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HOUSE . . . . . No. 1799

The Commonwealth of Massachusetts

In the Year Two Thousand 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:

SECTION 1. Chapter 149 of the General Laws, as appearing in the 2006 Official Edition 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:

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

"Forfeiture agreement": an agreement that imposes adverse financial consequences on an employee as a result of the termination of an employment relationship, regardless of whether the

employee engages in competitive activities following termination of the employment relationship. Forfeiture agreements do not include forfeiture for competition agreements.

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

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

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

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

(i) it must be in writing;

(ii) if the agreement is a condition of employment, the agreement together with an express statement that the agreement is a condition of employment must, to the extent reasonably feasible, be provided to the employee by the earlier of two weeks before the first day of the employee's employment or when any written offer of employment is sent to the employee, provided that if an offer of employment is first communicated orally, the employee also must either (A) simultaneously be informed that a noncompetition agreement will be a condition of

employment or (B) receive the required written notification prior to tendering resignation from any then-current employment;

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

it must be necessary to protect one or more of the following legitimate business interests of the employer: (A) trade secrets, as that term in defined in section 30 of chapter 266, to which the employee had access while employed; (B) confidential business information that otherwise would not qualify as a trade secret, including, but not limited to, customer lists containing the employer's proprietary information, product development plans, product launch plans, marketing strategies, and sales plans; and (C) goodwill of the employer;

it must be reasonable in duration in relation to the interests served and duration of the employment;

it must be reasonable in geographic reach;

it must be reasonable in the scope of proscribed activities; and

it must be consonant with public policy.

(c) No employee noncompetition agreement will be enforceable (1) against an employee whose annual gross salary and commissions, calculated on an annual basis at the time of the employee's termination, is less than $100,000; (2) beyond that necessary to protect the employer's legitimate business interests; or (3) for a period exceeding 2 years from the date of

the employee's termination, except that such period may be tolled by a court if the employee's breach of the noncompetition agreement was neither known to nor reasonably discoverable by the employer.

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

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

(h) Forfeiture agreements otherwise permitted by law are only enforceable if and to the extent that: (1) they comply with subsections (b)(i) through (b)(iii) and (2) the forfeiture is directly and reasonably related to the harm caused to the employer by the employee's departure, provided that such harm threatens the continued viability of the employer or a division of the employer. Any harm that may result from increased competition is not considered harm for purposes of this subsection.

(h) This section shall not apply to or alter existing law concerning: (1) sections 12X, 74D, or 135C of chapter 112; (2) section 186 of chapter 149; (3) bonus restriction agreements,

which are otherwise lawful; (4) covenants not to solicit employees of the employer; or (5) covenants not to solicit or transact business with customers of the employer.

SECTION 2. This act shall apply to non-competition agreements entered into on or after January 1, 2010.