

HOUSE No. 4401

The Commonwealth of Massachusetts



OFFICE OF THE GOVERNOR
COMMONWEALTH OF MASSACHUSETTS
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August 13, 2014

To the Honorable Senate and House of Representatives,

I am filing for your consideration legislation entitled “An Act to Promote Competition and Economic Development.”

Responding to the public commentary regarding two proposals in House Bill 4377, “An Act Promoting Economic Growth Across the Commonwealth” that you regarded as requiring more extensive consideration, I am filing a new bill to place authority for granting liquor licenses in the hands of municipalities and to place sensible limits on the use of non-competition agreements in the workplace.

Placing the authority to approve liquor licenses in the hands of municipal officials will allow local communities to make responsible decisions regarding their economic development and growth, freeing the legislature from time-consuming local issues. In the Act signed into law today, the legislature provided some relief for the City of Boston. It should now squarely address the issue for other municipalities as well.

Massachusetts must do everything it can to retain talented entrepreneurs, support individual career growth, and encourage innovative new businesses that are the engines of economic growth and job creation. While the Commonwealth currently leads the Nation in entrepreneurial activity, many entrepreneurs have expressed serious reservations about our restrictive laws regarding non-compete agreements. Providing the talent needed to support the kind of growth we want and need is considerably more difficult if employees are legally unable

to move between jobs in the innovation economy. Indeed, testimony offered to the legislative committee shows that the use of non-compete agreements is unusually broad in our Commonwealth. We should not continue to embrace restrictions that are inconsistent with the needs of a prosperous twenty-first century.

Earlier this year, I proposed a complete ban on non-compete agreements. Through considerable and thoughtful collaboration on the part of business leaders, policy makers and legislators, a compromise was developed, but ultimately not acted upon. I now propose that the legislature enact that compromise.

I urge your prompt consideration and enactment of this bill and I look forward to working with you on this effort.

Respectfully submitted,

Deval L. Patrick,
Governor

HOUSE No. 4401

Message from His Excellency the Governor recommending legislation relative to to regulate the use of non-competition agreements, enhance protection of trade secrets and provide for local control of liquor licensing.

The Commonwealth of Massachusetts

In the Year Two Thousand Fourteen

An Act to regulate the use of non-competition agreements, enhance protection of trade secrets and provide for local control of liquor licensing.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to a business-friendly environment that will stimulate job growth and improve the ease with which businesses can operate in the markets they serve, and to coordinate economic development activities funded by the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

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. This chapter shall be known and may be cited as the Uniform Trade Secrets
8 Act.

9 Section 2. As used in this chapter the following words, shall unless the context clearly
10 requires otherwise, have the following meanings:

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

(2) "Misappropriation",

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

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

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

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

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

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

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

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

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

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

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

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

43 Section 3. (a) Actual or threatened misappropriation may be enjoined upon equity
44 principles, including a showing that specific information qualifying as a trade secret has been or
45 is threatened to be misappropriated. No injunction shall issue with respect to a trade secret
46 unless the trade secret is specified with sufficient particularity so as to enable, reasonably under
47 the circumstances, the respondent to prepare a reasonable defense. Upon application to the
48 court, an injunction shall be terminated when the trade secret has ceased to exist, but the
49 injunction may be continued for an additional reasonable period of time in order to eliminate
50 commercial advantage that otherwise would be derived from misappropriation.

51 (b) In exceptional circumstances, an injunction may condition future use upon
52 payment of a reasonable royalty for no longer than the period of time for which use could have
53 been prohibited. Exceptional circumstances include, but are not limited to, a material and
54 prejudicial change of position prior to acquiring knowledge or reason to know of
55 misappropriation that renders a prohibitive injunction inequitable.

