

# The Commonwealth of Massachusetts

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**In the Year Two Thousand and Ten**  
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## 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 2008 Official Edition is hereby  
2 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 section 148B of chapter 149 of the  
5 General Laws.

6 “Employee noncompetition agreement”, an agreement between an employer and employee, or otherwise  
7 arising out of an actual or expected employment relationship, under which the employee or expected  
8 employee agrees to any extent that he will not engage in activities directly or indirectly competitive with  
9 his employer after the employment relationship has been severed. Employee noncompetition agreements  
10 include forfeiture for competition agreements, but do not include either: (i) noncompetition agreements  
11 made in connection with the sale of a business, sale of assets of a business, or otherwise outside of the  
12 employment relationship; (ii) forfeiture agreements; or (iii) agreements by which an employee agrees to  
13 not reapply for employment to the same employer after termination of the employee.

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

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

21 “Inevitable disclosure doctrine”, a doctrine by which, in the absence of an enforceable employee  
22 noncompetition agreement, a former employee may be prevented from working at a competitor based on  
23 the expectation that the employment would likely lead to the disclosure of a trade secret or confidential  
24 information of the employer.

25 “Restricted period”, the period of time after employment during which an employee is restricted by an  
26 employee noncompetition agreement from engaging in activities competitive with his or her employer.

- 27 (b) To be valid and enforceable, an employee noncompetition agreement must meet the minimum  
28 requirements of subsections (i) through (iv) hereof and meet or be capable of being reformed to  
29 meet the minimum requirements in subsections (v) through (ix) hereof.
- 30 (i) The agreement must be in writing, in a separate document, and signed by the employer  
31 and employee.  
32
- 33 (ii) The agreement must apply only to an employee whose average annualized federal gross  
34 income derived from the employer during the 3 years immediately prior to the  
35 employee's cessation of employment, or such shorter period if the employment was for  
36 less than 3 years, is greater than \$75,000 plus \$1,500 for each full year from the effective  
37 date of this section.  
38
- 39 (iii) If the agreement is a condition of employment, the agreement together with an express  
40 statement that the agreement is a condition of employment must, to the extent reasonably  
41 feasible, be provided to the employee by the earlier of 7 business days before the  
42 commencement of the employee's employment or when any written offer of employment  
43 is first sent to the employee, provided that if an offer of employment is first  
44 communicated orally, the employee also must either: (A) simultaneously be informed that  
45 a noncompetition agreement will be a condition of employment or (B) receive the  
46 required written notification prior to tendering resignation from any then-current  
47 employment.  
48
- 49 (iv) If the agreement is entered into after commencement of employment, it must be  
50 supported by reasonably adequate consideration, which consideration does not include  
51 the continuation of employment, and notice of the agreement must be provided at least 2  
52 weeks before the agreement is to be effective. Consideration in the amount of 10percent  
53 or more of the employee's then current annual compensation will be deemed  
54 presumptively reasonably adequate.  
55
- 56 (v) The agreement must be necessary to protect 1 or more of the following legitimate  
57 business interests of the employer: (A) the employer's trade secrets, as that term in  
58 defined in section 30 of chapter 266, to which the employee had access while employed;  
59 (B) the employer's confidential information that otherwise would not qualify as a trade  
60 secret; and (C) the employer's goodwill.  
61
- 62 (vi) The agreement must be reasonable in duration in relation to the interests served and the  
63 duration of actual employment, and in no event may the stated term exceed 1 year from  
64 the date of cessation of employment. A stated restricted period of no more than 6 months  
65 is presumptively reasonable. An agreement may permit the restricted period to be tolled  
66 by a court if the employee's breach of the employee noncompetition agreement was  
67 neither known to nor reasonably discoverable by the employer. Such tolling period will  
68 not count for purposes of the temporal standards specified herein.  
69
- 70 (vii) The agreement must be reasonable in geographic reach in relation to the interests served.  
71 A geographic reach that is limited to only the geographic area in which the employee  
72 provided services or had a material presence or influence is presumptively reasonable.  
73
- 74 (viii) The agreement must be reasonable in the scope of proscribed activities in relation to the  
75 interests served. A restriction on activities that protects a legitimate business interest and

