

Down the Garden Leave Path: Massachusetts Reforms Post-Employment Non-Competition Agreements – Will Other States Follow?

INTRODUCTION

On August 18, 2018, Massachusetts became the first state in the United States to sign into law a statute providing for “garden leave” payments to employees forced to sit out employment during a restricted period pursuant to a noncompetition agreement. A quest for a legislative ban on all non-compete agreements to level what had been perceived as an unfair playing field between the West Coast and the East Coast landed the proponents exactly where they did not want to be: with a codification in Massachusetts of exactly what the initiators had hoped to ban. What follows is a discussion of how this came to pass and what it could mean for non-compete agreements in Massachusetts and elsewhere.

The Massachusetts Noncompetition Agreement Act (the "Act") became effective and applicable to Massachusetts noncompetition agreements entered into on or after October 1, 2018. While the Act codified some aspects of Massachusetts case law and statutorily overrode others, the Act's most significant feature was a mandate that all noncompetition agreements be supported by (i) a garden leave clause, providing for pro-rata payment during the restricted period (limited generally to 12 months) of at least 50% of the employee's highest annualized base salary, or (ii) such other mutually-agreed upon consideration specified in the agreement. Noncompetition agreements are now required to be in writing, signed by both the employer and the employee and are subject to new notice requirements. The Act codified safe harbors for both an agreement's geographic scope and the scope of prohibited competitive activities. Finally, the Act prohibited enforcement of non-competes against large classes of low-wage employees.

Part I explains the history of non-competes in Massachusetts and offers an explanation for the impetus behind this bill. This Comment contends that the *Silicon Valley vs. Route 128*

Narrative, detailed below, was the driving force behind this law. Part II looks at garden leave, its place in English law, and its recognition in Massachusetts law prior to codification in 2018. Part III discusses the legislative attempts to address the perceived issues with Massachusetts non-compete agreements, highlighting the differences in the six bills that were introduced in the Massachusetts legislature before moving on to Part IV, which explains the Act itself. Part V analyzes the status of noncompetition agreements in light of the Act and suggests that, while much has been settled by the passage of the Act, there is still plenty of room for creative draftsmanship.

I. HISTORY OF NON-COMPETES IN MASSACHUSETTS

A. *Silicon Valley v. Route 128 Narrative*

A persistent narrative in the decade-long struggle for legislative change to Massachusetts' approach to the treatment of non-compete agreements is the "Silicon Valley Narrative": the claim that the rise of California's Silicon Valley high-tech industry and the decline of the Massachusetts Route 128 high-tech industry over the same period was directly attributable to the fact that Massachusetts enforces non-compete agreements and California, by statute, does not.¹ Both Silicon Valley and the Massachusetts Route 128 high-tech industrial districts started out nearly even in the post-WWII years.² Both the Silicon Valley and the Route 128 high-tech industrial districts were the direct outgrowth of U.S. government-funded, university-based military research and development during World War II and the early Cold War period that followed.³ In Massachusetts, the focal point for this research and development was MIT and Harvard in the greater Boston area.⁴ In California, the focal point was Stanford and U.C. Berkeley in the greater

¹ Cal. Bus. & Prof. Code § 16600 (2018).

² Route 128 started out ahead. It was not until the mid-1970s that Silicon Valley surpassed Route 128 in total technology employment. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 587 (1999).

³ *Id.* at 588–89.

⁴ *Id.* at 588.

San Francisco area.⁵ By the turn of the 21st Century, however, the Silicon Valley high-tech district had invented and re-invented itself through spin-offs and start-ups, fueled by technological innovations mostly spawned from the industrial district itself and not its academic support institutions.⁶ The Route 128 high-tech industrial district was outstripped by significant multiples by Silicon Valley in terms of production, export, and employment, and that trend continued into the new century.⁷

This well-documented history has offered a “natural experiment” in “economic geography,” a field pioneered by Alfred Marshall in the 1960’s.⁸ Marshall identified what he called “agglomeration industries” that achieved economies of scale in production, not by expanding vertically and horizontally as a single firm, but through inter-relationship among multiple firms within an industry focused within a single geographic location, such as the U.S. auto industry in the Detroit metropolitan area.⁹ Two seminal works, a 1994 book by AnnaLee Saxenian and a 1999 law review article by Ronald J. Gilson, were especially influential in feeding this narrative by comparing Silicon Valley and Route 128 as high-tech agglomeration industries on opposite U.S. coasts.¹⁰ Each geographic area achieved significant initial industrial district economies of scale from agglomeration¹¹ from the end of World War II through the 1980’s, based primarily upon the semiconductor revolution in communication and information technology. Only

⁵ *Id.* at 589.

⁶ *Id.* at 590–92.

⁷ Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 587 (1999).

⁸ *Id.* at 586.

⁹ *Id.* at 580–81.

¹⁰ ANNALEE SAXENIAN, *REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128* (1994); Gilson, *supra* note 2.

¹¹ Agglomeration economy is defined as, “a localized economy in which a large number of companies, services, and industries exist in close proximity to one another and benefit from the cost reductions and gains in efficiency that result from this proximity.” *Agglomeration*, MERRIAM-WEBSTER DICTIONARY (2019), <https://www.merriam-webster.com/dictionary/agglomeration%20economy> (last visited Jan. 19, 2019).

Silicon Valley, however, went on to achieve “second and third stage economies of scale,” by evolving newer technologies based on micro-computers (PC’s), smart devices, and internet applications. By contrast, the Route 128 industrial district largely failed to evolve beyond mainframe and minicomputers.¹²

In 1995, Saxenian argued that the combination of (i) major research universities (MIT/Harvard for Route 128 and Stanford/U.C. Berkeley for Silicon Valley) with a large and replenishing supply of scientifically-trained workers, and (ii) high production demand in the form of military contracts, contributed to the creation of a location-specific dynamic in both geographic locales.¹³ It also increased the potential for “spillover” of technology and innovation from these respective East Coast and West Coast universities, through the vehicle of the workers they trained and educated, and induced companies to locate in their respective industrial districts.¹⁴

Saxenian, however, went on to argue that in order to achieve a “second stage agglomeration” economy, where knowledge spills over from established firms within the district rather than from the universities, generating innovation and renewed growth within the district, it is necessary for there to be free movement of scientifically-trained workers from firm-to-firm. She demonstrated that such free movement was the norm in Silicon Valley, but not in Route 128; and she attributed this to a difference in employee/employer culture in each locale.¹⁵ In 1999, Gilson refined this analysis by identifying California’s statutory prohibition against enforcement of post-

¹² Early mainframe computers were room-sized devices. *What is a mainframe? It's a style of computing*, IBM KNOWLEDGE CENTER, https://www.ibm.com/support/knowledgecenter/zosbasics/com.ibm.zos.zmainframe/zconc_whatismainframe.htm; A minicomputer is defined as, “a small computer that is intermediate between a microcomputer and a mainframe in size, speed, and capacity, that can support time-sharing, and that is often dedicated to a single application.” *Minicomputer*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/minicomputer> (last visited Oct. 9, 2018).

¹³ Saxenian, *supra* note 10, at 11–14.

¹⁴ Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 593 (1999).

¹⁵ *Id.* at 593–94.

employment covenants not to compete as the key factor in creating Silicon Valley's high-mobility employee culture.¹⁶ Persuaded by the narrative that non-competes accounted for this result, many in Massachusetts have been trying to catch up ever since.

Some, however, have questioned Gilson's conclusion. Could this be a case of correlation without causation? The East Coast focused on one type of technology¹⁷ and the West Coast focused on a different type.¹⁸ As Ted Sichelman from the University of San Diego put it, "The major reason we posit for Silicon Valley's ascendance is that Route 128 was focused on the minicomputer and Silicon Valley was focused on the PC We all know what won out."¹⁹ The use of non-competes on the East Coast and their prohibition on the West Coast may have had nothing to do with Silicon Valley's initial triumph over Route 128. Nonetheless, there may be some truth in Saxenian's thesis that job-hopping results in second-stage agglomeration economies. It is hard to argue with the fact that, in Silicon Valley, "members of the 'PayPal Mafia' went on to found Tesla, YouTube, LinkedIn and Yelp."²⁰

In the two decades since the Gilson article, there has been much research into the economic impact of non-competes.²¹ Some of the research tentatively confirms Gilson's hypothesis that

¹⁶ Gilson points out that the main method for preventing knowledge transfers with heightened employee mobility is with the Uniform Trade Secrets Act, Cal. Civ. Code § 3426.1. At the time Gilson's article was published, Massachusetts had not yet adopted the UTSA, but "its common law definition of a trade secret [was] for practical purposes identical." *Id.* at 598. (Massachusetts adopted the UTSA when it passed the Massachusetts Noncompetition Agreement Act). *Id.* at 596–99.