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

58 Section 4. (a) Except to the extent that a material and prejudicial change of position prior
59 to acquiring knowledge or reason to know of misappropriation renders a monetary recovery
60 inequitable, a complainant is entitled to recover damages for misappropriation of specific
61 information qualifying as a trade secret. Damages can include both the actual loss caused by
62 misappropriation and the unjust enrichment caused by misappropriation that is not taken into
63 account in computing actual loss. In lieu of damages measured by any other methods, the
64 damages caused by misappropriation may be measured by the imposition of liability for a
65 reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

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

68 Section 5. The court may award reasonable attorney's fees to the prevailing party if: (i) a
69 claim of misappropriation is made or defended in bad faith, (ii) a motion to enter or to terminate
70 an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation
71 exists. In considering such an award, the court may take into account the claimant's
72 specification of trade secrets and the proof that such alleged trade secrets were misappropriated.

73 Section 6. (a) In an action under this chapter, a court shall preserve the secrecy of an
74 alleged trade secret by reasonable means, which may include granting protective orders in
75 connection with discovery proceedings, holding in-camera hearings, sealing the records of the
76 action, and ordering any person involved in the litigation not to disclose an alleged trade secret
77 without prior court approval.

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

Section 7. An action for misappropriation shall be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

Section 8. (a) Except as provided in subsection (b), this chapter shall supersede any conflicting laws of the commonwealth providing civil remedies for the misappropriation of a trade secret.

(b) This chapter shall not affect:

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

(2) remedies based on submissions to governmental units;

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

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

Section 9. This chapter shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it.

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

SECTION 3. Chapter 149 of the General Laws 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”: an individual who is considered an employee under section 148B of this chapter.

“Employee noncompetition agreement”: an agreement between an employer and employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that he or she will not engage in certain

activities competitive with his or her employer after the employment relationship has ended. Employee noncompetition agreements include forfeiture for competition agreements, but do not include (i) covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or transact business with customers of the employer; (iii) noncompetition agreements made in connection with the sale of a business or substantially all of the assets of a business, when the party restricted by the noncompetition agreement is an owner of at least a five percent interest of the business who received significant consideration for the sale; (iv) noncompetition agreements outside of an employment relationship; (v) forfeiture agreements; (vi) nondisclosure agreements; (vii) invention assignment agreements; (viii) garden leave agreements; (ix) noncompetition agreements made in connection with the cessation of employment; or (x) agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

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

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

“Garden leave agreement”: a type of employee noncompetition agreement by which an employer agrees to pay the employee during the restricted period. To constitute a garden leave clause within the meaning of this section, the agreement must (i) provide for the payment, on a pro-rata basis during the entirety of the restricted period, of at least fifty percent of the employee’s highest annualized base salary paid by the employer within the two years preceding the employee’s termination and (ii) not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments, even if the employer voluntarily shortens the restricted period.

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

(b) To be valid and enforceable, an employee noncompetition agreement must meet the minimum requirements of subsections (i) through (iii) hereof and meet or be capable of being reformed to meet the minimum requirements in subsections (iv) through (viii) hereof.

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

(ii) The agreement must, to the extent reasonably feasible, be provided to the employee by the earlier of five business days before the commencement of the employee's employment or when any formal offer of employment is first made to the employee.

(iii) If the agreement is entered into after commencement of employment but not in connection with the separation from employment, it must be supported by fair and reasonable consideration in addition to the continuation of employment, and notice of the agreement must be provided at least ten business days before the agreement is to be effective. If the agreement is entered into in connection with the separation from employment of the employee, the agreement must expressly provide the employee with seven days to rescind acceptance.

(iv) The agreement must be necessary to protect one or more of the following legitimate business interests of the employer: (A) the employer's trade secrets, as that term is defined in section 1 of chapter 93K, to which the employee had access while employed; (B) the employer's confidential information that otherwise would not qualify as a trade secret; or (C) the employer's goodwill.

(v) The agreement must be reasonable in duration in relation to the interests protected and the duration of actual employment. A stated restricted period of no more than six months is presumptively reasonable.

(vi) The agreement must be reasonable in geographic reach in relation to the interests protected. A geographic reach that is limited to only the geographic area in which the employee, during any time within the last two years of employment, provided services or had a material presence or influence is presumptively reasonable.

