

SENATE No. 169

The Commonwealth of Massachusetts

PRESENTED BY:

Jason M. Lewis

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 adoption of the accompanying bill:

An Act to protect trade secrets and eliminate non-compete agreements.

PETITION OF:

| NAME: | DISTRICT/ADDRESS: |
|--------------------------------|-------------------------------------|
| <i>Jason M. Lewis</i> | <i>Fifth Middlesex</i> |
| <i>Ruth B. Balse</i> | <i>12th Middlesex</i> |
| <i>William N. Brownsberger</i> | <i>Second Suffolk and Middlesex</i> |
| <i>Daniel A. Wolf</i> | <i>Cape and Islands</i> |
| <i>James B. Eldridge</i> | <i>Middlesex and Worcester</i> |
| <i>Denise Provost</i> | <i>27th Middlesex</i> |

SENATE No. 169

By Mr. Lewis, a petition (accompanied by bill, Senate, No. 169) of Jason M. Lewis, Ruth B. Balser, William N. Brownsberger, Daniel A. Wolf and other members of the General Court for legislation to protect trade secrets and eliminate non-compete agreements. Consumer Protection and Professional Licensure.

The Commonwealth of Massachusetts

**In the One Hundred and Eighty-Ninth General Court
(2015-2016)**

An Act to protect trade secrets and eliminate 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. The Massachusetts General Laws, as appearing in the 2014 Official Edition,
2 are hereby amended by inserting after chapter 93K the following new chapter:-

3 Chapter 93L.

4 UNIFORM TRADE SECRETS ACT

5 Section 1. This chapter shall be known and may be cited as the Uniform Trade Secrets
6 Act.

7 Section 2. 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 3. (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 4. (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 5. The court may award reasonable attorney's fees to the prevailing party if: (i) a
66 claim of misappropriation is made or defended in bad faith, (ii) a motion to enter or to terminate
67 an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation
68 exists. In considering such an award, the court may take into account the claimant's specification
69 of trade secrets and the proof that such alleged trade secrets were misappropriated.

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

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

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

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

84 (b) This chapter shall not affect:

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

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

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

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

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

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

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

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

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

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