¹⁷ Computer companies Digital Equipment Corporation, Wang Laboratories and Prime Computer, located in the Route 128 area, "made minicomputers - washing machine-size devices that were only 'mini' compared with the room-size mainframes that preceded them." Timothy B. Lee, *Massachusetts Just Stole An Important Page From Silicon Valley's Playbook*, VOX (Jul 1, 2016), <https://www.vox.com/2016/4/12/11349248/noncompetes-silicon-valley-route-128>.

¹⁸ Silicon Valley became the center for the production of microcomputers (PCs) designed by companies like Apple. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Matt Marx, Jasjit Singh & Lee Flemming, *Regional Disadvantage? Non-Compete Agreements and Brain Drain*, 44 RES. POL'Y 2, 394–404 (2011); THE WHITE HOUSE (2016), *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf; Evan Starr, J.J. Prescott, & Norman D. Bishara, *Understanding Noncompetition Agreements: The 2014 Survey Project*, 2016 MICH. ST. L. REV. 2, 369–464 (2016); Ted Sichelman & Jonathan Barnett, *Revisiting Labor Mobility in Innovation Markets*, (USC Law Legal Studies Paper No. 16-15, 2016),

non-competes reduce labor mobility to some extent.²² Whether this small, but statistically significant, impact is sufficient, in itself, to account for the dramatic Silicon Valley v. Route 128 Narrative remains unresolved.²³ An expansive survey project done by Evan Starr, J.J. Prescott, and Norman Bishara found that “signing a noncompete before accepting the job is statistically associated with better outcomes [in terms of wages, training, information-sharing, and job satisfaction].”²⁴ So, apparently, notice matters.

In 2016, the U.S. Treasury published a report entitled “Non-Compete Contracts: Economic Effects and Policy Implications.”²⁵ The report found that research suggests 18% of all workers are covered by non-competes and even 19% of workers in California are bound by non-competes, despite the general lack of enforceability in that state.²⁶ The report concluded that, while non-competes can provide benefits, such as the legitimate protection of an employer’s trade secrets, such agreements impose costs on employees in terms of reduced mobility, reduced freedom, and reduced bargaining power. Treasury even seemed to have accepted the Silicon Valley v. Route 128 Narrative, theorizing that reduced job churn results in lower labor productivity, stating, “[j]ob

<https://ssrn.com/abstract=2758854>; Evan Starr, *Consider This: Wages, Training, and Enforceability of Covenants Not to Compete*, (forthcoming at INDUS. & LAB. REL. REV., 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556669; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (US Census Bureau Center for Economic Studies Paper No. CES-WP-17-09; Ross School of Business Paper No. 1339, 2018), <https://ssrn.com/abstract=2905782>; Evan Starr, J.J. Prescott, & Norman D. Bishara, *Noncompetes and Employee Mobility*, (U of Michigan Law & Econ Research Paper No. 16-032, 2019), <https://ssrn.com/abstract=2858637>.

²² *Id.*

²³ Recent research has focused on the impact of non-competes on individual workers, positing the view that non-competes and no-poaching clauses contribute to wage stagnation, increasing inequality, and declining productivity. Alan Krueger & Eric Posner, *How Corporate America is Suppressing Wages for Many Workers*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/2018/02/28/opinion/corporate-america-suppressing-wages.html>.

²⁴ Evan Starr, J.J. Prescott, & Norman D. Bishara, *Noncompetes in the U.S. Labor Force*, (U of Michigan Law & Econ Research Paper No. 18-013, 2019), <https://ssrn.com/abstract=2625714>.

²⁵ OFF. OF ECON. POL’Y, U.S. DEP’T OF TREASURY (2016), *Non-compete Contracts: Economic Effects and Policy Implications*, <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>. See also *Petition For Rulemaking to Prohibit Worker Non-Compete Clauses*, OPEN MARKETS INSTITUTE (Mar. 2019), available at <https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

²⁶ *Id.* at 3–4 (citing Starr, *supra* note 24).

churn helps to raise labor productivity by achieving a better match of workers and firms and *may facilitate the development of industrial clusters like Silicon Valley.*²⁷ The Treasury report recommended greater “transparency in the offering of non-competes [i.e., notice] . . . [and a requirement] that firms provide ‘consideration’ to workers bound by non-compete contracts in exchange for both signing and abiding by non-competes.”²⁸ With this national call for notice requirements and garden leave payments, it is almost as if the Massachusetts Legislature was listening.

Whether true or false, the Silicon Valley Narrative, that non-competes killed Route 128, provided a simple and powerful argument for the proponents of a California-like ban on non-competes, especially in Massachusetts. It was an argument that focused on the public interest, glossing over the obvious self-interest the proponents of the ban (the start-up entrepreneurs and their venture capital backers) had in making it easier to poach high-tech talent. Similarly, the established high-tech firms who opposed the ban found it convenient to pursue their own self-interest in protecting their talent from being poached by making lofty appeals to freedom of contract. The game was on.

B. *Massachusetts Case Law Before the Act*

The courts in Massachusetts have long upheld contracts in restraint of trade or competition, although with reluctance.²⁹ Massachusetts has variations on a theme found in most states: employee noncompetition agreements are valid to the extent they are “reasonable,” and reasonableness turns on whether they are tailored to legitimate employer interests, including trade secrets, other confidential information, or the good will of the employer acquired through dealings

²⁷ *Id.* at 4 (emphasis added).

²⁸ *Id.* at 5.

²⁹ *Becker Coll. of Bus. Admin. & Secretarial Sci. v. Gross*, 183 N.E. 765, 766 (1933).

with his customers.³⁰ There is, however, a “public policy in favor of every person carrying on his trade or occupation freely.”³¹ Thus, close scrutiny is warranted because “an ordinary employee typically has only his own labor or skills to sell and often is not in a position to bargain with his employer.”³² Protection from ordinary competition is not a legitimate business interest and a noncompetition agreement designed solely for that purpose will not be upheld.³³ An employer cannot use a covenant not to compete to prevent its former employee “from using the skill and intelligence acquired or increased and improved through experience or through instruction received in the course of employment.”³⁴

The Massachusetts courts have taken particular care to scrutinize both (i) the period of the restraint on competitive employment³⁵ and (ii) the geographic scope of the restriction on post-termination competitive employment. With respect to geographic scope, the courts “rejected a rule which would arbitrarily limit the restriction to the geographic area of the place of

³⁰ *New Eng. Canteen Serv. Inc. v. Ashley*, 363 N.E.2d 526, 528 (Mass. 1977); *Marine Contractors Co. v. Hurley*, 310 N.E.2d 915, 920 (Mass. 1974); *All Stainless, Inc. v. Colby*, 308 N.E.2d 481, 487 (Mass. 1974); *Richmond Bros. v. Westinghouse Broad. Co.*, 256 N.E.2d 304, 307 (Mass. 1970) (“In determining whether a restriction as to time is reasonable, we must consider the nature of the plaintiff’s business and the character of the employment involved, as well as the situation of the parties, the necessity of the restriction for the protection of the employer’s business and the right of the employee to work and earn a livelihood.”); *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 376 (Mass. 1961); *Cedric G. Chase Photographic Labs., Inc. v. Hennessey*, 97 N.E.2d 397, 398 (Mass. 1951); *New Eng. Tree Expert Co. v. Russell*, 28 N.E.2d 997, 999 (Mass. 1940); *Econ. Grocery Stores Corp. v. McMenemy*, 195 N.E. 747, 749 (Mass. 1935); *Becker College*, 183 N.E. at 765; *Walker Coal & Ice v. Westerman*, 160 N.E. 801, 802 (Mass. 1928); *Edgecomb v. Edmonston* 153 N.E. 99, 101 (Mass. 1926); *Sherman v. Pfefferkorn*, 135 N.E. 568, 569 (Mass. 1922).

³¹ *Routhier Placement Specialists, Inc. v. Brown*, No. 02-3532-E, 2002 WL31248032, at *1 (Mass. Super. Ct. Sept. 26, 2002), citing *Woolley’s Laundry v. Silva*, 304 Mass. 383, 387 (1939); *Commonwealth v. CRINC*, 392 Mass. 79, 87–88 (1984).

³² *Alexander & Alexander, Inc. v. Danahy*, 488 N.E.2d 22, 28 (Mass. App. Ct. 1986).

³³ *Marine Contractors*, 310 N.E.2d at 920; *Richmond Bros.*, 256 N.E.2d at 307.

³⁴ *Club Aluminum Co. v. Young*, 160 N.E. 804, 806 (Mass. 1928).