- 76 is limited to only the specific types of services provided by the employee at any time  
77 during no more than the last 2 years of employment is presumptively reasonable.  
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- 79 (ix) The agreement must be consonant with public policy.  
80
- 81 (c) Notwithstanding anything to the contrary in this section, a court may, in its discretion, reform an  
82 employee noncompetition agreement so as to render it valid and enforceable.
- 83 (d) Notwithstanding anything to the contrary in this section, a court may decline to enforce some or  
84 all of the restrictions in an otherwise valid and enforceable employee noncompetition agreement:  
85 (1) in extraordinary circumstances; (2) where otherwise necessary to prevent injustice or an  
86 unduly harsh result; or (3) based on any other common law or statutory legal or equitable defense  
87 or doctrine, or on other equitable factors that would militate against enforcement.
- 88 (e) A court shall award the employee reasonable attorneys' fees and costs incurred in defending  
89 against the enforcement of any employee noncompetition agreement: (1) if the court declines to  
90 enforce a material restriction or reforms a restriction in material respect, unless the specific  
91 rejected or reformed restriction is presumptively reasonable as set forth above; or (2) if the court  
92 finds the employer to have acted in bad faith in connection with the enforcement of the employee  
93 noncompetition agreement. The entitlement to legal fees shall also apply to an employee who  
94 commences a lawsuit challenging his or her employee noncompetition agreement, provided that  
95 at least 2 business days prior to the filing of such lawsuit, the employee provided the former  
96 employer with specific measures that the employee would take to protect the employer's  
97 legitimate business interests, which measures are substantially adopted by a court as part of a  
98 hearing on preliminary injunctive relief. The entitlement to legal fees shall apply regardless of  
99 whether the employee pays the legal fees him or herself or if they are paid by another person or  
100 entity. A court may award attorneys' fees and costs at any time during the proceedings, including  
101 as part of a decision in connection with a preliminary injunction motion. Any such award of fees  
102 and costs shall be immediately due and payable to the employee. A court may require the  
103 employer, at any point, to post a bond or multiple bonds to cover any anticipated fees and costs.
- 104 (f) A court may award the former employer its reasonable attorneys' fees and costs permitted by  
105 contract or statute only if: (1) the employee noncompetition agreement was presumptively  
106 reasonable in duration, geographic reach, and scope of proscribed activities; (2) the employee  
107 noncompetition agreement was enforced by the court without substantial modification; and (3)  
108 the court finds that the employee engaged in bad faith conduct.
- 109 (g) The substantive, procedural, and remedial rights provided to the employee in this section are not  
110 subject to advance waiver.
- 111 (h) Except as expressly provided by this section, a person defending against or otherwise opposing  
112 the enforcement of an employee noncompetition agreement, including by way of challenging the  
113 waiver of a substantive, procedural or remedial right provided in this section, shall not be subject  
114 to any contractual penalty, requirement to indemnify, tender back or any other disadvantage  
115 imposed as a consequence of such defense or opposition, and shall continue to be entitled to the  
116 rest of the benefits flowing from the contract. Any contractual provision to the contrary is void.
- 117 (i) No choice of law provision that would have the effect of avoiding the requirements of this section  
118 will be enforceable if the employee is, and has been for at least 30 days, a resident of or working  
119 in Massachusetts at the time of his or her termination of employment. This provision may not be  
120 avoided by an involuntary transfer of the employee out of Massachusetts.

- 121 (j) Forfeiture agreements otherwise permitted by law are enforceable only if and to the extent that:  
122 (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is directly and  
123 reasonably related to the harm caused to the employer by the employee's departure, provided that  
124 such harm threatens the continued viability of the employer. Any harm that may result from  
125 increased competition or the replacement of the employee is not considered harm for purposes of  
126 this subsection.
- 127 (k) This section may expand, but shall not narrow, the prohibitions imposed by: (1) sections 12X,  
128 74D, 129B, or 135C of chapter 112; (2) section 186 of chapter 149; or (3) applicable industry or  
129 other regulation or rules.
- 130 (l) Nothing in this section shall expand or restrict the right of any person to protect trade secrets or  
131 other confidential information by injunction or any other lawful means under other applicable  
132 laws or agreements. Notwithstanding the forgoing, the inevitable disclosure doctrine is rejected  
133 and shall not be utilized, although an employee who has disclosed trade secrets or other  
134 confidential information belonging to his or her prior employer may be enjoined in any respect  
135 that a court of competent jurisdiction deems appropriate.
- 136 (m) This section shall not apply to or alter existing law concerning: (1) covenants not to solicit  
137 employees of the employer; (2) covenants not to solicit or transact business with customers of the  
138 employer; (3) restrictive covenants made in connection with the sale of a business or the assets of  
139 a business; (4) agreements by which an employee agrees to not reapply to the same employer  
140 after termination of employment; or (5) the payment of wages.

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142 SECTION 2. This act may be referred to as the Noncompetition Agreement Act and shall apply to  
143 employee noncompetition agreements entered into on or after January 1, 2010.