries out a similar business within the specified geographic area in which the business is sold.
- (2) Dissolution of a partnership or dissociation of a partner from a partnership as long as the remaining partnership is carrying on a like business in the same geographic area.

- (3) Dissolution of a limit liability company as long as the former members may be competing in the same geographic area.

The law does not serve to limit the creation or application of nondisclosure agreements.

The exceptions are extremely narrow and clearly indicate an intent to do away with any type of postemployment restrictions *vis-à-vis* ongoing business operations.

This proposed amendment to Chapter 149 of the General Laws would be even more detrimental to business owners or operators than those provisions of HO2293, an Act relative to noncompetition agreements.

Interestingly both bills are currently pending before the same committee i.e. the Joint Committee on Labor and Workforce Development of the Massachusetts House. The text of both bills is attached hereto.

Consideration of both of these bills in essence establishes a "Hobson's choice" of sorts for business interests in the state.



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H02296 Filed By: <u>Harrington</u>	An Act relative to the prohibition of noncompetition agreements By Ms. Harrington of Groton, a petition (accompanied by bill, House, No. 2296) of Provost and Harrington relative to the prohibition of noncompetition business agreements Joint Committee on Labor and Workforce Development.	<i>(NEW)</i>	
H02293 Filed By: <u>Ehrlich</u> <u>Brownsberger</u>	An Act relative to noncompetition agreements By Representatives Ms. Ehrlich of Marblehead and Mr. Brownsberger, a petition (accompanied by bill, House, No. 2293) of DiNatale and others relative to employment agreements concerning engaging in activities directly or indirectly competitive with the employer Joint Committee on Labor and Workforce Development.	<i>(one we have been watching)</i>	
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Bill H02296

Sponsors, Sheia Harrington

Bill text

SECTION 1. Chapter 149 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by adding, after section 24K, the following new section: "Section 24I. (a) As used in this section, the following words shall have the following meanings: "Business entity", any (a) partnership, including a limited partnership or a limited liability partnership, (b) limited liability company, or, (c) corporation. "Owner of a business entity", any (a) partner, in the case of a business entity that is a partnership, or, (b) member, in the case of a business entity that is a limited liability company, or, (c) any owner of capital stock, in the case of a business entity that is a corporation. "Ownership interest", a (a) partnership interest, in the case of a business entity that is a partnership, including a limited partnership or a limited liability partnership, or, (b) membership interest, in the case of a business entity that is a limited liability company, or, (c) capital stockholder, in the case of a business entity that is a corporation. "Subsidiary", any business entity over which the selling business entity has voting control, or from which the selling business entity has a right to receive a majority share of distributions upon dissolution or other liquidation of the business entity, or has both voting control and a right to receive these distributions. (b) Except as provided in this section, any contract that serves to restrict an employee or former employee from engaging in a lawful profession, trade, or business of any kind is deemed unlawful. (c) Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, or; (b) all or substantially of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or; (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein. (d) In the case of a dissolution of partnership or a dissociation of the partner from the partnership, any partner may, upon or in anticipation, agree to refrain from carrying on a similar business within a specified geographic area where the partnership business has been transacted, so long as any other member of the partnership, or any person deriving title to the business or its goodwill from any such other member of the partnership, carries on a like business therein. (e) In the case of a dissolution of a limited liability company, any member may, upon or in anticipation of the termination of his interest in the limited liability company, agree to refrain from carrying on a similar business within a specified geographic area where the limited liability company business has been transacted, so long as any other member of the limited liability company, or any person deriving title to the business or its goodwill from any such other member of the limited liability company, carries on a like business therein. (f) Nothing in this section shall serve to limit the creation or application of non-disclosure agreements intended to prohibit the sharing of certain information, including but not limited to, trade secrets, and proprietary or confidential information. "

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HOUSE No. xxxxx

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The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

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
- 2 hereby 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,
- 5 section 148B.
- 6 “Employee noncompetition agreement”: an agreement between an employer and employee, or
- 7 otherwise arising out of an actual or expected employment relationship, under which the
- 8 employee or expected employee agrees to any extent that he or she will not engage in activities

9 directly or indirectly competitive with his or her employer after the employment relationship has
10 been severed. Employee noncompetition agreements include forfeiture for competition
11 agreements, but do not include (i) covenants not to solicit or hire employees of the employer; (ii)
12 covenants not to solicit or transact business with customers of the employer; (iii) noncompetition
13 agreements made in connection with the sale of a business or substantially all of the assets of a
14 business, when the party restricted by the noncompetition agreement is an owner of the business
15 who received consideration for the sale; (iv) noncompetition agreements outside of an
16 employment relationship; (v) forfeiture agreements; or (iii) agreements by which an employee
17 agrees to not reapply for employment to the same employer after termination of the employee.

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

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

25 “Garden leave clause”: a type of employee noncompetition agreement by which an employer
26 agrees to pay the employee during the restricted period. To constitute a garden leave clause
27 within the meaning of this section, an employee noncompetition agreement must (a) have a
28 restricted period of no more than two years from the date of cessation of employment; (b) for the
29 full restricted period on a pro rated, per annum basis and without offset for any income the
30 employee may receive from other unrestricted activities, the greater of: (i) fifty percent of the

31 employee's highest annualized base salary paid by the employer within the two years preceding
32 the employee's termination or (ii) \$35,000 (together with an additional \$700 for each full year
33 from the effective date of this section); (c) require either that the payments are to be made in a
34 lump sum within ten business days following the cessation of the employee's employment or that
35 the payments are to be made on a pro rata basis in equal bi-weekly, or more frequent, payments
36 starting immediately after the cessation of the employee's employment; and (d) not permit an
37 employer to unilaterally discontinue or otherwise fail or refuse to make the payments, even if the
38 employer voluntarily shortens the restricted period.

