The Commonwealth of Massachusetts

PRESENTED BY:

Lori A. Ehrlich and William N. Brownsberger

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 adoption of the accompanying bill:

An Act relative to the judicial enforcement of noncompetition agreements.

PETITION OF:

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<tr>
<th>NAME</th>
<th>DISTRICT/ADDRESS</th>
<th>DATE ADDED</th>
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<tbody>
<tr>
<td>Lori A. Ehrlich</td>
<td>8th Essex</td>
<td>1/19/2017</td>
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<tr>
<td>Ruth B. Balser</td>
<td>12th Middlesex</td>
<td>1/31/2017</td>
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<tr>
<td>Jennifer E. Benson</td>
<td>37th Middlesex</td>
<td>1/24/2017</td>
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<tr>
<td>James M. Cantwell</td>
<td>4th Plymouth</td>
<td>1/27/2017</td>
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<tr>
<td>Marjorie C. Decker</td>
<td>25th Middlesex</td>
<td>2/3/2017</td>
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<td>Carolyn C. Dykema</td>
<td>8th Middlesex</td>
<td>1/25/2017</td>
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<tr>
<td>James B. Eldridge</td>
<td>Middlesex and Worcester</td>
<td>1/26/2017</td>
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<tr>
<td>Sean Garballey</td>
<td>23rd Middlesex</td>
<td>2/3/2017</td>
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<tr>
<td>Colleen M. Garry</td>
<td>36th Middlesex</td>
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<td>Kenneth I. Gordon</td>
<td>21st Middlesex</td>
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<td>Paul R. Heroux</td>
<td>2nd Bristol</td>
<td>2/2/2017</td>
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<td>Louis L. Kafka</td>
<td>8th Norfolk</td>
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<td>Mary S. Keefe</td>
<td>15th Worcester</td>
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<td>Kay Khan</td>
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<td>James R. Miceli</td>
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<td>Sarah K. Peake</td>
<td>4th Barnstable</td>
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<td>Alice Hanlon Petsch</td>
<td>14th Norfolk</td>
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<tr>
<td>Chris Walsh</td>
<td>6th Middlesex</td>
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An Act relative to the judicial enforcement of 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:

SECTION 1. Sections 42 and 42A of chapter 93 of the General Laws are hereby repealed.

SECTION 2. The General Laws are hereby amended by inserting after chapter 93K the following chapter:-

CHAPTER 93L

TRADE SECRETS ACT

Section 1. As used in this chapter, the following words shall have the following meanings:
“Improper means” includes, but is not limited to, theft, bribery, misrepresentation, unreasonable intrusion into private physical or electronic space, breach or inducement of a breach of a confidential relationship or other duty to limit acquisition, disclosure or use of information; provided, however, that “improper means” shall not include reverse engineering from properly accessed materials or information or independent discovery or development.

“Misappropriation”:

(i) an act of acquisition of a trade secret of another by a person who knows or who has reason to know that the trade secret was acquired by improper means; or

(ii) an act of disclosure or of use of a trade secret of another without that person's express or implied consent by a person who:

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of the actor’s disclosure or use, knew or had reason to know that the actor’s knowledge of the trade secret was:

[I] derived from or through a person who had used improper means to acquire it;

[II] acquired under circumstances giving rise to a duty to limit its acquisition, disclosure, or use; or

[III] derived from or through a person who owed a duty to the person seeking relief to limit its acquisition, disclosure, or use; or
(C) before a material change of such actor’s position, knew or had reason to know that it
was a trade secret and that the actor’s knowledge of it had been acquired by accident, mistake, or
through another person’s act described in clause (i) or subclause (A) or (B) of clause (ii).

(3) “Person” includes a natural person, corporation, business trust, estate, trust,
partnership, association, joint venture, company, society, government, governmental subdivision
or agency, or any other legal or commercial entity.

(4) “Trade secret”: specified or specifiable information, whether or not fixed in tangible
form or embodied in any tangible thing, including, but not limited to, a formula, pattern,
compilation, program, device, method, technique, process, design, prototype, procedure,
software code, business strategy or other business information, customer list or other customer
information, invention, or scientific, technical, or financial information that, at the time of the
alleged misappropriation:

[i] derived economic advantage or value, actual or potential, from not being generally
known to, and not being readily ascertainable by proper means by, others who might obtain
economic advantage or value from its acquisition, disclosure or use; and

[ii] was the subject of efforts that were reasonable under the circumstances, which may
include reasonable notice to protect against it being acquired, disclosed, or used without the
consent of the person properly asserting rights therein or a predecessor in interest of such person.

Section 2. (a) Actual or threatened misappropriation may be enjoined upon principles of
equity, including, but not limited to, consideration of party conduct before or after
commencement of litigation and circumstances of potential use, upon a showing that information
qualifying as a trade secret has been, or inevitably will be, misappropriated. Upon application to
the court, an injunction shall be terminated when the trade secret has ceased to exist, but the
injunction may be continued for an additional reasonable period of time in order to eliminate any
economic advantage that otherwise would be derived from misappropriation.