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

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

(c) No employee noncompetition agreement shall be enforceable against an employee who is nonexempt under the Fair Labor Standards Act, 29 U.S.C. 201-219. This section does not render void or unenforceable the remainder of the contract or agreement containing the unenforceable noncompetition agreement, nor does it preclude the imposition of a noncompetition restriction by a court, whether through preliminary or permanent injunctive relief or otherwise, as a remedy for a breach of another agreement.

(d) Notwithstanding anything to the contrary in this section, a court may, in its discretion, reform an employee noncompetition agreement so as to render it valid and enforceable, provided, however, that a court may reform the duration, the scope of proscribed

activities, and the geographic reach only if the provision to be reformed was either presumptively reasonable as set forth above or the employer made objectively reasonable efforts to draft the particular provision so that it would be presumptively reasonable as set forth above. Further, a court may decline to enforce some or all of the restrictions in an otherwise valid and enforceable employee noncompetition agreement where necessary to prevent injustice or an unduly harsh result, including those arising from the employee's economic circumstances, or based on any other common law or statutory legal or equitable defense or doctrine.

(e) No choice of law provision that would have the effect of avoiding the requirements of this section will be enforceable if the employee is, and has been for at least thirty days immediately preceding his or her cessation of employment, a resident of or employed in Massachusetts at the time of his or her termination of employment.

SECTION 4. The preceding Section may be referred to as the Massachusetts Noncompetition Agreement Act and shall apply to employee noncompetition agreements entered into on or after January 1, 2015.

SECTION 5. Section 12 of chapter 138 of the General Laws is hereby amended by striking out, in lines 63 to 65, inclusive, as appearing in the 2012 Official Edition, the words “, notwithstanding any limitation on the number of licenses the city or town is authorized to grant in section 17,” and inserting in place thereof the following words:- pursuant to the municipal plan as required by section 17.

SECTION 6. Said section 12 of said chapter 138 is hereby further amended by striking out, in lines 89 and 90, as so appearing, the words “and irrespective of any limitation of number of licenses contained in section seventeen”.

SECTION 7. The sixth paragraph of said section 12 of said chapter 138, as so appearing, is hereby amended by striking out the second sentence.

SECTION 8. Said section 12 of said chapter 138, as amended by section 16 of chapter 36 of the acts of 2013, is hereby further amended by adding the following 4 paragraphs:-

All licenses issued under this section pursuant to a new license application that is filed after January 1, 2015 shall be non-transferable and a licensing authority shall not approve the transfer of such license.

If the license granted under this section is cancelled, revoked or no longer in use by the license holder, the license shall be returned physically, with all of the legal rights, privileges and restrictions pertaining thereto to the licensing authority.

If a license holder closes or terminates the license holder's business, or sells or transfers the license holder's business, the license holder shall return the license physically, with all of the legal rights, privileges and restrictions pertaining thereto to the licensing authority. The

licensing authority may then in its discretion grant a license to a qualified new applicant at a different location according to the standard for a new license.

A license may be re-issued by the licensing authority at the same location only if an applicant for the license files with the local licensing authority a letter from the department of revenue and any applicable government agency indicating that the license is in good standing with the department and agency and that all applicable taxes, payments, assessments and contributions for unemployment and health insurance have been paid. If a license is granted under this section then cancelled, revoked or no longer in use, and then re-issued to a new applicant at the same location and the prior license holder at that location was reported as delinquent as specified in section 25, the name of the new license applicant shall appear in the place and stead of the former license holder, as of the date of the new license being issued, unless the alcoholic beverages control commission otherwise orders in writing, for good cause, after a hearing with notice to all parties.

SECTION 9. Said chapter 138 is hereby further amended by inserting after section 13 the following section:-

Section 13A. (a) As used in this section, the following words shall have the following meanings unless the context clearly requires otherwise:

"Airline club", an establishment that is not open to the general public and which is operated by or for an airline at the airport to provide exclusive or special accommodations to members and their guests in accordance with airline policy.

"Airport", the General Edward Lawrence Logan International Airport.

