

HOUSE No.

The Commonwealth of Massachusetts

PRESENTED BY:

Lori Ehrlich

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 Non-Compete Agreements.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Lori Ehrlich	8th Essex
John V. Fernandes	10th Worcester

The Commonwealth of Massachusetts

In the Year Two Thousand and 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 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:

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

11

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

16

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

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

25

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

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

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32 (i) it must be in writing;

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34 (ii) if the agreement is a condition of employment, the agreement together with an express
35 statement that the agreement is a condition of employment must, to the extent reasonably
36 feasible, be provided to the employee by the earlier of two weeks before the first day of the
37 employee’s employment or when any written offer of employment is sent to the employee,
38 provided that if an offer of employment is first communicated orally, the employee also
39 must either (A) simultaneously be informed that a noncompetition agreement will be a
40 condition of employment or (B) receive the required written notification prior to tendering
41 resignation from any then-current employment;

42

43 (iii) if the agreement is entered into after employment, it must be supported by reasonably
44 adequate consideration, which consideration does not include the continuation of
45 employment, and notice of the agreement must be provided at least two weeks before the
46 agreement is to be effective;

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48 (iv) it must be necessary to protect one or more of the following legitimate business interests of
49 the employer: (A) trade secrets, as that term is defined in section 30 of chapter 266, to
50 which the employee had access while employed; (B) confidential business information that

51 otherwise would not qualify as a trade secret, including, but not limited to, customer lists
52 containing the employer's proprietary information, product development plans, product
53 launch plans, marketing strategies, and sales plans; and (C) goodwill of the employer;
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55 (v) it must be reasonable in duration in relation to the interests served and duration of the
56 employment;
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58 (vi) it must be reasonable in geographic reach;
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60 (vii) it must be reasonable in the scope of proscribed activities; and
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62 (viii) it must be consonant with public policy.
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64 (c) No employee noncompetition agreement will be enforceable (1) against an employee whose
65 annual gross salary and commissions, calculated on an annual basis at the time of the
66 employee's termination, is less than \$100,000; (2) beyond that necessary to protect the
67 employer's legitimate business interests; or (3) for a period exceeding 2 years from the date of
68 the employee's termination, except that such period may be tolled by a court if the employee's
69 breach of the noncompetition agreement was neither known to nor reasonably discoverable by
70 the employer.

71

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

74

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

82

83 (h) Forfeiture agreements otherwise permitted by law are only enforceable if and to the extent
84 that: (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is directly and
85 reasonably related to the harm caused to the employer by the employee's departure, provided
86 that such harm threatens the continued viability of the employer or a division of the employer.

87 Any harm that may result from increased competition is not considered harm for purposes of
88 this subsection.

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90 (h) This section shall not apply to or alter existing law concerning: (1) sections 12X, 74D, or
91 135C of chapter 112; (2) section 186 of chapter 149; (3) bonus restriction agreements,
92 which are otherwise lawful; (4) covenants not to solicit employees of the employer; or (5)
93 covenants not to solicit or transact business with customers of the employer.

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95 SECTION 2. This act shall apply to non-competition agreements entered into on or after January

96 1, 2010.