

**HOUSE . . . . . No. 2371**

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The Commonwealth of Massachusetts

PRESENTED BY:

***Bradley H. Jones, Jr.***

*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 non-competition agreements.

PETITION OF:

| NAME:                         | DISTRICT/ADDRESS:     | DATE ADDED:      |
|-------------------------------|-----------------------|------------------|
| <i>Bradley H. Jones, Jr.</i>  | <i>20th Middlesex</i> | <i>1/20/2017</i> |
| <i>Susan Williams Gifford</i> | <i>2nd Plymouth</i>   | <i>11/1/2017</i> |
| <i>Paul K. Frost</i>          | <i>7th Worcester</i>  | <i>11/1/2017</i> |
| <i>Todd M. Smola</i>          | <i>1st Hampden</i>    | <i>2/3/2017</i>  |
| <i>Sheila C. Harrington</i>   | <i>1st Middlesex</i>  | <i>11/1/2017</i> |
| <i>Steven S. Howitt</i>       | <i>4th Bristol</i>    | <i>11/1/2017</i> |
| <i>Nicholas A. Boldyga</i>    | <i>3rd Hampden</i>    | <i>11/1/2017</i> |
| <i>Kimberly N. Ferguson</i>   | <i>1st Worcester</i>  | <i>11/1/2017</i> |

**HOUSE . . . . . No. 2371**

By Mr. Jones of North Reading, a petition (accompanied by bill, House, No. 2371) of Bradley H. Jones, Jr., and others relative to non-competition agreements. Labor and Workforce Development.

**The Commonwealth of Massachusetts**

**In the One Hundred and Ninetieth General Court  
(2017-2018)**

An Act relative to non-competition 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 2014 Official Edition,  
2 is hereby amended by inserting after section 24K the following section:-

3 Section 24L. Massachusetts Noncompetition Agreement Act

4 (a) As used in this section, the following words shall have the following meanings:

5 “Business entity”: any person or group of persons performing or engaging in any activity,  
6 enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for  
7 profit or not for profit, including but not limited to corporations, limited liability companies,  
8 limited partnerships, or limited liability partnerships.

9 “Employee”: an individual who is considered an employee under section 148B of this  
10 chapter; provided, however, that the term “employee”, as used in this chapter, shall also include  
11 independent contractors under section 148B.

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

16           “Forfeiture for competition agreement”: an agreement that by its terms or through the  
17 manner in which it is enforced imposes adverse financial consequences on a former employee as  
18 a result of the termination of an employment relationship if the employee engages in competitive  
19 activities.

20           “Garden leave clause”: a provision within a noncompetition agreement by which an  
21 employer agrees to pay the employee during the restricted period, provided that such provision  
22 shall become effective upon termination of employment unless the restriction upon post-  
23 employment activities are waived by the employer or ineffective under subsection (c) (iii).

24           “Noncompetition agreement”: an agreement between an employer and an employee, or  
25 otherwise arising out of an existing or anticipated employment relationship, under which the  
26 employee or expected employee agrees that he or she will not engage in certain specified  
27 activities competitive with his or her employer after the employment relationship has ended.  
28 Noncompetition agreements do not include (i) covenants not to solicit or hire employees of the  
29 employer; (ii) covenants not to solicit or transact business with customers, clients, or vendors of  
30 the employer; (iii) noncompetition agreements made in connection with the sale of a business  
31 entity or substantially all of the operating assets of a business entity or partnership, or otherwise  
32 disposing of the ownership interest of a business entity or partnership (or division or subsidiary  
33 thereof), when the party restricted by the noncompetition agreement is a significant owner of, or

34 member or partner in, the business entity who will receive significant consideration or benefit  
35 from the sale or disposal; (iv) noncompetition agreements outside of an employment  
36 relationship; (v) forfeiture agreements; (vi) nondisclosure or confidentiality agreements; (vii)  
37 invention assignment agreements; (viii) garden leave clauses; (ix) noncompetition agreements  
38 made in connection with the cessation of or separation from employment if the employee is  
39 expressly given seven business days to rescind acceptance; (x) agreements by which an  
40 employee agrees to not reapply for employment to the same employer after termination of the  
41 employee or (xi) forfeiture for competition agreements.

42 “Restricted period”: the period of time after the date of cessation of employment during  
43 which an employee is restricted by a noncompetition agreement from engaging in activities  
44 competitive with his or her employer.

45 (b) To be valid and enforceable, a noncompetition agreement must meet the minimum  
46 requirements of subsections (i) through (viii) hereof.