³⁵ *Sherman*, 135 N.E. at 568 (3 years); *Edgecomb*, 153 N.E. at 101 (5 years); *Becker College*, 183 N.E. at 765 (5 years); *S. New Eng. Ice Co. v. Ferrero*, 4 N.E.2d 359 (Mass. 1936) (5 years); *New Eng. Tree*, 28 N.E.2d at 997 (3 years); *Hennessey*, 97 N.E.2d 397 (Mass. 1951) (2 years); *Marine Contractors*, 310 N.E.2d at 921 (Less than 3 years) (“The original five-year duration of the agreement might be somewhat troublesome.”); *Boulangier v. Dunkin’ Donuts Inc.*, 442 Mass. 635 (2004) (2 years); *Alexander*, 488 N.E.2d at 28 (5 years); *Novelty Bias*, 175 N.E.2d at 376 (3 years).

employment.”³⁶ Instead, they have taken care to ensure that the geographic scope restricted by the noncompetition agreement is no greater than is “reasonably” necessary to protect the employer’s legitimate business interest.³⁷ In general, however, the geographic scope has most often been limited to the employee’s sales territory or to the area in which the employer operates or has customers.³⁸

Finally, for purposes of comparing Massachusetts case law to the provisions of the Act, a few points should be noted about Massachusetts case law on non-competes. First, covenants not to compete have also been held enforceable in Massachusetts against independent contractors.³⁹ Second, continued employment has been held to be sufficient consideration to support a noncompetition agreement.⁴⁰ Third, termination of employment at the initiative of the employer has not, by itself, invalidated a noncompetition provision.⁴¹ While the Massachusetts courts have not adopted by that name the Blue Pencil doctrine (which permits a court to modify or revise a

³⁶ *Novelty Bias*, 175 N.E.2d at 376 (citing *New Eng. Tree*, 28 N.E.2d at 999).

³⁷ *Kroeger v. Stop & Shop Cos.*, 432 N.E.2d 566, 568 (Mass. App. Ct. 1982); *Hennessey*, 97 N.E.2d at 398 (“If the restriction is too broad as to time . . . or territory . . . it may be enforced to the extent necessary to protect the plaintiff.”) (upholding the Master’s decree that reduced the geographic scope of the restraint from a 50 mile radius to a 35 mile radius from Waltham City Hall); *New Eng. Tree*, 28 N.E.2d at 999 (“The Master found that the covenant was reasonable as to time, but unreasonably broad as to space, and he cut down the covenant as to space.”) (Restraining the employee from competing in an area smaller than described in the agreement but larger than the area in which he worked for his employer); *Novelty Bias*, 175 N.E.2d at 377; *Marine Contractors*, 310 N.E.2d at 921 (“The consequence of every covenant not to compete, however, is that the covenantor is deprived of a possible means of earning his living, within a defined area and for a limited time. That fact alone does not make such covenants unenforceable. Hurley has not established any extraordinary hardship which would be caused him by the enforcement of his promise not to compete. He may engage in any work other than marine repair work. . . . The geographic scope of the agreement coincides with the area in which Marine performs almost all of its work, and this is precisely drawn to protect Marine’s goodwill.”).

³⁸ *Edgecomb*, 153 N.E. at 99; *New Eng. Tree*, 28 N.E.2d at 997; *Hennessey*, 97 N.E.2d at 397; *All Stainless, Inc v Colby*, 308 N.E.2d 481 (Mass. 1974).

³⁹ *Boulangier*, 815 N.E.2d at 572.

⁴⁰ *Sherman v. Pfefferkorn*, 135 N.E. 568, 569 (Mass. 1922) (“The instrument was not void for lack of consideration. Reasonably construed, it contained a promise by the plaintiff thereafter to employ the defendant and by the defendant to work for the plaintiff.”) (involving a case where the defendant executed a noncompetition agreement while he was already employed by the plaintiff); “*Wilkinson v. QCC*, No. 99-P-1854, 2001 WL 1646491, at *1 (Mass. App. Ct. Dec. 21, 2001) (unpublished) (concluding that “to the extent new consideration was required [for the non-compete agreement], continued employment was the consideration”)” *Bos. Sci. Corp. v. Mabey*, 455 F. App’x 803, 805 (10th Cir. 2011).

⁴¹ *Kroeger v The Stop & Shop Cos.*, 432 N.E.2d 566, 572 (Mass. App. Ct. 1982); *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d at 376 (where the employee stole from the company).

covenant to make the covenant enforceable) they have, in fact, adopted the concept with respect to noncompetition agreements.⁴²

II. GARDEN LEAVE

A. U.K. Garden Leave

A means of balancing competing employer and employee interests has evolved in the U.K. in the form of “garden leave” agreements. Traditional “garden leave” agreements are triggered when an employee gives notice of employment termination. Statutory notice periods in the U.K. vary based upon length of employment.⁴³ A garden leave provision lengthens the notice provision contractually. The employee will serve out her notice period, and continue to receive her salary and benefits, but will not undertake normal work duties. To separate the employee from sensitive client or confidential information, the employee will remain at home “tending her garden.” Because the employee remains employed, receiving compensation, however, the employee still owes a duty of loyalty to her employer and may not actively work for a competitor.⁴⁴ In the United Kingdom, restricting competition or the use of confidential information, other than trade secrets, during the post-employment period may be made only through express agreement.⁴⁵

⁴² *New Eng. Tree*, 28 N.E.2d at 999 (Mass. 1940) (“It is settled in this Commonwealth that such contracts [noncompetition agreements] are divisible and will not be enforced as to any parts of the covenant that are not reasonably necessary for the protection of the good will of the employer’s business.”). See also *Sherman*, 135 N.E. at 568; *Edgewomb*, 153 N.E. at 101 (“The Courts have, however, seen their way to treat such a covenant [not to compete] as divisible, and to enforce it to the extent to which it is reasonable, while declining to enforce such part of it as is unreasonable. There are many reported case in which covenants in restraint of trade have been held to be divisible as regards space.”); *All Stainless*, 308 N.E.2d at 485 (“If the covenant is too broad in time, in space or in any other respect, it will be enforced only to the extent that it is severable for the purposes of enforcement.”); *Cedric G. Chase Photographic Labs., Inc. v. Hennessey*, 97 N.E.2d 397 (Mass. 1951); *Novelty Bias*, 175 N.E.2d at 377.

⁴³ Employment Rights Act, 1996, c. 18, §§ 86(2-3).

⁴⁴ See generally Bob Hepple, *The Duty of Loyalty: Employee Loyalty in English Law*, 20 COMP. LAB. L. & POL’Y J. 205 (1999).

⁴⁵ *Id.* at 205.

Law surrounding employee loyalty rests entirely on common law.⁴⁶ Garden leave provisions were a response to the somewhat uncertain landscape of what may or may not be an enforceable restriction.⁴⁷ These provisions seek to balance the employer's interest in reducing competition and protecting confidential client or business information with employee's interest in earning a wage.

The leading case associated with garden leave in the U.K. is *Evening Standard Co. Ltd. v. Henderson*, in which the defendant was required to provide one year's notice of employment termination and was required to not work outside of the company without express permission of his employer.⁴⁸ The defendant was offered a job with a competing newspaper and resigned, giving only two months' notice, in breach of contract. His employer sought an injunction for the remainder of the notice period per the employment agreement, but also offered to pay the employee's salary and benefits during that time, regardless of whether the defendant came back to work during his notice period.⁴⁹ The court granted the employer an injunction.⁵⁰ This intention to honor the employment agreement by paying the employee his salary for the duration seemingly made an unenforceable restriction enforceable, thus laying the groundwork for garden leave.⁵¹

Two years later, in *Provident Financial Group v. Hayward*, the English court was confronted with an actual garden leave provision.⁵² The defendant's employment contract included a clause requiring one-year's notice of employment termination, during which time he was prohibited from competing with his employer. His contract also provided that,

⁴⁶ *Id.*

⁴⁷ *Credit Suisse Asset Management Ltd. v. Armstrong* [1996] I.C.R. 882, 891-92 (C.A.). See Howard J. Rubin & Gregg A. Gilman, *Will Garden Leaves Blossom in the States?*, 33 EMP. REL. L.J. 1, 2 (2007).

⁴⁸ *Evening Standard Co. Ltd. v. Henderson*, [1987] I.C.R. 588.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Provident Financial Group v. Hayward*, [1989] 3 All E.R. 298.

