Massachusetts Non-Compete Statute

SECTION 20. Chapter 149 of the General Laws, as appearing in the 2016 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, unless the context clearly requires otherwise:

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

“Employee”, an individual who is considered an employee under section 148B; provided, however, that the term “employee” shall also include independent contractors.

“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 agreement.

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

“Noncompetition agreement”, an agreement between an employer and an employee, or otherwise arising out of an existing or anticipated employment relationship, under which the employee or expected employee agrees that the employee will not engage in certain specified activities competitive with the employee’s employer after the employment relationship has ended, including, but not limited to, a forfeiture for competition agreement; provided, however, that “noncompetition agreement” shall not include: (i) a covenant not to solicit or hire employees of the employer; (ii) a covenant not to solicit or transact business with customers, clients or vendors of the employer; (iii) an agreement made in connection with the sale of a business entity or substantially all of the operating assets of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity, partnership or division or subsidiary of a business entity or partnership, when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale or disposal; (iv) an agreement outside of an employment relationship; (v) a forfeiture agreement; (vi) a nondisclosure or confidentiality agreement; (vii) an invention

assignment agreement; (viii) a garden leave clause; (ix) an agreement made in connection with the cessation of or separation from employment if the employee is expressly given 7 business days to rescind acceptance; or (x) an agreement by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

“Restricted period”, the period of time after the date of cessation of employment during which an employee is restricted by a noncompetition agreement from engaging in activities competitive with the employee’s employer.

(b) A noncompetition agreement shall not be valid or enforceable unless:

(i) in the case of an agreement that was entered into in connection with the commencement of employment, the agreement: (A) is in writing signed by both the employer and employee; (B) expressly states that the employee has the right to consult with counsel prior to signing; and (C) is provided to the employee before a formal offer of employment is made or 10 business days before the commencement of the employee’s employment, whichever comes first;

(ii) in the case of an agreement that was entered into after commencement of employment but not in connection with the separation from employment: (A) the agreement is supported by fair and reasonable consideration independent from the continuation of employment; (B) notice of the agreement was provided not less than 10 business days before the effective date of the agreement; (C) the agreement was in writing; (D) the agreement was signed by both the employer and employee; and (E) the agreement expressly states that the employee has the right to consult with counsel prior to signing;

(iii) the agreement is no broader than necessary to protect one or more of the following legitimate business interests of the employer: (A) the employer’s trade secrets, as defined in section 1 of chapter 93L; (B) the employer’s confidential information that otherwise would not qualify as a trade secret; or (C) the employer’s goodwill; provided, however, that the agreement 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, a non-disclosure agreement or a confidentiality agreement;

(iv) the stated restricted period within the agreement does not exceed 1 year from the date of cessation of employment; provided, however, that if the employee has breached the employee’s fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, the restricted period may be not more than 2 years from the date of cessation of employment;

(v) the agreement is reasonable in geographic reach in relation to the interests protected; provided, however, that a geographic reach that is limited to only the geographic areas in which the employee, during any time within the last 2 years of employment, provided services or had a material presence or influence shall be presumptively reasonable;

(vi) the agreement is reasonable in the scope of proscribed activities in relation to the interests protected; provided, however, that a proscription 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 2 years of employment shall be presumptively reasonable;

(vii) the agreement includes a garden leave clause or other mutually-agreed upon consideration between the employer and the employee; provided, however, that such consideration shall be specified in the agreement; provided further, that a garden leave clause within the meaning of this clause shall: (A) provide for the payment, consistent with the requirements for the payment of wages under section 148 of chapter 149, on a pro-rata basis during the entirety of the restricted period of at least 50 per cent of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination; and (B) except in the event of a breach by the employee, not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments; provided, however, if the restricted period has been increased beyond 1 year as a result of the employee's breach of a fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, the employer shall not be required to provide payments to the employee during the extension of the restricted period; and

(viii) the agreement is consistent with public policy.

(c) A noncompetition agreement shall not be enforceable against: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. 201-219, inclusive; (ii) an undergraduate or graduate student that partakes in an internship or otherwise enters a short-term employment relationship with an employer, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate educational institution; (iii) an employee that has been terminated without cause or laid off; or (iv) an employee that is 18 years old or younger.

(d) Nothing in this section shall render void or unenforceable the remainder of a contractor agreement containing an unenforceable noncompetition agreement or 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 or a statutory or common law duty.

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

(f) No choice of law provision that would have the effect of avoiding the requirements of this section shall be enforceable if the employee is, and has been for at least 30 days immediately preceding the employee's cessation of employment, a resident of or employed in the commonwealth at the time of the employee's termination of employment.