(b) In exceptional circumstances, an injunction may condition future use upon payment
of a reasonable royalty for not longer than the period of time for which use could have been
prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial
change of position prior to acquiring knowledge or reason to know of misappropriation that
renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be
compelled by court order.

Section 3. (a) Except to the extent that a material and prejudicial change of position prior
to acquiring knowledge or reason to know of misappropriation renders a monetary recovery
inequitable, a complainant is entitled to recover damages for misappropriation of information
qualifying as a trade secret. Damages can include both the actual loss caused by
misappropriation and the unjust enrichment caused by misappropriation that is not taken into
account in computing actual loss. In lieu of damages measured by any other methods, the
damages caused by misappropriation may be measured by the imposition of liability for a
reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

(b) If willful and malicious misappropriation exists, the court may award exemplary
damages in an amount not exceeding twice the amount of an award made under subsection (a).

Section 4. The court may award reasonable attorneys’ fees and costs to the prevailing
party if: (i) a claim of misappropriation is made or defended in bad faith; (ii) a motion to enter or
to terminate an injunction is made or resisted in bad faith; or (iii) willful and malicious
misappropriation exists.

Section 5. (a) In an action under this chapter, a court shall preserve the secrecy of an
alleged trade secret by reasonable means, which may include granting protective orders in
connection with discovery proceedings, holding in-camera hearings, sealing the records of the
action, and ordering any person involved in the litigation not to disclose an alleged trade secret
without prior court approval.

(b) In an action under this chapter, in alleging trade secrets misappropriation a party shall
state with reasonable particularity the circumstances thereof, including the nature of the trade
secrets and the basis for their protection. Before commencing discovery relating to an alleged
trade secret, the party alleging misappropriation shall identify the trade secret with sufficient
particularity under the circumstances of the case to allow the court to determine the appropriate
parameters of discovery and to enable reasonably other parties to prepare their defense.

Section 6. An action for misappropriation shall be brought within 3 years after the
misappropriation is discovered or, by the exercise of reasonable diligence, should have been
discovered. For the purposes of this chapter, a continuing disclosure or use constitutes a single
claim.

Section 7. (a) Except as provided in subsection (b), this chapter shall supersede any
conflicting laws providing civil remedies for the misappropriation of a trade secret.

(b) This chapter shall not affect: (1) contractual rights and remedies, provided that, to the
extent such rights and remedies are based on an interest in the economic advantage of
information claimed to be confidential, such confidentiality shall be determined according to the
definition of trade secret in subsection (4) of section 1, and the terms and circumstances of the underlying contract shall be considered in determining the reasonableness of the measures to protect such confidentiality; (2) remedies based on submissions to governmental units; (3) other civil remedies to the extent that those remedies are not based upon misappropriation of a trade secret; or (4) criminal remedies, whether or not based upon misappropriation of a trade secret.

Section 8. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

Section 9. This chapter shall be known and may be cited as the Trade Secrets Act.

SECTION 3. Chapter 149 of the General Laws is hereby amended by inserting after section 24K the following section:-

Section 24L. (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:

“Business entity”: corporations, trusts, partnerships, incorporated or unincorporated associations, or any other legal entity or operating division of any of the foregoing that is engaged in, or planning to engage in, trade or commerce, whether for profit or not for profit.

“Employee”: an individual who is considered an employee under section 148B.

“Forfeiture agreement”: an agreement that imposes adverse financial consequences on a former employee as a result solely of the termination of an employment relationship, regardless of whether the employee engages in competitive activities following termination of the employment relationship; provided, however that “forfeiture agreements” do not include forfeiture for competition agreements.
“Forfeiture for competition agreement”: an agreement that by its terms or through the manner in which it is enforced imposes adverse financial consequences on a former employee if the employee engages in competitive activities after the termination of the employment relationship.

“Noncompetition agreement”: an agreement between an employer and an employee arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees to not engage in certain specified activities competitive with the employee’s employer after the employment relationship has ended; provided, however, that “noncompetition agreements” shall include forfeiture for competition agreements, but shall not include: (i) covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or transact business with customers, clients, referral sources, or vendors of the employer; (iii) noncompetition agreements made in connection with the sale of a business entity or substantially all of the operating assets of a business entity, or otherwise disposing of the ownership interest of a business entity, when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or other benefit from the sale or disposal of the business entity; (iv) noncompetition agreements outside of an employment relationship; (v) forfeiture agreements; (vi) nondisclosure or confidentiality agreements; (vii) invention assignment agreements; (viii) noncompetition agreements made as part of a severance agreement or otherwise in connection with the termination of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; or (ix) agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employee.
“Restricted period”: the period of time after the date of termination of employment during which an employee is restricted from engaging in activities competitive with the employee’s former employer by a noncompetition agreement.