[T]he Company shall be under no obligation to vest in or assign to the Executive any powers or duties or to provide any work for the Executive, and the Company may at any time or from time to time suspend the Executive from the performance of his duties or exclude him from any premises of the Company, *but salary will not cease . . .*⁵³

The defendant provided his notice, but, when faced with the prospect of spending several months at home rather than in the office, he notified his employer of his decision to commence employment at his competing job early. His employer sought an injunction.⁵⁴ Unlike in *Evening Star*, the Court did not grant an injunction because the employer could not show sufficient damages if the employee were to leave before the notice period ended. The Court did recognize, however, that, in certain circumstances, such as an employee assuming an identical or substantially similar situation with a competitor, garden leave would be appropriate and would be upheld.⁵⁵ Thus, garden leave was established, though not blindly followed, by the courts.⁵⁶

B. *Garden Leave in Massachusetts*

Garden leave was most likely introduced in the United States by the financial industry, having borrowed the concept from their London counterparts.⁵⁷ The key difference between American and English garden leave provisions is that American garden leave occurs post-employment termination.⁵⁸ Few published decisions have considered pure garden leave provisions.⁵⁹ Of those cases, two occurred in Massachusetts and bear some examination.

⁵³ *Id.* at 300 (emphasis added).

⁵⁴ *Id.* at 298.

⁵⁵ *Id.* at 304–05.

⁵⁶ At least one English court has found that when seeking an injunction against competitive employment, severance payments are not the equivalent of continued employment because in the former a duty of loyalty no longer exists between the parties. *JA Mont (UK) Ltd. v. Mills*, [1993] F.S.R. 577, 586–88.

⁵⁷ For a more in-depth discussion of garden leave in the United States, *see generally* Charles A. Sullivan, *Tending the Garden: Restricting Competition via "Garden Leave"*, 37 *BERKELEY J. EMP. & LAB. L.* 293; Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 *COLUM. L. REV.* 2291 (2002).

⁵⁸ Sullivan, *supra* note 57, at 304.

⁵⁹ “Garden leave” appears in twenty-nine cases in the Lexis Advance database. This search was performed on October 15, 2018.

In 2008, Bear Stearns sought enforcement of a garden leave provision, which required a 90-day notice period before resignation, or termination of employment.⁶⁰ This provision was “buried” in compensation documents that the defendants never signed.⁶¹ Despite Bear Stearns’ willingness to pay defendants’ salaries for the garden leave period, the court was unwilling to enforce what it deemed a “stealth restrictive covenant.”⁶²

Later that same year, Bear Stearns sought an injunction preventing a broker from joining a competing firm.⁶³ In this case, curing the “stealth restrictive covenant” issue, Bear Stearns offered the broker a base salary raise in consideration for accepting a 90-day garden leave provision.⁶⁴ Nevertheless, the broker accepted a position with a competing firm, beginning the following day, in violation of this provision. Bear Stearns agreed to pay the broker’s salary for the duration of the garden leave, but reserved the right to restrict the broker’s access to clients and confidential information during that time. While the court agreed that Bear Stearns would likely prevail on its breach of contract claim, it declined to grant an injunction as against public policy.⁶⁵ The court noted that, “the effect of specific performance in this case would be to require the defendant to continue an at-will employment relationship against his will, it is unenforceable in that manner.”⁶⁶ These two cases indicate that Massachusetts courts have been reluctant to enforce garden leave provisions, treating them as pure restrictive covenants.

III. LEGISLATIVE ATTEMPTS TO ADDRESS NON-COMPETES IN MASSACHUSETTS

A. Prior Legislative Attempts

⁶⁰ Bear Stearns & Co. v. McCarron, Nos. 124272, SUCV2008-00979-BLS1, 2008 Mass. Super. LEXIS 503, at *1 (Mar. 5, 2008)

⁶¹ *Id.* at *9.

⁶² *Id.* at *8.

⁶³ Bear, Stearns & Co. v. Sharon, 550 F. Supp. 2d 174 (D. Mass. 2008).

⁶⁴ *Id.* at 176.

⁶⁵ *Id.* at 179.

⁶⁶ *Id.* at 178.

Three fundamental arguments have been offered to justify prohibiting or limiting post-employment non-compete agreements: (i) such agreements represent an unwarranted restraint of trade thus injuring the public by depriving it of the benefits of competition; (ii) they are unfair to employees who are restricted in their ability to earn a living; and (iii) non-compete agreements are economically inefficient because they stifle high technology innovation and the growth of start-up businesses.⁶⁷

Historically, Massachusetts courts have viewed post-employment covenants not to compete as disfavored restraints of trade, akin to monopolies, cartels and price fixing arrangements that interfered with the efficient functioning of a free market for human capital; therefore, such agreements should be enforced only to the extent necessary to protect employer property interests in trade secrets, customer relationships, goodwill, etc. This restraint of trade rationale required a balancing of the employer's property rights against the public policy interest in free labor markets. Generally, courts in Massachusetts and most other states have adopted this argument as the rationale for common law rulings that disfavor and limit, but do not prohibit, non-competes.⁶⁸

More recently, use of non-competes to restrict lower compensated employees, licensed professionals and non-technical employees has raised concerns about fairness to employees who may sign boilerplate non-competes without careful consideration when they take a new job, focusing attention on the economic harm to individual employees.⁶⁹ Employers often justify such non-competes as a means to protect their investments in employee training, rather than protecting technology, trade secrets, or goodwill.⁷⁰ Courts in Massachusetts and other states have, however,

⁶⁷ Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1304 (2005); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 627 (1960).

⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS, §188 (AM. LAW INST. 1981); Russell Beck, *Beck, Reed, Ridden, LLP - BRR 50 State Noncompete Chart*, <https://www.beckreedriden.com/wp-content/uploads/2019/01/Noncompetes-50-State-Survey-Chart-20190113.pdf>. (last visit Jan. 19, 2019).

⁶⁹ Long, *supra* note 67, at 1301–03.

⁷⁰ See *Marine Contractors Co. v. Hurley*, 310 N.E.2d 915, 920 (Mass. 1974).

increasingly emphasized “employee fairness” by requiring a more substantial employer property interest, and the employee fairness argument has been applied to support legislation that bans enforcement of non-competes for lower compensated, non-technical and other classes of employees.⁷¹

Finally, in the Information Age,⁷² a number of economists and other academics have argued that non-competes should be prohibited altogether (as they have been in California), at least in the high-tech industries, because non-competes impede the rapid dispersion of technical know-how critical to the spin-offs and start-ups that have fueled innovation and growth (the “Silicon Valley Narrative”).⁷³ The decade-long effort to legislatively reform the Massachusetts law regarding non-compete agreements⁷⁴ that culminated in the adoption of the Act in August 2018 has featured all three arguments, often wielded by different players in the legislative process.⁷⁵

⁷¹ Mass. Gen. Laws ch. 112, § 12X; Mass. Gen. Laws ch. 112, § 74D; Mass. Gen. Laws ch. 112, § 135C; Mass. Gen. Laws ch. 149, § 186 (Broadcasters); Clare O’Connor, *Does Jimmy Johns Non-Compete Clause for Sandwich Makers Have Legal Legs?*, FORBES, (Oct. 15, 2014, 2:41 PM), <https://www.forbes.com/sites/clareoconnor/2014/10/15/does-jimmy-johns-non-compete-clause-for-sandwich-makers-have-legal-legs/#78b6160c4107>.

⁷² The Information Age is defined as, “the modern age regarded as a time in which information has become a commodity that is quickly and widely disseminated and easily available especially through the use of computer technology.” *Information Age*, MERRIAM-WEBSTER DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/Information%20Age> (last visited Jan. 19, 2019).

⁷³ Gilson, *supra* note 2; Natarajan Balasubramanian, Jin Woo Chang, Mariko Sakakibara, Jagadeesh Sivadasan & Evan Starr, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High Tech Workers*, (US Census Bureau Center for Economic Studies Paper No. CES-WP-17-09, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2905782; Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry ... and Exit?*, 12 INNOVATION POL’Y AND THE ECON. 39 (2012); Matt Marx, Jasjut Singh, & Lee Fleming, *Regional Disadvantage? Non-Compete Agreements and Brain Drain*, 44 RESEARCH POL’Y 394 (2011); Dan Messeloff, *Giving the Green Light to Silicon Alley Employees: No-Compete Agreements between Internet Companies and Employees under New York Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 711 (2001); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentive to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425 (2011).

⁷⁴ “‘AIM has fought relentlessly for more than 11 years on behalf the vast majority of Massachusetts employers who wish to preserve the use of non-competes to protect intellectual property. The new bill accomplishes that goal and reflects the productive compromise brokered two years ago by the speaker,’ said Brad MacDougall, Vice President of Government Affairs.” John Regan, *Beacon Hill Passes Energy, Non-Compete Bills; No Agreement on Health Measure*, AIM BLOG, (Aug. 1, 2018, 8:16 AM), <https://blog.aimnet.org/aim-issueconnect/beacon-hill-passes-energy-non-compete-bills-but-no-agreement-on-health-measure>.