47 (i) If the agreement is entered into in connection with the commencement of employment,  
48 it must be in writing and signed by both the employer and employee and expressly state that the  
49 employee has the right to consult with counsel prior to signing. The agreement must be provided  
50 to the employee by the earlier of a formal offer of employment or 10 business days before the  
51 commencement of the employee’s employment.

52 (ii) If the agreement is entered into after commencement of employment but not in  
53 connection with the separation from employment, it must be supported by fair and reasonable  
54 consideration independent from the continuation of employment, and notice of the agreement  
55 must be provided at least 10 business days before the agreement is to be effective. Moreover, the

56 agreement must be in writing and signed by both the employer and employee and expressly state  
57 that the employee has the right to consult with counsel prior to signing.

58 (iii) The agreement must be no broader than necessary to protect one or more of the  
59 following legitimate business interests of the employer: (A) the employer's trade secrets, as that  
60 term is defined in section 1 of chapter 93L; (B) the employer's confidential information that  
61 otherwise would not qualify as a trade secret; or (C) the employer's goodwill. A noncompetition  
62 agreement may be presumed necessary where the legitimate business interest cannot be  
63 adequately protected through an alternative restrictive covenant, including but not limited to a  
64 non-solicitation agreement or a non-disclosure or confidentiality agreement.

65 (iv) In no event may the stated restricted period exceed 12 months from the date of  
66 cessation of employment, unless the employee has breached his or her fiduciary duty to the  
67 employer or the employee has unlawfully taken, physically or electronically, property belonging  
68 to the employer, in which case the duration may not exceed 2 years from the date of cessation of  
69 employment.

70 (v) The agreement must be reasonable in geographic reach in relation to the interests  
71 protected. A geographic reach that is limited to the geographic areas in the world in which the  
72 employee, during any time within the last 12 months of employment, worked or had job  
73 responsibilities is presumptively reasonable.

74 (vi) The agreement must be reasonable in the scope of proscribed activities in relation to  
75 the interests protected. A restriction on activities that protects a legitimate business interest and is  
76 limited to only the specific types of services provided by the employee at any time during the last  
77 2 years of employment is presumptively reasonable.

78 (vii) The noncompetition agreement shall be supported by a garden leave clause or other  
79 mutually-agreed upon consideration, which shall include training, that provides the employee,  
80 the opportunity to receive compensation during the post-employment restricted period. To  
81 constitute a garden leave clause or other mutually agreed-upon compensation within the meaning  
82 of this section, the agreement must (i) provide for the payment, consistent with the requirements  
83 for the payment of wages under section 148 of chapter 149 of the general laws, on a pro-rata  
84 basis during the entirety of the restricted period, of at least 50 percent of the employee's highest  
85 annualized base salary paid by the employer within the 2 years preceding the employee's  
86 termination; and (ii) except in the event of a breach by the employee, not permit an employer to  
87 unilaterally discontinue or otherwise fail or refuse to make the payments; provided, however, if  
88 the restricted period has been increased beyond 12 months as a result of the employee's breach  
89 of a fiduciary duty to the employer or the employee has unlawfully taken, physically or  
90 electronically, property belonging to the employer, the employer shall not be required to provide  
91 payments to the employee during the extension of the restricted period.

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

93 (c) A noncompetition agreement shall not be enforceable against the following types of  
94 workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29  
95 U.S.C. 201-219; (ii) undergraduate or graduate students that partake in an internship or otherwise  
96 enter a short-term employment relationship with an employer, whether paid or unpaid, while  
97 enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii)  
98 employees that have been laid off, unless such an employee remains eligible to receive during  
99 the post-employment restricted period, which may be in exchange for a release of claims, at least  
100 50 percent of the employee's highest annualized base salary paid by the employer within the 2

101 years preceding the employee's termination or (iv) employees age 18 or younger. This section  
102 does not render void or unenforceable the remainder of the contract or agreement containing the  
103 unenforceable noncompetition agreement, nor does it preclude the imposition of a  
104 noncompetition restriction by a court, whether through preliminary or permanent injunctive relief  
105 or otherwise, as a remedy for a breach of another agreement or a statutory or common law duty.

106 (d) A court may, in its discretion, reform or otherwise revise a noncompetition agreement  
107 so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate  
108 business interests.

109 (f) All civil actions relating to employee noncompetition agreements or subject to this  
110 section shall be brought in the county where the employee resides or in Suffolk County. The  
111 superior court or the business litigation session of the superior court in Suffolk County shall have  
112 exclusive jurisdiction of all civil actions relating to employee noncompetition agreements or  
113 subject to this section.

114 SECTION 2. Section 1 may be referred to as the Massachusetts Noncompetition  
115 Agreement Act and shall apply to employee noncompetition agreements entered into on or after  
116 January 1, 2018.