

HOUSE No. 2371

The Commonwealth of Massachusetts

PRESENTED BY:

Bradley H. Jones, Jr.

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 relative to non-competition agreements.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
<i>Bradley H. Jones, Jr.</i>	<i>20th Middlesex</i>
<i>Susan Williams Gifford</i>	<i>2nd Plymouth</i>
<i>Paul K. Frost</i>	<i>7th Worcester</i>
<i>Todd M. Smola</i>	<i>1st Hampden</i>
<i>Sheila C. Harrington</i>	<i>1st Middlesex</i>
<i>Steven S. Howitt</i>	<i>4th Bristol</i>
<i>Nicholas A. Boldyga</i>	<i>3rd Hampden</i>
<i>Kimberly N. Ferguson</i>	<i>1st Worcester</i>

HOUSE No. 2371

By Mr. Jones of North Reading, a petition (accompanied by bill, House, No. 2371) of Bradley H. Jones, Jr., and others relative to non-competition agreements. Labor and Workforce Development.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

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. Chapter 149 of the General Laws, as appearing in the 2014 Official Edition,
2 is hereby amended by inserting after section 24K the following section:-

3 Section 24L. Massachusetts Noncompetition Agreement Act

4 (a) As used in this section, the following words shall have the following meanings:

5 “Business entity”: any person or group of persons performing or engaging in any activity,
6 enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for
7 profit or not for profit, including but not limited to corporations, limited liability companies,
8 limited partnerships, or limited liability partnerships.

9 “Employee”: an individual who is considered an employee under section 148B of this
10 chapter; provided, however, that the term “employee”, as used in this chapter, shall also include
11 independent contractors under section 148B.

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

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

20 “Garden leave clause”: a provision within a noncompetition agreement by which an
21 employer agrees to pay the employee during the restricted period, provided that such provision
22 shall become effective upon termination of employment unless the restriction upon post-
23 employment activities are waived by the employer or ineffective under subsection (c) (iii).

24 “Noncompetition agreement”: an agreement between an employer and an employee, or
25 otherwise arising out of an existing or anticipated employment relationship, under which the
26 employee or expected employee agrees that he or she will not engage in certain specified
27 activities competitive with his or her employer after the employment relationship has ended.
28 Noncompetition agreements do not include (i) covenants not to solicit or hire employees of the
29 employer; (ii) covenants not to solicit or transact business with customers, clients, or vendors of
30 the employer; (iii) noncompetition agreements made in connection with the sale of a business
31 entity or substantially all of the operating assets of a business entity or partnership, or otherwise
32 disposing of the ownership interest of a business entity or partnership (or division or subsidiary
33 thereof), when the party restricted by the noncompetition agreement is a significant owner of, or

34 member or partner in, the business entity who will receive significant consideration or benefit
35 from the sale or disposal; (iv) noncompetition agreements outside of an employment
36 relationship; (v) forfeiture agreements; (vi) nondisclosure or confidentiality agreements; (vii)
37 invention assignment agreements; (viii) garden leave clauses; (ix) noncompetition agreements
38 made in connection with the cessation of or separation from employment if the employee is
39 expressly given seven business days to rescind acceptance; (x) agreements by which an
40 employee agrees to not reapply for employment to the same employer after termination of the
41 employee or (xi) forfeiture for competition agreements.

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

45 (b) To be valid and enforceable, a noncompetition agreement must meet the minimum
46 requirements of subsections (i) through (viii) hereof.

47 (i) If the agreement is entered into in connection with the commencement of employment,
48 it must be in writing and signed by both the employer and employee and expressly state that the
49 employee has the right to consult with counsel prior to signing. The agreement must be provided
50 to the employee by the earlier of a formal offer of employment or 10 business days before the
51 commencement of the employee’s employment.