⁷⁵ Mass. Gen. Laws ch. 149, § 24L (2018).

In 2014, Massachusetts Governor Duval Patrick sought a broad ban on non-competes similar to California's.⁷⁶ This proposal, supported by high-tech start-ups and their venture capital sponsors, was based largely on the “innovative efficiency” argument derived from the Silicon Valley Narrative.⁷⁷ The proposal was opposed by the trade group Associated Industries of Massachusetts (“AIM”) representing the established business community, and it failed to gain legislative traction.⁷⁸

In 2016, proponents of legislative restrictions on non-compete agreements broadened their arguments by combining the “employee fairness” with the “innovative efficiency” argument, by both prohibiting non-compete agreements for a broad class of employees and mandating that employers make “garden leave” payments to former employees against whom they enforce such non-competes. The House of Representatives unanimously adopted a compromise, supported by AIM and many large employers, limiting the non-compete period to one year and featuring “garden leave.” That compromise embodied all three rationales: (i) it reflected the public policy – restraint of trade argument by largely codifying existing principles of Massachusetts common law regarding post-employment non-competes; (ii) it addressed “employee fairness” by requiring protective notices and “cooling-off” periods, banning non-competes for lower compensated and certain other

⁷⁶ Gregory Gomer, *Patrick Announces Plan to Abolish Noncompetes & Launch a Global EIR Program Aimed at H-1B Visas*, AMERICANINNO.COM (Apr. 10, 2014), <https://www.americaninno.com/boston/patrick-announces-plan-to-abolish-noncompetes-launch-a-global-eir-program-aimed-at-h1-b-visa-program/>; Nick Deluca, *Water Cooler Guide: A Brief History of Non-Compete Laws in Massachusetts*, AMERICANINNO.COM (Apr. 10, 2014), <https://www.americaninno.com/boston/massachusetts-non-compete-history-of-non-compete-laws-in-massachusetts/>.

⁷⁷ Quoting Michael Troiano, chief marketing officer at MA-based Actifio, “Non-competes helped destroy the last generation of great Boston technology companies. There was a time when Silicon Valley vs. 128 was a jump ball. Smart people have argued that the difference in policy related to non-competes impaired labor mobility . . . [in Massachusetts] and liberated it . . . [in California].” Quoting Jeff Bussgang, general partner at Flybridge Capital Partners, “Many studies have shown that non-compete agreements reduce R&D investment and stifle innovation.” Lauren Landry, *Boston’s Tech Community Responds to Gov. Patrick’s Plan to Ban Non-Competes*, AMERICANINNO.COM (Apr. 10, 2014), <https://www.americaninno.com/boston/gov-patricks-plan-to-ban-noncompetes-boston-tech-community-responds/>.

⁷⁸ John Regan, *Governor Signs Jobs Bill; Renews Bid for Non-Compete Restrictions*, AIM BLOG, (Aug. 13, 2014, 3:42 PM), <https://blog.aimnet.org/aim-issueconnect/governor-signs-job-bill-renews-bid-for-non-compete-restrictions>.

classes of employees, and prohibiting enforcement against employees terminated without cause or laid-off and (iii) requiring “garden leave” or other compensation for former employees who were subject to restriction.⁷⁹ That compromise, however, did little to address the innovative efficiency rationale that had been the basis for the non-compete ban originally proposed by Governor Patrick and supported by the venture capitalists and high-tech entrepreneurs. At the end of the day, the House compromise supported by Governor Patrick’s successor, Governor Baker, and AIM and its members, could not be reconciled with a Senate version supported by venture capitalists and high-tech entrepreneurs that also featured “garden leave,” but limited the non-compete period to only three months, which amounted to a de facto ban on post-employment non-competes.⁸⁰ Finally, in 2018, the legislative compromise from 2016 was revived, enacted by the legislature and signed by Governor Baker, with the “restraint of trade” and “employee fairness” arguments carrying the day.⁸¹

B. The Successful Legislative Session

While the goal for those persuaded by the Silicon Valley Narrative was a complete legislative ban on non-compete agreements, only one of the six bills (Senate Bill 1020) introduced in the legislative session that passed the Massachusetts Noncompetition Agreement Act, provided for such complete ban, including a ban on noncompetition agreements already in existence.⁸² The

⁷⁹ Brad MacDougall, *House Non-Compete Bill Seeks Middle Ground*, AIM BLOG, (Jun. 28, 2016, 1:20 PM), <https://blog.aimnet.org/aim-issueconnect/house-non-compete-bill-seeks-middle-ground>.

⁸⁰ John Regan, *Lawmakers OK Energy, Economic Bills; Non-Competes Remain Unchanged*, AIM BLOG, (Aug. 1, 2016, 8:40 AM), <https://blog.aimnet.org/aim-issueconnect/lawmakers-ok-energy-economic-bills-non-competes-remain-unchanged>.

⁸¹ John Regan, *Baker Signs Energy, Non-Compete Bills; Vetoes Patent Trolling*, AIM Blog (Aug. 13, 2018, 8:00 AM), <https://blog.aimnet.org/aim-issueconnect/baker-signs-energy-non-compete-bills-vetoes-patent-trolling>; “The law governing non-competes, included in an economic development bill, mirrors the compromise that AIM and other business groups reached two years ago with House Speaker Robert DeLeo.” Regan, *supra* note 74.

⁸² “Any written or oral contract or agreement arising out of an employment or independent contractor relationship that prohibits, impairs, restrains, restricts, or places any condition on, a person's ability to seek, engage in or accept any type of employment or independent contractor work, for any period of time after an employment or independent contractor relationship has ended, shall be void and unenforceable with respect to that restriction. This section shall not render void or unenforceable the remainder of the contract or agreement. Nor shall this section affect (i) covenants

other five bills supported the concept of an enforceable non-compete agreement, each just differing in terms of the requirements to be met in order to be enforceable. Most of the remaining five bills provided for a restriction on competition for a period no longer than twelve months.⁸³ Two of the bills were a codification of principles established under Massachusetts case law, but provided for no garden leave payments,⁸⁴ while three of the bills provided for some form of garden leave payment.⁸⁵ Two of those three provided for garden leave payments equal to 100% of the terminated employee's annualized earnings.⁸⁶ One (Senate Bill 840) even included bonus payments and employer-paid benefit premiums.⁸⁷ House Bill 2371, however, which proposed a 50% garden leave payment provision, won out in the final version of the statute.⁸⁸

not to solicit or hire employees or independent contractors of the employer; (ii) covenants not to solicit or transact business with customers of the employer; (iii) non-disclosure agreements; (iv) 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 10 per cent interest of the business who received significant consideration for the sale; (v) noncompetition agreements outside of an employment relationship; (vi) forfeiture agreements; or (vii) agreements by which an employee agrees to not reapply for employment to the same employer after termination of the employee.

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

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

This section shall apply to all contracts and agreements, including those executed before the effective date of this chapter." S. 1020 § 11, 190th Gen. Court, Reg. Sess. (Mass. 2017).

⁸³ S. 840, 190th Gen. Court, Reg. Sess. (Mass. 2017); S. 988, 190th Gen. Court, Reg. Sess. (Mass. 2017); S. 1017, 190th Gen. Court, Reg. Sess. (Mass. 2017); H. 2366, 190th Gen. Court, Reg. Sess. (Mass. 2017); H. 2371, 190th Gen. Court, Reg. Sess. (Mass. 2017).

⁸⁴ Mass. S. 988; Mass. H. 2366.

⁸⁵ Mass. S. 840; Mass. S. 1017; Mass. H. 2371.

⁸⁶ "The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee which shall be equal to or greater than 100 per cent of the employee's highest annualized earnings paid by the employer within the 2 years preceding the employee's termination and is negotiated during the 30-day period immediately following the termination of employment." Mass. S. 1017, § 3(b)(10); Mass. S. 840 § 3(b)(10).

⁸⁷ "To constitute a garden leave clause under this section, the noncompetition agreement shall: (i) provide for the payment, consistent with the requirements for the payment of wages, under section 148, of 100 per cent of the employee's highest annualized base salary plus bonus and/or pro-rated bonus and benefit premiums paid by the employer within the 2 years preceding the employee's termination; and (ii) not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments except in the event of a breach by the employee." Mass. S. 840 § 3(b)(10).

⁸⁸ H. 2371, 190th Gen. Court, Reg. Sess. (Mass. 2017).

Of the three bills that contained a specified garden leave provision and that permitted the tendering of some other “mutually-agreed upon consideration,” two of the bills (Senate Bill 1017 and Senate Bill 840) precluded the employer was from negotiating such “mutually-agreed upon consideration” with the employee prior to the employee’s date of hire or prior to any date preceding the employee’s termination of employment.⁸⁹ This concept did not make it into the final statute.⁹⁰ Both Senate Bill 1017 and Senate Bill 840 also required that such “other mutually-agreed upon consideration” equal or exceed the garden leave payment provided for in each bill.⁹¹ Again, this concept did not make it into the final statute.