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

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

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

49 (i) The agreement must be in writing and signed by both the employer and employee.

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

59

60 (iii) If the agreement is entered into after commencement of employment, it must be
61 supported by fair and reasonable consideration in addition to the continuation of employment,
62 and notice of the agreement must be provided at least two weeks before the agreement is to be
63 effective.

64

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

70

71 (v) The agreement must be reasonable in duration in relation to the interests protected and
72 the duration of actual employment, and, with the exception of a garden leave clause, in no event
73 may the stated restricted period exceed one year from the date of cessation of employment. A
74 stated restricted period of no more than six months is presumptively reasonable. An agreement
75 may permit the restricted period to be tolled by a court if the employee's breach of the employee
76 noncompetition agreement was neither known to nor reasonably discoverable by the employer.
77 Such tolling period will not count for purposes of the temporal standards specified herein.

78

79 (vi) The agreement must be reasonable in geographic reach in relation to the interests
80 protected. A geographic reach that is limited to only the geographic area in which the employee,
81 during any time within the last two years of employment, provided services or had a material
82 presence or influence is presumptively reasonable.

83

84 (vii) The agreement must be reasonable in the scope of proscribed activities in relation to the
85 interests protected. A restriction on activities that protects a legitimate business interest and is
86 limited to only the specific types of services provided by the employee at any time during the last
87 two years of employment is presumptively reasonable.

88

89 (viii) The agreement must be consonant with public policy.

90

91 (c) Notwithstanding anything to the contrary in this section, a court may, in its discretion,
92 reform an employee noncompetition agreement so as to render it valid and enforceable. If a
93 court shortens the duration of a garden leave clause, the court may, in its discretion, impose a pro
94 rata reduction on the duration or amount of the required payments.

95 (d) Notwithstanding anything to the contrary in this section, a court may decline to enforce
96 some or all of the restrictions in an otherwise valid and enforceable employee noncompetition
97 agreement (1) in extraordinary circumstances; (2) where otherwise necessary to prevent injustice
98 or an unduly harsh result; or (3) based on any other common law or statutory legal or equitable
99 defense or doctrine, or on other equitable factors that would militate against enforcement. In
100 assessing whether to enforce some or all of the restrictions, the court shall take into account the
101 economic circumstances of, and economic impact on, the restricted party.

102 (e) A court shall award the employee reasonable attorneys' fees and costs incurred in
103 defending against the enforcement of any employee noncompetition agreement (1) if the court
104 declines to enforce a material restriction or reforms a restriction in a substantial respect, unless
105 (i) the specific rejected or reformed restriction is presumptively reasonable as set forth above; (ii)
106 the employer made objectively reasonable efforts to draft the rejected or reformed restriction so
107 that it would be presumptively reasonable as set forth above; or (iii) the agreement is a garden
108 leave clause; or (2) if the court finds the employer to have acted in bad faith in connection with
109 the enforcement of the employee noncompetition agreement. The entitlement to legal fees shall
110 also apply to an employee who commences a lawsuit challenging his or her employee
111 noncompetition agreement, provided that at least two business days prior to the filing of such
112 lawsuit, the employee provided the former employer with specific measures that the employee
113 would take to protect the employer's legitimate business interests, which measures are

114 substantially adopted by a court as part of a hearing on preliminary injunctive relief. The
115 entitlement to legal fees shall apply regardless of whether the employee pays the legal fees
116 himself or herself or if the legal fees are paid by another person or entity. A court may award
117 attorneys' fees and costs at any time during the proceedings, including as part of a decision in
118 connection with a preliminary injunction motion. Any such award of fees and costs shall be
119 immediately due and payable to the employee. A court may require the employer, at any point,
120 to post a bond or multiple bonds to cover any anticipated fees and costs.

121 (f) A court may award the former employer some or all of its reasonable attorneys' fees and
122 costs incurred in connection with the enforcement of the employee noncompetition agreement
123 permitted by contract or statute only if (1) the employee noncompetition agreement was
124 presumptively reasonable in duration, geographic reach, and scope of proscribed activities; (2)
125 the employee noncompetition agreement was enforced by the court without substantial
126 modification; and (3) the court finds that the employee engaged in bad faith conduct.

127 (g) The substantive, procedural, and remedial rights provided to the employee in this section
128 are not subject to advance waiver.

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

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

140 (j) Forfeiture agreements otherwise permitted by law are enforceable only if and to the
141 extent that: (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is
142 directly and reasonably related to the harm caused to the employer by the employee's departure,
143 provided that such harm threatens the continued viability of the employer. Subparagraph (2) of
144 this paragraph j does not apply to incentive equity compensation plans or agreements. Any harm
145 that may result from increased competition or the replacement of the employee is not considered
146 harm for purposes of this subsection.

147 (k) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections
148 12X, 74D, 129B, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable
149 industry or other regulation or rules.

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

157 (m) This section shall not apply to or alter existing law concerning: (1) any restrictive
158 covenant other than employee noncompetition agreements and forfeiture agreements; or (2) the
159 payment of wages.

160

161 SECTION 2. This act may be referred to as the Noncompetition Agreement Act and shall apply
162 to employee noncompetition agreements entered into on or after January 1, 2012.

163