(b) (1) To be valid and enforceable, a noncompetition agreement shall satisfy the requirements of this subsection (b).

(2) If the noncompetition agreement is entered into in connection with the commencement of employment, it shall be in writing and signed by both the employer and employee and shall expressly state that the employee has the right to consult with counsel prior to signing. The agreement shall be provided to the employee by the earlier of a formal written offer of employment or two weeks before the commencement of the employee’s employment; provided, however, that the employee may waive this two-week requirement if the employer and the employee plan for the employee to commence employment in less than two weeks from the date of the formal written offer of employment and the waiver is expressly stated in the noncompetition agreement.

(3) If the noncompetition agreement is entered into after commencement of employment, it shall be supported by consideration independent from the continuation of employment, and notice of the noncompetition agreement shall be provided at least 10 business days before the agreement is to be effective. The noncompetition agreement shall be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

(4) To remain valid and enforceable, the employer shall review a noncompetition agreement with the employee not less than once every 3 years.
(5) The agreement shall be no broader than necessary to protect 1 or more of the following legitimate business interests of the employer: (i) the employer’s trade secrets, as that term is defined in section 1 of chapter 93L; (ii) the employer’s confidential information that otherwise would not qualify as a trade secret; or (iii) the employer’s goodwill. A noncompetition agreement may be presumed necessary where (x) the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a covenant not to solicit or transact business with customers, clients, referral sources, or vendors of the employer, a covenant not to solicit or hire employees of the employer, or a nondisclosure or confidentiality agreement, for any reason, including but not limited to because the employee breached such alternative restrictive covenant; (y) the employee has unlawfully taken, physically or electronically, property belonging to the employer; or (z) the employee has breached a fiduciary duty to the employer.

(6) In no event may the stated restricted period exceed 12 months from the date of termination of employment, unless the employee has breached his or her fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration may not exceed 2 years from the date of termination of employment. A restricted period complies with this subsection (b)(6) shall be presumptively reasonable.

(7) The agreement shall be reasonable in geographic reach in relation to the interests protected. A geographic reach that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence is presumptively reasonable.
(8) The agreement shall be reasonable in the scope of proscribed activities in relation to the interests protected. A restriction on activities that protects a legitimate business interest and is limited to only the specific types of services provided by the employee at any time during the last 2 years of employment is presumptively reasonable.

(9) Not later than 10 business days after the termination of an employment relationship, the employer shall notify the employee in writing by certified mail of the employer’s intent to enforce the noncompetition agreement. If the employer fails to provide such notice, the noncompetition agreement shall be deemed to have been waived by the employer. This paragraph shall not apply if the employee has unlawfully taken, physically or electronically, property belonging to the employer or the employee has already breached any of the following: the noncompetition agreement, a covenant not to solicit or transact business with customers, clients, referral sources, or vendors of the employer, a covenant not to solicit or hire employees of the employer, a confidentiality agreement with the employer, or a fiduciary duty to the employer.

(10) The agreement shall be consonant with public policy.

(c) A noncompetition agreement shall not be enforceable against the following types of workers: (1) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. sections 201 to 219, inclusive; (2) undergraduate or graduate students that partake in an internship or otherwise enter a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (3) employees that have been terminated without cause or laid off; or (4) employees age 18 or younger; (5) persons performing services who are not deemed employees pursuant to
section 148B who perform services for an employer for less than 1 year; provided, however, that
the provisions of this section shall apply to persons performing contracted services for an
employer for 1 year or more. This section does not render void or unenforceable the remainder
of the contract or agreement containing the unenforceable noncompetition agreement, nor does it
preclude the imposition of a noncompetition restriction by a court, whether through preliminary
or permanent injunctive relief or otherwise, as a remedy for a breach of another agreement or a
statutory or common law duty.

(d) Except as provided in this subsection, a court may not enforce a noncompetition
agreement that fails to satisfy any of the requirements of subsection (b); provided, however, that
a court may, in its discretion, reform or otherwise revise, to render valid and enforceable, any
aspect of a noncompetition agreement that is presumptively reasonable under subsection (b)(5)
through (b)(8).

(e) This section shall not render the remainder of the contract or agreement containing the
unenforceable noncompetition agreement void or unenforceable and shall not preclude the
imposition of a noncompetition restriction by a court, whether through preliminary or permanent
injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or
common law duty.

(f) No choice of law provision that would have the effect of avoiding the requirements of
this section shall be enforceable if the employee is, and has been for at least 30 days immediately
preceding the employee’s termination of employment, a resident of or employed in the
commonwealth at the time of his or her termination of employment.
(g) All civil actions relating to noncompetition agreements subject to this section that are
commenced in the state courts of this Commonwealth shall be brought in the county where the
employee resides or, if the employee is not a resident of Massachusetts or if mutually agreed
upon by the employer and employee, in Suffolk county.