Four of the bills mandated that, to remain valid and enforceable, the employer had to review the non-competition agreement with the employee on a periodic basis.⁹² Senate Bill 840 even went so far as to require that the employer obtain the written consent from the employee of the agreement’s continued validity.⁹³ The concept of a mandatory periodic review did not, in any form, make it into the final statute.

One of the bills failed to codify “goodwill” as a legitimate business interest to be protected, though such concept is settled in Massachusetts case law.⁹⁴ Three of the bills codified the “Blue Pencil doctrine,” valid, in principle if not in name, under Massachusetts case law.⁹⁵ Senate Bill

⁸⁹ S. 1017 § 3(b)(10), 190th Gen. Court, Reg. Sess. (Mass. 2017); S. 840 § 3(b)(10), 190th Gen. Court, Reg. Sess. (Mass. 2017).

⁹⁰ Mass. Gen. Laws ch. 149, § 24L (2018).

⁹¹ *Id.*

⁹² Mass. S. 840 § 3(b)(4); S. 988 § 3(b)(4), 190th Gen. Court, Reg. Sess. (Mass. 2017); H. 2366 § 3(b)(4), 190th Gen. Court, Reg. Sess. (Mass. 2017); Mass. S. 1017 § 3(b)(4).

⁹³ “To remain valid and enforceable, the employer shall review a noncompetition agreement with the employee not less than once every 3 years *and obtain written consent from the employee of the agreement’s validity.*” Mass. S. 840 § 3(b)(4) (emphasis added).

⁹⁴ Mass. S. 840; *Sherman v. Pfefferkorn*, 241 Mass. 468 (1922); *New England Tree Expert Co. Inc. v. Russell*, 306 Mass. 504 (1940).

⁹⁵ Mass. S. 988 § 3(d); Mass. H. 2371 § 3(d); Mass. H. 2366 § 3(d).

840 and Senate Bill 1017, however, did the opposite and specifically rejected the Blue Pencil doctrine.⁹⁶ The final statute codified the Blue Pencil doctrine.⁹⁷

All five of the bills that permitted noncompetition agreements provided for some form of employer waiver of the restraint on the employee's engagement in competitive activity, either at the moment of termination of the employee's employment or within a prescribed period of days thereafter. The employer waiver took various forms. House Bill 2366 and Senate Bill 988 mandated that, not later than 10 business days after the employee's termination of employment, the employer was required to notify the employee in writing, by certified mail, of the employer's intent to enforce the noncompetition agreement or the agreement would be deemed waived by the employer.⁹⁸ An exception to the automatic waiver was made for instances in which the employee unlawfully took employer property or breached any of the specified covenants.⁹⁹ Senate Bill 1017 contained a similar mandate, but did not require that the written notification be made by certified mail.¹⁰⁰ Finally, Senate Bill 840 also mandated a 10-day written notice (not by certified mail), but

⁹⁶ "A court shall not 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. A court shall not invoke the doctrine of inevitable disclosure to extend an expired noncompetition agreement or otherwise render enforceable a noncompetition agreement that fails to satisfy the requirements of paragraphs (2) to (11), inclusive, of subsection (c)." S. 840 §3(e); S. 1017 §3(e).

⁹⁷ Mass. Gen. Laws ch. 149, § 24L(d) (2018).

⁹⁸ Mass. H. 2366 § 3(b)(9); Mass. S. 988 § 3 (b)(9).

⁹⁹ "Not later than 10 business days after the termination of an employment relationship, the employer shall notify the employee in writing by certified mail of the employer's intent to enforce the noncompetition agreement. If the employer fails to provide such notice, the noncompetition agreement shall be deemed to have been waived by the employer. This paragraph shall not apply if the employee has unlawfully taken, physically or electronically, property belonging to the employer or the employee has already breached any of the following: the noncompetition agreement, a covenant not to solicit or transact business with customers, clients, referral sources, or vendors of the employer, a covenant not to solicit or hire employees of the employer, a confidentiality agreement with the employer, or a fiduciary duty to the employer." Mass. H. 2366 § 3(b)(9); S. 988 § 3(b)(9), 190th Gen. Court, Reg. Sess. (Mass. 2017).

¹⁰⁰ "Not later than 10 days after the termination of an employment relationship, the employer shall notify the employee in writing of the employer's intent to enforce the noncompetition agreement. If the employer fails to provide such notice, the noncompetition agreement shall be void. This paragraph shall not apply if the employee has breached a fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer." S. 1017 § 3(b)(9), 190th Gen. Court, Reg. Sess. (Mass. 2017).

provided as the only exception those instances in which an employee is terminated for “good cause.”¹⁰¹

At the end of the day, the proponents of the Silicon Valley Narrative, who advocated for a statutory ban on all non-compete agreements, lost. The final statute continues the world in which non-competes are enforceable in Massachusetts. Those legislators who sought some protection for employees with little or no bargaining power and little or no confidential information, prevailed, because the final statute excluded large categories of such employees from being subject to any noncompetition agreement at all. Finally, those who were concerned about the financial hardship imposed on an employee who is forced to remain unemployed during his or her restricted period, succeeded to some extent, because the final statute codified, for the first time in the U.S., the concept of garden leave payments to ease the burden on the former employee forced to be idle.

IV. THE MASSACHUSETTS NONCOMPETITION AGREEMENT ACT

The final version of the Massachusetts Noncompetition Agreement Act (the “Act”) was signed into law on August 10, 2018. The Act became effective and applicable to noncompetition agreements entered into on or after October 1, 2018. With its passage, Massachusetts became the first state in the U.S. to adopt a statutory version of garden leave, providing Massachusetts employers with a “safe harbor” for noncompetition agreements if they follow the specified rules.¹⁰² The Act codified some aspects of Massachusetts common law in the area of non-compete agreements, but it also statutorily overrode other aspects of such Massachusetts common law.

¹⁰¹ Mass. S. 840 §3 (b)(9).

¹⁰² Following the Massachusetts Noncompetition Agreement Act, six other states followed suit. Florida (FLA. STAT. § 542.336 (2019)), Maine (Me. Rev. Stat. Ann. tit. 26 § 599-A (2020)), Maryland (MD. CODE ANN., LAB. & EMPL. § 3-716 (2020)), New Hampshire (N.H. REV. STAT. § 275:70-a (2020)), Oregon (OR. REV. STAT. § 653.295 (2020)), Rhode Island (R.I. Gen. Laws §§ 28-59-1–3 (2020)), and Washington (WASH. REV. CODE §§ 49.62.005–900 (2020)) passed legislation which ban non-compete agreements or make them unenforceable for some or most workers in the state based on their income.

For new agreements, entered into on or after October 1, 2018, the Act provides that to be valid and enforceable, such noncompetition agreements “shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided such consideration is specified in the noncompetition agreement.”¹⁰³ Garden leave, as defined under the Act, requires (i) payment “consistent with the requirements for the payment of wages under section 148 of chapter 149 of the general laws,”¹⁰⁴ (ii) payment on a pro-rata basis during the entirety of the restricted period (the period during which the employee is restricted from engaging in “activities competitive with his or her employer,”)¹⁰⁵ and (iii) payment of at least 50% of the employee's highest annualized base salary paid by the employer within the 2 years preceding the employee's termination of employment.¹⁰⁶

Bonuses are not considered when calculating the specified garden leave payments. It is unclear how fringe benefits, such as health insurance and life insurance, or retirement plan benefits are to be treated under the Act. Were the words “consistent with the requirements for the payment of wages under section 148 of chapter 149 of the general laws,” which deals primarily with the timing of the payment of wages, meant somehow to address this issue? Or are garden leave payments made pro-rata over the entirety of the restricted period to be treated as “wages” for fringe benefit and retirement plan purposes? Are employer-paid portions of fringe benefit premiums meant to continue during the garden leave period, as they do under UK law? It is unclear; the Act does not specifically address this.

Finally, under the Act, an employer is not permitted to unilaterally *discontinue* or otherwise fail or refuse to make such garden leave payments, “except in the event of a *breach by the*

¹⁰³ Mass. Gen. Laws ch. 149, § 24L(b)(vii) (2018).

¹⁰⁴ *Id.*

¹⁰⁵ Mass. Gen. Laws ch. 149, § 24L(a).

