

HOUSE No. 4082

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, May 15, 2014.

The committee on Labor and Workforce Development to whom were referred the petition (accompanied by bill, Senate, No. 846) of William N. Brownsberger, Michael Barrett, Patricia D. Jehlen and Lori A. Ehrlich for legislation relative to employee non-competition agreements, the joint petition (accompanied by bill, House, No. 1715) of Lori A. Ehrlich, William Brownsberger and others for legislation to limit the time that former employees must wait before being employed by a competitor, and the petition (accompanied by bill, House, No. 1729) of Sheila C. Harrington relative to the prohibition of noncompetition business agreements, reports recommending that the accompanying bill (House, No. 4082) ought to pass.

For the committee,

THOMAS P. CONROY.

HOUSE No. 4082

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

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2 repealed.

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

5 Chapter 93K.

6 UNIFORM TRADE SECRETS ACT

7 Section 1. As used in this chapter the following words, shall unless the context clearly
8 requires otherwise, have the following meanings:

9 (1) "Improper means", includes, without limitation, theft, bribery, misrepresentation, or
10 breach or inducement of a breach of a confidential relationship or other duty to limit acquisition,
11 disclosure or use of information;

12 (2) "Misappropriation",

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

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

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

18 (B) at the time of his disclosure or use, knew or had reason to know that his knowledge of
19 the trade secret was

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

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

23 [III] derived from or through a person who owed a duty to the person seeking relief to
24 limit its acquisition, disclosure or use; or

25 (C) before a material change of his or her position, knew or had reason to know that it
26 was a trade secret and that knowledge of it had been acquired by accident or mistake.

27 (3) "Person", a natural person, corporation, business trust, estate, trust, partnership,
28 association, joint venture, government, governmental subdivision or agency, or any other legal or
29 commercial entity.

30 (4) "Trade secret", specified or specifiable information, whether or not fixed in tangible
31 form or embodied in any tangible thing, including but not limited to a formula, pattern,
32 compilation, program, device, method, technique, process, business strategy, or scientific,
33 technical, financial or customer data that

34 [i] at the time of alleged misappropriation, derived economic value, actual or potential,
35 from not being generally known to, and not being readily ascertainable by proper means by,
36 others who might obtain economic value from its acquisition, disclosure or use; and

37 [ii] has at all times been the subject of efforts that are reasonable under the circumstances
38 to give notice that it should not be and to ensure that it is not acquired, disclosed or used without
39 the consent of the person asserting ownership thereof, or such person's predecessor in interest.

40 Section 2. (a) Actual or threatened misappropriation may be enjoined upon equity
41 principles, including a showing that specific information qualifying as a trade secret has been or
42 is threatened to be misappropriated. No injunction shall issue with respect to a trade secret unless
43 the trade secret is specified with sufficient particularity so as to enable, reasonably under the
44 circumstances, the respondent to prepare a reasonable defense. Upon application to the court, an
45 injunction shall be terminated when the trade secret has ceased to exist, but the injunction may
46 be continued for an additional reasonable period of time in order to eliminate commercial
47 advantage that otherwise would be derived from misappropriation.

48 (b) In exceptional circumstances, an injunction may condition future use upon payment
49 of a reasonable royalty for no longer than the period of time for which use could have been
50 prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial

51 change of position prior to acquiring knowledge or reason to know of misappropriation that
52 renders a prohibitive injunction inequitable.

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

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

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

65 Section 4. The court may award reasonable attorney's fees to the prevailing party if:

66 (i) a claim of misappropriation is made or defended in bad faith,

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68 (ii) a motion to enter or to terminate an injunction is made or resisted in bad faith, or

69 (iii) willful and malicious misappropriation exists. In considering such an award, the
70 court may take into account the claimant's specification of trade secrets and the proof that such
71 alleged trade secrets were misappropriated.

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

77 (b) In an action under this chapter, averments of trade secrets and misappropriation
78 thereof shall be stated with particularity.

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

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

86 (b) This chapter shall not affect:

87 (1) contractual remedies, provided that, to the extent such remedies are based on or
88 justified by confidentiality of information, such confidentiality shall be determined according to
89 the definition of trade secret in this chapter;

90 (2) remedies based on submissions to governmental units;

91 (3) other civil remedies to the extent that they are not based upon misappropriation of a
92 trade secret; or

93 (4) criminal remedies, whether or not based upon misappropriation of a trade secret.

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

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

98 Section 10. This chapter shall not apply to misappropriation occurring prior to the
99 effective date. With respect to a continuing misappropriation that began prior to the effective
100 date, the chapter shall not apply to the continuing misappropriation that occurs after the effective
101 date.

102 Section 11. Any written or oral contract or agreement arising out of an employment or
103 independent contractor relationship that prohibits, impairs, restrains, restricts, or places any
104 condition on, a person's ability to seek, engage in or accept any type of employment or
105 independent contractor work, for any period of time after an employment or independent
106 contractor relationship has ended, shall be void and unenforceable with respect to that restriction.
107 This section shall not render void or unenforceable the remainder of the contract or agreement.
108 Nor shall this section affect (i) covenants not to solicit or hire employees or independent
109 contractors of the employer; (ii) covenants not to solicit or transact business with customers of
110 the employer; (iii) non-disclosure agreements; (iv) noncompetition agreements made in
111 connection with the sale of a business or substantially all of the assets of a business, when the
112 party restricted by the noncompetition agreement is an owner of at least a 10 per cent interest of
113 the business who received significant consideration for the sale; (v) noncompetition agreements
114 outside of an employment relationship; (vi) forfeiture agreements; or (vii) agreements by which
115 an employee agrees to not reapply for employment to the same employer after termination of the
116 employee.

117 For the purposes of this section, chapter 149, section 148B shall control the definition of
118 employment.

119 This section shall be construed liberally for the accomplishment of its purposes, and no
120 other provision of the General Laws shall be construed in a manner that would limit its coverage.
121 Nothing in this section shall preempt tort or contract claims, or other statutory claims, based
122 upon an employer's use, or attempted use, of an unlawful contract or agreement to interfere with
123 subsequent employment or contractor work.

124 This section shall apply to all contracts and agreements, including those executed before
125 the effective date of this chapter.