

HOUSE No. 02293

The Commonwealth of Massachusetts

PRESENTED BY:

Lori A. Ehrlich and

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 noncompetition agreements.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Lori A. Ehrlich</i>	<i>8th Essex</i>
<i>Stephen L. DiNatale</i>	<i>3rd Worcester</i>
<i>William N. Brownsberger</i>	<i>24th Middlesex</i>
<i>Michael D. Brady</i>	<i>9th Plymouth</i>
<i>Carolyn C. Dykema</i>	<i>8th Middlesex</i>
<i>Patricia D. Jehlen</i>	<i>Second Middlesex</i>
<i>Jay Kaufman</i>	<i>15th Middlesex</i>
<i>Jason M. Lewis</i>	<i>31st Middlesex</i>
<i>Alice Hanlon Peisch</i>	<i>14th Norfolk</i>
<i>Kate Hogan</i>	<i>3rd Middlesex</i>
<i>Kay Khan</i>	<i>11th Middlesex</i>

HOUSE No. 02293

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.

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.

50 (ii) If the agreement is a condition of employment, the agreement together with an express
51 statement that the agreement is a condition of employment must, to the extent reasonably
52 feasible, be provided to the employee by the earlier of seven business days before the
53 commencement of the employee's employment or when any written offer of employment is first
54 sent to the employee, provided that if an offer of employment is first communicated orally, the

55 employee also must either (A) simultaneously be informed that an employee noncompetition
56 agreement will be a condition of employment or (B) receive the required written notification
57 prior to tendering resignation from any then-current employment.

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

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

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

74 (vi) The agreement must be reasonable in geographic reach in relation to the interests
75 protected. A geographic reach that is limited to only the geographic area in which the employee,

76 during any time within the last two years of employment, provided services or had a material
77 presence or influence is presumptively reasonable.

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

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

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

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

94 (e) A court shall award the employee reasonable attorneys' fees and costs incurred in
95 defending against the enforcement of any employee noncompetition agreement (1) if the court
96 declines to enforce a material restriction or reforms a restriction in a substantial respect, unless
97 (i) the specific rejected or reformed restriction is presumptively reasonable as set forth above; (ii)

98 the employer made objectively reasonable efforts to draft the rejected or reformed restriction so
99 that it would be presumptively reasonable as set forth above; or (iii) the agreement is a garden
100 leave clause; or (2) if the court finds the employer to have acted in bad faith in connection with
101 the enforcement of the employee noncompetition agreement. The entitlement to legal fees shall
102 also apply to an employee who commences a lawsuit challenging his or her employee
103 noncompetition agreement, provided that at least two business days prior to the filing of such
104 lawsuit, the employee provided the former employer with specific measures that the employee
105 would take to protect the employer's legitimate business interests, which measures are
106 substantially adopted by a court as part of a hearing on preliminary injunctive relief. The
107 entitlement to legal fees shall apply regardless of whether the employee pays the legal fees
108 himself or herself or if the legal fees are paid by another person or entity. A court may award
109 attorneys' fees and costs at any time during the proceedings, including as part of a decision in
110 connection with a preliminary injunction motion. Any such award of fees and costs shall be
111 immediately due and payable to the employee. A court may require the employer, at any point,
112 to post a bond or multiple bonds to cover any anticipated fees and costs.

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

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

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

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

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

139 (k) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections
140 12X, 74D, 129B, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable
141 industry or other regulation or rules.

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

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

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