¹⁰⁶ Mass. Gen. Laws ch. 149, § 24L(b)(vii).

employee.”¹⁰⁷ What would constitute such a “breach by the employee” is not specified. Nor does the Act make clear whether the contemplated “breach by the employee” is one occurring during the employee's period of employment prior to termination or one that could occur after the date of the employee's termination of employment, or both. Support for the latter interpretation may be found in the word “discontinue,” for the use of that word contemplates the beginning of payments that then cease, or discontinue, at some point upon the discovery of the prohibited “breach.”

In a move that both codified and changed Massachusetts common law, the Act limited the restricted period permitted in a new noncompetition agreement to a maximum of 12 months from date of cessation of employment.¹⁰⁸ The restricted period could be extended beyond 12 months to a period of no more than 24 months under two circumstances: (i) where the employee has “breached his or her fiduciary duty to the employer,” or (ii) where the employee has unlawfully taken, physically or electronically, property belonging to the employer.¹⁰⁹ The Act goes on to make clear, however, that if the restricted period “has been increased beyond 12 months 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 [garden leave] payments to the employee during the extension of the restricted period.”¹¹⁰ The Act fails to clarify what “fiduciary duty to the employer” a former employee would have that he or she could breach. Certainly, under UK garden leave law, the basis for holding an employee to a continuing duty of loyalty to his employer during the garden leave period is the fiction that the garden leave payments are in the nature of continued employment for the employer,

¹⁰⁷ Mass. Gen. Laws ch. 149, § 24L(b)(vii) (emphasis added).

¹⁰⁸ Mass. Gen. Laws ch. 149, § 24L(b)(iv).

¹⁰⁹ *Id.*

¹¹⁰ Mass. Gen. Laws ch. 149, § 24L(b)(vii) (emphasis added).

during which period the employee is required to do the job of doing nothing.¹¹¹ Under Massachusetts law, however, it has been held that an employee's duty of loyalty to his former employer ceases upon termination of employment, unless it can be demonstrated that the employee left with confidential information, in which case a continuing duty of loyalty may be implied.¹¹² So what “fiduciary duty” did the Massachusetts legislature envision an employee continuing to owe to his former employer? Did the Massachusetts Legislature intend to codify an implied duty of loyalty hereafter in every case where an employee signs a non-compete? Alternatively, was the Massachusetts Legislature attempting to say that if an employee breached his fiduciary duty to his employer *during his employment prior to the date of his cessation of employment*, then in such case, the restricted period could be extended from twelve to twenty-four months, and no garden leave payments would be required to be made during the period of extension?¹¹³ It is likely that the legislature intended the former, an implied duty of loyalty to the former employer in return for the garden leave payments.

New noncompetition agreements must now be in writing and signed by both the employer and the employee.¹¹⁴ The agreement must expressly state that the employee has the right to consult with counsel prior to signing.¹¹⁵ In a departure from Massachusetts case law, if an agreement is entered into *after* commencement of employment but not in connection with an employee's separation from employment, it “must be supported by fair and reasonable

¹¹¹ Imam-Sadeque vs. BlueBay Asset Management (Services) Ltd [2012] EWHC 3511(QB) (holding that the purpose of garden leave is to secure an employee's loyalty to their current employer for the duration of their notice period).

¹¹² Agero, Inc. v. Rubin, 14-P-932 (Mass. App. Ct. Sep. 8, 2015).

¹¹³ Nor, presumably, would garden leave payments be owing during the initial 12 months of the restricted period in the case of a breach of fiduciary duty prior to termination of employment, pursuant to subsection (b)(vii) of the Act.

¹¹⁴ Mass. Gen. Laws ch. 149, § 24L(b)(i), (ii).

¹¹⁵ *Id.*

consideration independent from the continuation of employment.”¹¹⁶ Presumably, that would normally be a raise.

The Act also introduced new notice requirements. If the agreement is entered into in connection with the commencement of employment, then it “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.”¹¹⁷ If an agreement is entered into after commencement of employment but not in connection with an employee's separation from employment, “notice of the agreement must be provided at least 10 business days before the agreement is to be effective.”¹¹⁸

In a codification of existing Massachusetts common law, under the Act, an agreement:

must be 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 that term is 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 good will.¹¹⁹

As a limited “safe harbor,” a noncompetition agreement will 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.”¹²⁰ So, in addition to arguing that a covenant not to compete is broader than is necessary to protect one of the specified legitimate business interests, an employee can now also argue that the business interest could have alternatively been protected through a non-solicitation, non-disclosure or confidentiality agreement, in lieu of the covenant not to compete.

¹¹⁶ Mass. Gen. Laws ch. 149, § 24L(b)(ii); *Sherman v Pfefferkorn*, 241 Mass. 468 (1922).

¹¹⁷ Mass. Gen. Laws ch. 149, § 24L(b)(i).

¹¹⁸ Mass. Gen. Laws ch. 149, § 24L(b)(ii).

¹¹⁹ Mass. Gen. Laws ch. 149, § 24L(b)(iii).

¹²⁰ *Id.*

The Massachusetts Legislature saw fit to define what would be deemed reasonable as to geographic scope and proscribed activities, thus obviating the need for some measure of litigation of these matters going forward. For new agreements, a geographic reach must be reasonable in relation to the interests protected, but a geographic reach will be presumed reasonable if it is limited to "only the geographic areas in which the employee, during any time in the past 2 years of employment, provided services or had a material presence of influence."¹²¹ Of course, the question of what is an "area" still remains. Is an "area" a neighborhood, a town, a city, a county? Is it where the employee operated physically, telephonically, or electronically? The courts will decide. Similarly, the Act addressed the scope of proscribed activities. They must also be reasonable in relation to the interests protected, but a restriction on activities that (i) protects a legitimate business interest, and (ii) is limited to "only the specific types of services provided by the employee at any time during the last 2 years of employment is presumptively reasonable."¹²² Finally, just as with past Massachusetts case law, particularly in the area of geographic scope, the Act codifies the Blue Pencil doctrine, stating that 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 interest."¹²³

As significant as codification of garden leave in noncompetition agreements has been, so also is the legislative pronouncement regarding who cannot be covered under any circumstance by any noncompetition agreement. The Act provides that it applies to all employees and independent contractors working in Massachusetts, regardless of whether the agreement has a choice of law provision specifying the law of some other jurisdiction applies.¹²⁴ Henceforth, noncompetition

¹²¹ Mass. Gen. Laws ch. 149, § 24L(b)(v).

¹²² Mass. Gen. Laws ch. 149, § 24L(b)(vi).

¹²³ Mass. Gen. Laws ch. 149, § 24L(d).

¹²⁴ Mass. Gen. Laws ch. 149, § 24L(a), (e).

agreements cannot be enforced against (i) employees who are classified as non-exempt under the Fair Labor Standards Act, (ii) undergraduate or graduate students who partake in an internship or short-term employment while enrolled in an educational institution, (iii) employees that have been terminated without cause or laid off, and (iv) employees who are 18 years of age or younger.¹²⁵ Obviously the prohibitions of enforcement against hourly workers and workers under age 18 were the result of what the Legislature deemed to be unacceptable employer overreach in bargaining power against classes of employees who likely held no “secrets” that could put their former employer at a competitive disadvantage when they went to work elsewhere.¹²⁶ Also, it appears that the Legislature was persuaded by the argument that employees who are terminated without cause by the employer cannot be viewed as a competitive threat if the employer was willing to part with the employee voluntarily, hence the exclusion of employees terminated without cause from enforceable non-competes under the Act.¹²⁷ Certainly, there may be litigation in the future as to whether or not an employee was terminated without cause, since the Act does not define “cause” or “without cause,” but the Act still remains a statement of public policy in Massachusetts that an employee whom an employer is willing to terminate voluntarily is not now prohibited from securing employment immediately with some other employer. An unintended side effect of the

¹²⁵ Mass. Gen. Laws ch. 149, § 24L(c)(i-iv) (2018).

¹²⁶ In 2014, Jimmy Johns garnered the spotlight when it began requiring its low-wage employees to sign non-competes as a condition of continued employment. Employees were barred from working for competitors (those whose revenues included 10% or more derived from sandwich sales) located within 2 miles of a Jimmy Johns store for a period of 2 years. This focused attention on the use of non-competes among low-wage workers, a group unlikely to possess confidential information or trade secrets that would benefit a competitor. The New York Attorney General settled its law suit against Jimmy Johns in June 2016. Press Release, N.Y. ST. OFF. OF ATT’Y GEN., *Attorney General Schneiderman Announces Settlement With Jimmy John’s to Stop Including Non-Compete Agreements in Hiring Packets* (Jun. 22, 2016), <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements>.

¹²⁷ “A noncompetition agreement shall not be enforceable against the following types of workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29 U.S.C. 201-219; (ii) undergraduate or graduate students that partake in an internship or otherwise enter 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) employees that have been terminated without cause or laid off; or (iv) employees age 18 or younger.” Mass. Gen. Laws ch. 149, § 24L(c) (2018).

