

Joint Committee on Labor & Workforce Development Bill Summary

BILL NUMBER:	House Bill 1701
TITLE:	An Act relative to the judicial enforcement of noncompetition agreements
LEAD SPONSOR:	Joint Committee on Labor & Workforce Development
SIMILAR MATTERS:	<i>See also S957, H1719, H1761, and S169</i>
HEARING DATE:	June 23, 2015
LEGISLATIVE HISTORY:	Similar to House Bill 1729 of 188 th Session <i>Redraft H4802: Discharged to EcoDev; Study</i>
SUMMARY OF EXISTING LAWS AFFECTED:	There is currently no codified law regulating noncompetition agreements. G.L. c. 149 contains the law regulating Labor and Industries in Massachusetts.
SUMMARY OF THE PROPOSED LAW:	<p>SECTION 1 repeals sections 42 and 42A of chapter 93 of General Laws, related to trade secrets.</p> <p>SECTION 2 codifies the Uniform Trade Secrets Act as Chapter 93L of the general laws.</p> <p>Section 1 defines relevant terminology, including “improper means,” “misappropriation,” and “trade secret.”</p> <p>Section 2 provides that, (a) under certain circumstances, actual or threatened misappropriation of a trade secret may be enjoined. An injunction terminates when a trade secret ceases to exist, but may continue for an additional period of time to eliminate any commercial advantage derived from misappropriation. (b) In exceptional circumstances, injunctions may condition future use on payment of royalties. (c) Affirmative acts to protect a trade secret can be compelled by court order.</p> <p>Section 3 provides that (a) a complainant is entitled to recoverable damages for misappropriation of trade secrets. Damages can include actual loss and unjust enrichment. (b) If willful and malicious misappropriation exists, the court may award damages not exceeding twice any award that otherwise would be made.</p>

Section 4 authorizes the court to award attorney's fees if a misappropriation claim is made or defended in bad faith, if a motion to enter or terminate an injunction is made or resisted in bad faith, or where willful and malicious misappropriation exists.

Section 5 requires (a) the court use reasonable means to preserve the secrecy of a trade secret in an action under this chapter. Such means may include granting protective orders, sealing records of the action, or ordering any person involved in the litigation to not disclose an alleged trade secret without prior court approval. (b) A party alleging trade secret misappropriation must state with reasonable particularity the nature of the trade secrets and basis for protection. Prior to commencement of discovery, the party alleging misappropriation shall identify with sufficient particularity the trade secret under the circumstances of the case.

Section 6 provides a 3-year statute of limitations to bring a claim under this chapter, starting from the date the misappropriation is discovered or, through reasonable diligence, would be discovered.

Section 7 provides that this act shall supersede any conflicting laws, but shall not affect, for example, contractual remedies.

Section 8 encourages uniformity amongst the states in application.

Section 9 the chapter shall be known as the Uniform Trade Secrets Act.

SECTION 3 adds section 25L, The Massachusetts Noncompetition Agreement Act, to Chapter 149 of the General Laws:

Subsection (a) provides applicable definitions.

Subsection (b) requires a noncompetition agreement to meet the criteria below to be enforceable:

- (i) Requires that the non-compete be signed, in writing, and state that the employee has the right to consult with counsel; further, the non-compete must be provided to the employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee's employment.
- (ii) Requires a non-compete entered into after the commencement of

employment be supported by fair and reasonable consideration independent from continued employment, subject to the same notification requirements from subsection (i).

- (iii) Requires that the agreement be no broader than necessary to protect certain legitimate business interests, including (a) employer's trade secrets; (b) employer's confidential business information; and (c) employer's goodwill; a non-compete may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement.
- (iv) Prohibits a restricted period exceeding 12 months, unless the employee has breached a fiduciary duty or the employer can prove the employee has unlawfully taken property belonging to the employer, in which case the restrictive period can be extended to no more than 2 years.
- (v) Requires the agreement to be reasonable in geographic scope in relation to the interests protected.
- (vi) Requires the agreement to be reasonable in scope regarding the nexus between the proscribed activities relative to the interests protected; provides that limiting restricted activities to services provided by the employee in the last 2 years is presumptively reasonable.
- (vii) Requires that a non-compete agreement be supported by a garden leave clause, such that an employee will be paid for the duration of the restricted period on a pro-rata basis of 50% of the employee's highest annualized salary from the last 2 years. In the event of a breach of fiduciary duty by the employee where the restricted period is extended beyond 12 months, an employer shall be not required to provide garden during the extended restricted period.
- (viii) Requires that the agreement be consonant with public policy.

Subsection (c) prohibits the enforcement of non-competition agreements against certain types of workers, including: (i) employees classified as nonexempt under the FLSA; (ii) student interns or graduate or undergraduate students that engage in short-term employment while enrolled in school; (iii) employees that have been terminated without cause or laid off; and (iv) employees aged 18 and under.

Subsection (d) prohibits judicial reform of non-compete agreements.

Subsection (e) prohibits choice-of-law provisions that would avoid the effects of this section where the employee is a resident of or was employed in Massachusetts 30 days preceding the cessation of employment.

Subsection (f) grants the Suffolk County superior court or the business litigation sessions of the superior court exclusive jurisdiction of all civil actions relating to employee noncompetition agreements.

SECTION 4 provides that the Noncompetition Act shall be in effect and apply to contracts signed after July 1, 2016.

SECTION 5 provides that the UTSA provision shall also take effect July 1, 2016, provided that it shall not apply to misappropriation occurring prior to the effective date.

This bill adds a new section to c. 149 deeming null, void, and unenforceable any provision in a written or oral contract arising out of an employment or independent contractor relationship that restricts, prohibits, or conditions in any way an employee or independent contractor's ability to engage in employment or independent contract work for any period of time after employment or contract work has ended.

This bill would not affect temporary restraining orders or injunctions of a non-compete agreement that address a breach of a separate contractual obligation of the employee or independent contractor.

The following agreements would not be considered noncompetition agreements: (1) covenants not to solicit/hire employees of that employer; (2) covenants not to solicit/transact business with customers of the employer, (3) *nondisclosure* agreements; (4) certain noncompetition agreements made in connection with the sale of a business; (5) noncompetition agreements made outside an employment relationship; (6) forfeiture agreements, and (7) agreements by which an employee agrees not to reapply for employment to the same employer after termination.

This bill only affects agreements signed after the effective date of this act.