

HOUSE No. 1799

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act Relative to Non-Compete 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
2 is 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
4 meanings:

5 “Employee noncompetition agreement”: an agreement between an employer and
6 employee under which the employee agrees that the employee will not, whether alone, as an
7 employee of another person or entity, or in any other capacity, engage in activities directly or
8 indirectly competitive with his or her employer. Employee noncompetition agreements include
9 forfeiture for competition agreements. Employee noncompetition agreements do not include
10 noncompetition agreements made in connection with the sale of a business or otherwise outside
11 of the employment relationship.

12 “Forfeiture agreement”: an agreement that imposes adverse financial consequences on an
13 employee as a result of the termination of an employment relationship, regardless of whether the

14 employee engages in competitive activities following termination of the employment
15 relationship. Forfeiture agreements do not include forfeiture for competition agreements.

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

19 “Garden leave clause”: a type of employee noncompetition agreement by which an
20 employee is required to provide notice of resignation for a specified period before such
21 resignation becomes operative and during which time the employer may prohibit the employee
22 from engaging in activities competitive with the employer.

23 “Restricted period”: the period of time under the employee noncompetition agreement
24 during which an employee is restricted from engaging in activities competitive with his or her
25 employer.

26 (b) To be valid, an employee noncompetition agreement must meet, or be capable of
27 being reformed to meet, the following minimum requirements:

28 (i) it must be in writing;

29 (ii) if the agreement is a condition of employment, the agreement together with an
30 express statement that the agreement is a condition of employment must, to the extent reasonably
31 feasible, be provided to the employee by the earlier of two weeks before the first day of the
32 employee’s employment or when any written offer of employment is sent to the employee,
33 provided that if an offer of employment is first communicated orally, the employee also must
34 either (A) simultaneously be informed that a noncompetition agreement will be a condition of

35 employment or (B) receive the required written notification prior to tendering resignation from
36 any then-current employment;

37 if the agreement is entered into after employment, it must be supported by reasonably
38 adequate consideration, which consideration does not include the continuation of employment,
39 and notice of the agreement must be provided at least two weeks before the agreement is to be
40 effective;

41 it must be necessary to protect one or more of the following legitimate business interests
42 of the employer: (A) trade secrets, as that term is defined in section 30 of chapter 266, to which
43 the employee had access while employed; (B) confidential business information that otherwise
44 would not qualify as a trade secret, including, but not limited to, customer lists containing the
45 employer's proprietary information, product development plans, product launch plans, marketing
46 strategies, and sales plans; and (C) goodwill of the employer;

47 it must be reasonable in duration in relation to the interests served and duration of the
48 employment;

49 it must be reasonable in geographic reach;

50 it must be reasonable in the scope of proscribed activities; and

51 it must be consonant with public policy.

52 (c) No employee noncompetition agreement will be enforceable (1) against an
53 employee whose annual gross salary and commissions, calculated on an annual basis at the time
54 of the employee's termination, is less than \$100,000; (2) beyond that necessary to protect the
55 employer's legitimate business interests; or (3) for a period exceeding 2 years from the date of

56 the employee's termination, except that such period may be tolled by a court if the employee's
57 breach of the noncompetition agreement was neither known to nor reasonably discoverable by
58 the employer.

59 (d) Nothing in this section restricts the right of any person to protect trade secrets or
60 other proprietary information by injunction or any other lawful means under other applicable
61 laws.

62 (g) Noncompetition agreements and garden leave clauses are enforceable for the full
63 term of the agreement, for up to two years, if the employer provides the employee, for the full
64 restricted period and without offset for any income the employee may receive from other
65 noncompetitive activities, a minimum of the greater of: (1) compensation equal to fifty percent
66 of the employee's annual gross base salary and commissions at the time of the employee's
67 termination or (2) \$100,000. Payment of such compensation may be made consistent with the
68 manner in which the employee had been paid prior to the termination of the employment
69 relationship.

70 (h) Forfeiture agreements otherwise permitted by law are only enforceable if and to
71 the extent that: (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is
72 directly and reasonably related to the harm caused to the employer by the employee's departure,
73 provided that such harm threatens the continued viability of the employer or a division of the
74 employer. Any harm that may result from increased competition is not considered harm for
75 purposes of this subsection.

76 (h) This section shall not apply to or alter existing law concerning: (1) sections 12X,
77 74D, or 135C of chapter 112; (2) section 186 of chapter 149; (3) bonus restriction agreements,

78 which are otherwise lawful; (4) covenants not to solicit employees of the employer; or (5)
79 covenants not to solicit or transact business with customers of the employer.

80 SECTION 2. This act shall apply to non-competition agreements entered into on or after
81 January 1, 2010.