Act may be that employers will claim “cause” in more terminations than is currently true. “It’s just not working out” might be less common than “We’re firing you for cause.”

V. WHAT DOES IT MEAN?

With the passage of the Act, many things now seem settled with respect to noncompetition agreements. Those who lobbied for a complete statutory ban on non-competition agreements lost. Whatever advantage California has had because of its near-absolute ban on non-competes, it will continue to have, although perhaps to a slightly diminished extent. It was possible to have an enforceable non-competition agreement in Massachusetts before the passage of the Act and, provided the rules are followed, it remains possible to have an enforceable non-competition agreement after its passage. Certainly, one reading of the Act is that it was an attempt by the Massachusetts Legislature to codify certain aspects of Massachusetts case law and at the same time offer employers the opportunity to craft ‘safe harbor’ non-competition agreements that would be enforceable, if the employer were willing to jump through the specified hoops, including providing the terminated employee with garden leave pay during the period of his restriction on competitive activity. The garden leave provision, how it was crafted and what it requires, has been an attention-getter since its passage as the first of its kind in the U.S. The garden leave provision, however, is not all that is noteworthy in the Act, and certainly not all that is important to practitioners trying to draft enforceable non-compete agreements that will protect their employer-clients.

The provision in the Act, that permits “other mutually-agreed upon consideration between the employer and the employee ... specified in the ... agreement”¹²⁸ to support an enforceable non-competition agreement, is a loophole through which one could drive a truck.¹²⁹ This language

¹²⁸ Mass. Gen. Laws ch. 149, § 24L(b)(vii) (2018).

¹²⁹ “‘The statute as it’s currently passed was watered down significantly because it gave another option,’ said Erik Winton, who co-leads Jackson Lewis’s practice focused on noncompetes and is based in Boston. ‘I see most companies likely ignoring [the garden leave payment] and going with the other option,’ which could take the form of a signing

was a compromise, first introduced in the earlier 2016 legislative run at addressing non-competes.¹³⁰ While the Act specifies the method of calculating the amount of the garden leave pay and even the timing of such payments during the restricted period, the Act contains no such specifications with respect to such “other mutually-agreed upon consideration.” Yet the Massachusetts legislators had the option of including such specifications in the final statute, because at least two of the proposed bills contained a mandate that the “other consideration” equal or exceed the specified garden leave pay.¹³¹ As one practitioner stated, “[i]t appears to allow the parties to agree to *less valuable* consideration that could be provided to the employee *at any time*, including the commencement of employment (e.g., a hiring bonus). Thus, what was proposed initially as a garden leave ‘requirement’ appears to be more of an optional contractual provision.”¹³²

Clearly, the Associated Industries of Massachusetts (AIM), the largest employer association in Massachusetts and one of the foremost lobbyists involved in this decade-long legislative battle, shares the view that a one-time payment at the commencement of employment, such as a hiring bonus, would be adequate ‘other’ compensation to support an enforceable non-

bonus, the promise of severance, or some other kind of additional pay or benefit.” Jena McGregor, *Massachusetts Bill Would Require Employers To Pay Up When Enforcing Noncompetes -- But There’s A Loophole*, WASH. POST, (Aug. 2, 2018), https://www.washingtonpost.com/business/2018/08/02/massachusetts-bill-would-require-employers-pay-up-when-enforcing-noncompetes-theres-loophole/?utm_term=.268e7f712d6c.

¹³⁰ “Garden Leave: A provision that would have required employers to pay workers half their salary during the restricted period of a non-compete agreement has been modified to recognize ‘other mutually-agreed upon consideration between the employer and the employee.’ That means companies that compensate employees at the time they sign non-competes would not have to pay them again during the restricted period. While AIM would prefer to eliminate the ‘garden leave’ provision entirely, the revision provides some flexibility to employers.” Brad MacDougall, *House Non-Compete Bill Seeks Middle Ground*, AIM Blog, (Jun. 28, 2016 1:20 PM), <https://blog.aimnet.org/aim-issueconnect/house-non-compete-bill-seeks-middle-ground>.

¹³¹ S. 840 § 3(b)(10), 190th Gen. Court, Reg. Sess. (Mass. 2017); S. 1017 § 3(b)(10), 190th Gen. Court, Reg. Sess. (Mass. 2017);

¹³² Erik Winton & Colin A. Thakkar, *Massachusetts Legislature (Finally) Passes Non-Compete Law*, JACKSON LEWIS, (Aug. 1, 2018), <https://www.jacksonlewis.com/publication/Massachusetts-legislature-finally-passes-non-compete-law>, (emphasis added).

compete under the Act, and believes they are responsible for making that so.¹³³ So, if a one-time payment may suffice and if such payment may be made at any time, it might even be possible to craft an enforceable non-competition agreement that provides for such “other mutually-agreed upon consideration” to be paid at the *end* of the restricted period, once the employer is certain that the former employee has met his agreement to refrain from competitive activities. Obviously, there is a great deal of opportunity for creative draftsmanship still available, even though certain requirements as to notice, execution, duration of the restricted period, delineation of geographic scope and proscribed activities will still have to be met.

That is not all. The Act permits a form of “employer waiver” of a non-competition agreement. The definition of a “Garden Leave Clause” under the Act provides that garden leave payments “shall become *effective upon termination* of employment *unless* the restriction upon post-employment activities are *waived by the employer*.”¹³⁴ This would permit an employer to put in place non-competition agreements, satisfying the requirements of the Act, including the garden leave payment requirement, and then “cherry-pick,” choosing to enforce (and pay for) only those few agreements that cover employees the employer determines might pose an actual competitive threat – so long as the employer makes his decision as to which to enforce and which not to enforce *on or before* the date of each employee’s termination of employment.

Finally, there is still an opportunity to be creative with respect to “non-competition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance,” which are specifically

¹³³ “The non-compete language signed by [Governor] Baker mirrors an agreement AIM and other business groups reached two years ago with House Speaker Robert DeLeo. The measure . . . does not require companies that compensate employees at the time they sign non-competes to pay them again during the restricted period.” John Regan, *Baker Signs Energy, Non-Compete Bills; Vetoes Patent Trolling*, AIM BLOG, (Aug. 13, 2018, 8:00 AM), <https://blog.aimnet.org/aim-issueconnect/baker-signs-energy-non-compete-bills-vetoes-patent-trolling>.

¹³⁴ Mass. Gen. Laws ch. 149, § 24L(a) (2018).

excluded from coverage under the Act.¹³⁵ “A non-compete can be negotiated when someone leaves a company, and the restrictions in the new law would not apply.”¹³⁶ Nevertheless, even in this context, where such an agreement is statutorily excluded from coverage, a draftsman may not have complete “carte blanche.” “[E]mployers must understand that while exempted, Massachusetts courts will continue to analyze these agreements’ enforceability under Massachusetts common law, and likely will look to the public policy behind the non-compete law in their analysis. For example, even though the new law exempts restrictive covenants included in separation agreements, courts could ask why a covenant lasting more than one (1) year should be enforced.”¹³⁷

CONCLUSION

Venture capitalists and start-up entrepreneurs began this legislative process seeking a ban on non-competes to achieve parity with California, both legally and economically. Their ultimate goal was to make it possible for companies to raid knowledgeable, experienced talent with impunity. Instead, the arguments for greater fairness to employees, rather than greater opportunities for innovation, carried the day, resulting in (i) the exclusion from non-competes of large categories of lower-compensated employees and of employees terminated voluntarily without cause, and (ii) garden leave payments for those remaining employees forced to be idle for a restricted period under a non-compete. Yet, just as garden leave protection came into being, a late compromise surfaced in the form of “other mutually-agreed upon consideration,” effectively gutting the garden leave requirement. The irony is that those who came seeking a total ban on

¹³⁵ *Id.*

¹³⁶ Shira Schoenberg, *What does Massachusetts’ non-compete reform mean for you?*, MASS LIVE (Aug. 16, 2018, 6:30 AM), <https://www.masslive.com/expo/news/erry-2018/08/d4240441a67183/what-does-massachusetts-noncom.html>.

¹³⁷ Katherine Beattle & Jennifer Budoff *New Massachusetts Non-Compete Law Goes Into Effect October 1, 2018*, MINTZ LEVIN INSIGHTS CENTER, (Aug. 14, 2018) <https://www.employmentmattersblog.com/2018/08/new-massachusetts-non-compete-law-goes-into-effect-october-1-2018/>.

non-competes in Massachusetts may have ended by making non-competes stronger and more enforceable than they were before. In the past two years, seven states passed legislation to effect a ban or restriction on non-competes, yet Massachusetts remains the only state to mandate garden leave payments.