"Passenger terminals", the passenger terminals and designated airline clubs within the airport.

"Restricted airport licenses", licenses for: (i) the sale of all alcoholic beverages to be drunk on the premises within the passenger terminals; and (ii) the sale of wines and malt beverages to be drunk on the premises within the passenger terminals.

(b) The licensing board for the city of Boston may grant restricted airport licenses to common victuallers duly licensed under chapter 140 and operating within the passenger terminals subject to the approval of the alcoholic beverages control commission. Once issued to a licensee within the passenger terminals, the licensing board shall not approve the transfer of a restricted airport license to a location outside of the passenger terminals. A restricted airport license shall be nontransferable to any other person, corporation or organization operating outside the passenger terminals and shall be clearly marked "nontransferable outside the passenger terminals at the airport" on its face. A restricted airport license, if revoked or no longer in use, shall be returned physically, with all of the legal rights and privileges pertaining

thereto, to the licensing board which may then grant that license to a new applicant operating within the passenger terminals, consistent with this section.

SECTION 10. The first paragraph of section 14 of said chapter 138, as so appearing, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:- Special licenses for the sale of all alcoholic beverages, wines and malt beverages only or either of them may, as determined by the municipality, be issued by the local licensing authorities to the responsible manager of any indoor or outdoor activity or enterprise or to the responsible manager of any nonprofit organization conducting any indoor or outdoor activity or enterprise.

SECTION 11. Section 15 of said chapter 138, as so appearing, is hereby amended by inserting after the fourth paragraph the following paragraph:-

Any person or entity who holds licenses under both this section and section 18 or 19, which licenses were granted prior to January 1, 2011, may obtain licenses under this section in accordance with the other provisions of this section.

SECTION 12. Section 16A of said chapter 138, as so appearing, is hereby amended by striking out, in line 11, the word “so” and inserting in place thereof the following words:- as determined by a municipality to be.

SECTION 13. Said section 16A of said chapter 138, as so appearing, is hereby further amended by striking out, in lines 14 and 15, the words “, to the extent that the same are issuable under section seventeen”.

SECTION 14. Said section 16A of said chapter 138, as so appearing, is hereby further amended by striking out, in line 18, the words “for the purposes of section seventeen”.

SECTION 15. Said chapter 138 is hereby amended by striking out the first four full paragraphs of section 17, as so appearing, beginning with the words “The local licensing authorities”, and inserting in place thereof the following four paragraphs:-

Section 17. A city or town, except the city of Boston, shall determine the number of all alcoholic beverage or wines and malt beverage licenses to be issued by its local licensing authority under sections 12, 14 and 15F, including the number of seasonal licenses; provided, that for licenses issued under section 15, cities and towns, except the city of Boston, may grant 1 such license for each population unit of 5,000 or any additional fraction thereof but may, regardless of population, grant at least 2 licenses under section 15.

A city or town, except the city of Boston, that seeks to grant additional licenses on or after July 1, 2014 shall adopt a plan that is approved by the mayor, city council or board of selectmen. The plan shall determine the process for granting additional licenses; provided, however, that: (i) at least one public hearing regarding the plan shall be conducted by the city

286 council, board of selectmen or governing body of the city or town; and (ii) the city or town shall
287 notify the alcoholic beverages control commission of the public hearing; a public hearing shall
288 be held on all license applications .

289 The governing body of each city or town, except the city of Boston, shall hold a public
290 hearing regarding a license application within 30 days of the date of the license application.

291 Unless expressly authorized by this chapter, a local licensing authority shall not grant
292 licenses to any person, firm or corporation under more than 1 section of this chapter.

293 SECTION 16. Sections 17A to 17C, inclusive, of said chapter 138 are hereby repealed.

294 SECTION 17. Section 29 of said chapter 138, as appearing in the 2012 Official Edition,
295 is hereby amended by striking out, in lines 20 to 23, inclusive, the words “; but a license issued
296 to a registered pharmacist under said section shall be included in computing the number of
297 licenses that may be granted in any city or town as provided in section seventeen”.