(g) All civil actions relating to noncompetition agreements subject to this section shall be brought in the county wherein the employee resides or, if mutually agreed upon by the employer and the employee, in the county of Suffolk; provided, however, that in any such action brought in the county of Suffolk, the superior court or the business litigation session of the superior court shall have exclusive jurisdiction.

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SECTION 55. Section 24L of chapter 149 of the General Laws shall apply to employee noncompetition agreements entered into on or after October 1, 2018.

Massachusetts Trade Secrets Law

CHAPTER 93L. UNIFORM TRADE SECRETS ACT.

Section 1. As used in this chapter, the following words shall have the following meanings unless the context clearly requires otherwise:

“Improper means”, without limitation, theft, bribery, misrepresentation, unreasonable intrusion into private physical or electronic space or breach or inducement of a breach of a confidential relationship or other duty to limit acquisition, disclosure or use of information; provided, however, that “improper means” shall not include reverse engineering from properly accessed materials or information.

“Misappropriation”, (i) the 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) the 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 the trade secret; or (B) at the time of the disclosure or use, knew or had reason to know that the trade secret was acquired: (1) through a person who had utilized improper means to acquire it; (2) under circumstances giving rise to a duty to limit its acquisition, disclosure or use; or (3) 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 such person’s position, knew or had reason to know that what was disclosed was a trade secret and that such person’s knowledge of the trade secret had been acquired by accident, mistake or through another person’s act described in subclause (A) of clause (ii) or subclauses (1) or (2) of subclause (B) of said clause (ii).

“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.

“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, customer list, invention or scientific, technical, financial or customer data that, at the time of the alleged misappropriation: (i) provided an economic advantage, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who might obtain economic advantage from its acquisition, disclosure or use; and (ii) was the subject of efforts that were reasonable under the circumstances to protect against the acquisition, disclosure or use of such information without the consent of the person properly asserting rights therein or such person’s predecessor in interest including, but not limited to, reasonable notice.

Section 2.

(a) Actual or threatened misappropriation may be enjoined upon principles of equity including, but not limited to, consideration of prior conduct and the circumstances of potential use, upon a showing that information qualifying as a trade secret has been or is threatened to be misappropriated. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist; provided, however, that the injunction may be continued for an additional reasonable period of time if necessary to eliminate any economic advantage that otherwise would be derived from such misappropriation.

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

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

Section 3.

(a) Except to the extent that a material and prejudicial change of position prior to acquiring the knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by the imposition of liability for a reasonable royalty for the unauthorized disclosure or use of a trade secret.

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

Section 4.

The court may award reasonable attorney’s fees and costs to the prevailing party if:

(i) a claim of misappropriation is made or defended in bad faith;

(ii) a motion to enter or to terminate an injunction is made or resisted in bad faith; or

(iii) willful and malicious misappropriation exists.

In considering such an award, the court may take into account the claimant’s specification of trade secrets and the proof that such alleged trade secrets were misappropriated.

Section 5.

(a) In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery

proceedings, holding in-camera hearings, sealing the records of the action or ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

(b) In an action alleging misappropriation, a party shall state with reasonable particularity the circumstances thereof, including the nature of the trade secret and the basis for its protection. Before commencing discovery relating to an alleged trade secret, the party alleging misappropriation shall identify the trade secret with sufficient particularity under the circumstances of the case to allow the court to determine the appropriate parameters of discovery and to reasonably enable other parties to prepare their defense.

Section 6.

An action alleging misappropriation must be brought not more than 3 years after the misappropriation was discovered or should have been discovered by the exercise of reasonable diligence. For the purposes of this chapter, a continuing disclosure or use constitutes a single claim.

Section 7.

(a) Except as provided in subsection (b), this chapter shall supersede any conflicting laws of the commonwealth that provide civil remedies for misappropriation.

(b) This chapter shall not affect:

(i) contractual remedies; provided, however, that, to the extent such remedies are based on an interest in the economic advantage of information claimed to be confidential, such confidentiality shall be determined according to the definition of trade secret in section 1 and the terms and circumstances of the underlying contract shall be considered in such determination;

(ii) remedies based on submissions to governmental units;

(iii) other civil remedies to the extent that they are not based upon misappropriation; or

(iv) criminal remedies, whether or not based upon misappropriation.

Section 8.

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

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SECTION 56. Chapter 93L of the General Laws, inserted by section 18, shall take effect on October 1, 2018 and shall not apply to misappropriation commencing prior to the October 1, 2018, regardless of whether such misappropriation continues after that date.