52 (ii) If the agreement is entered into after commencement of employment but not in
53 connection with the separation from employment, it must be supported by fair and reasonable
54 consideration independent from the continuation of employment, and notice of the agreement
55 must be provided at least 10 business days before the agreement is to be effective. Moreover, the

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

58 (iii) The agreement must be no broader than necessary to protect one or more of the
59 following legitimate business interests of the employer: (A) the employer's trade secrets, as that
60 term is defined in section 1 of chapter 93L; (B) the employer's confidential information that
61 otherwise would not qualify as a trade secret; or (C) the employer's goodwill. A noncompetition
62 agreement may be presumed necessary where the legitimate business interest cannot be
63 adequately protected through an alternative restrictive covenant, including but not limited to a
64 non-solicitation agreement or a non-disclosure or confidentiality agreement.

65 (iv) In no event may the stated restricted period exceed 12 months from the date of
66 cessation of employment, unless the employee has breached his or her fiduciary duty to the
67 employer or the employee has unlawfully taken, physically or electronically, property belonging
68 to the employer, in which case the duration may not exceed 2 years from the date of cessation of
69 employment.

70 (v) The agreement must be reasonable in geographic reach in relation to the interests
71 protected. A geographic reach that is limited to the geographic areas in the world in which the
72 employee, during any time within the last 12 months of employment, worked or had job
73 responsibilities is presumptively reasonable.

74 (vi) The agreement must be reasonable in the scope of proscribed activities in relation to
75 the interests protected. A restriction on activities that protects a legitimate business interest and is
76 limited to only the specific types of services provided by the employee at any time during the last
77 2 years of employment is presumptively reasonable.

78 (vii) The noncompetition agreement shall be supported by a garden leave clause or other
79 mutually-agreed upon consideration, which shall include training, that provides the employee,
80 the opportunity to receive compensation during the post-employment restricted period. To
81 constitute a garden leave clause or other mutually agreed-upon compensation within the meaning
82 of this section, the agreement must (i) provide for the payment, consistent with the requirements
83 for the payment of wages under section 148 of chapter 149 of the general laws, on a pro-rata
84 basis during the entirety of the restricted period, of at least 50 percent of the employee's highest
85 annualized base salary paid by the employer within the 2 years preceding the employee's
86 termination; and (ii) except in the event of a breach by the employee, not permit an employer to
87 unilaterally discontinue or otherwise fail or refuse to make the payments; provided, however, if
88 the restricted period has been increased beyond 12 months as a result of the employee's breach
89 of a fiduciary duty to the employer or the employee has unlawfully taken, physically or
90 electronically, property belonging to the employer, the employer shall not be required to provide
91 payments to the employee during the extension of the restricted period.

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

93 (c) A noncompetition agreement shall not be enforceable against the following types of
94 workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29
95 U.S.C. 201-219; (ii) undergraduate or graduate students that partake in an internship or otherwise
96 enter a short-term employment relationship with an employer, whether paid or unpaid, while
97 enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii)
98 employees that have been laid off, unless such an employee remains eligible to receive during
99 the post-employment restricted period, which may be in exchange for a release of claims, at least
100 50 percent of the employee's highest annualized base salary paid by the employer within the 2

101 years preceding the employee's termination or (iv) employees age 18 or younger. This section
102 does not render void or unenforceable the remainder of the contract or agreement containing the
103 unenforceable noncompetition agreement, nor does it preclude the imposition of a
104 noncompetition restriction by a court, whether through preliminary or permanent injunctive relief
105 or otherwise, as a remedy for a breach of another agreement or a statutory or common law duty.

106 (d) A court may, in its discretion, reform or otherwise revise a noncompetition agreement
107 so as to render it valid and enforceable to the extent necessary to protect the applicable legitimate
108 business interests.

109 (f) All civil actions relating to employee noncompetition agreements or subject to this
110 section shall be brought in the county where the employee resides or in Suffolk County. The
111 superior court or the business litigation session of the superior court in Suffolk County shall have
112 exclusive jurisdiction of all civil actions relating to employee noncompetition agreements or
113 subject to this section.

114 SECTION 2. Section 1 may be referred to as the Massachusetts Noncompetition
115 Agreement Act and shall apply to employee noncompetition agreements entered into on or after
116 January 1, 2018.