Scribbles Squibs[1]# 67 (September 26, 2018):

"MASSACHUSETTS PASSES EMPLOYEE NON-COMPETITION AGREEMENT ACT (EFFECTIVE AUGUST 10, 2018)"

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I. INTRODUCTION.

Claims and litigations concerning claimed breaches of employee non-competition agreements are quite complex, founded upon numerous appellate court decisions. At the same time, for many businesses, an ex-employee's surreptitiously attempting to leave the reservation at midnight carrying with him/her your entire store of clients and estimates-in-process is no less serious than a heart attack. Because, if they can't be stopped – somehow – you, the employer, might have a heart attack. Or, the business itself might have a figurative heart attack.

Until last month, there wasn't a great deal of statutory law involved with non-compete agreements.

Many employer-brought cases were commenced with the plaintiff employer seeking an injunction in efforts to enforce the agreement. (An injunction is a court order in which a judge orders a party *not* to do something (the more usual injunction) or, in very limited circumstances, to *do* something.) And, there was a statute which dealt with this.

There was even a statute which made the unlawful use of a trade secret a crime, with possible imprisonment and fines.

The greatest amount of law on this subject matter, however, could be found in a huge number of appellate decisions discussing non-compete agreements.

The Legislature recently passed – and the Governor signed – the bill set forth in the title. The entire text of this new law is set forth below.

There are seven specific requirements that must be addressed/included in an employee non-compete agreement *now*, as a matter of statutory law.[2] The last one I suspect most of our readers are going to find **startling**. (I find it startling!)

II. MASSACHUSETTS LAW ON SEEKING AN INJUNCTION.

Preliminarily, I should begin by stating that it is very difficult in a commercial context to get injunctive relief, being a court order ordering a defendant to do something or *not* to do something. Usually, such a request is sought very early in the case, often at the very beginning of the case when the complaint is filed. To get an injunction, the party seeking it – the 'moving party' – has to meet a number of 'tests' (requirements). For example, is there an adequate remedy at law (meaning monetary damages) that the plaintiff can seek? Is there irreparable harm? Does the plaintiff come down on the right side of a 'balancing of the equities' test? Is there any public interest element? Does the plaintiff demonstrate a 'reasonable likelihood of success on the merits'? Meeting many of these tests can be quite difficult.

Since, under some circumstances, the granting of an injunction can achieve the same result as a trial on the merits – which only occurs after a period of potentially extensive discovery and after a trial where both sides get the opportunity to put on witnesses and cross-examine the other side's witnesses – these orders are not easily given or obtained.

In fact, most properly-written non-compete agreements have had in them a clause where the employee acknowledges that in the event of his/her violation of the agreement, the granting of monetary damages alone is not sufficient to accomplish appropriate recompense. The purpose of this provision is to make it somewhat easier for the employer/plaintiff/moving party to get an injunction with help as to one of the 'tests'.

Here's a statute concerning getting injunctive relief for the purposes of protecting 'trade secrets'?

M.G.L.A. 93 § 42A

§ 42A. Injunctive relief; taking of trade secrets

"Any aggrieved person may file a petition in equity in the supreme judicial court or in the superior court for the county in which either the petitioner or the respondent resides or transacts business, or in Suffolk county, to obtain appropriate injunctive relief including orders or decrees restraining and enjoining the respondent from taking, receiving, concealing, assigning, transferring, leasing, pledging, copying or otherwise using or disposing of a **trade secret, regardless of value. The term "trade secret" as used in this** section shall have the same meaning as set forth in section thirty of chapter two hundred and sixty-six.

In an action by an employer against a former employee under the provisions of this section for the conversion of a trade secret and where such conversion is in violation of the terms of a **written employment agreement** between said employer and employee, said employer shall, upon petition, be granted a preliminary injunction if it is **shown that**

said employee is working in a directly competitive capacity with his former employer in violation of the terms of such agreement and that in violation of the terms of such agreement said employee has used such trade secret in such competition." (Emphasis added)

Having said all of this, in any situation, if you are trying to realistically up front evaluate your chances of getting an injunction, based on my understanding of the law and by my own experience, your chances are not good. Having done a fair amount of bid law work, I haven't even tried to get an injunction to restrain a job's going forward for at least twenty years. Seeking an injunction makes a case a lot more expensive, particularly in the early phases of a case. Injunctions *do* issue very occasionally for bid work. But, they are few and far between. And, of those that do issue, for many of them, there are multiple plaintiffs, such as including industry trade groups.

III. THEFT OF 'TRADE SECRETS' CAN BE A CRIME.

M.G.L.A. 266 § 30. Larceny; general provisions and penalties

> "(1) Whoever steals, or with intent to defraud obtains by a false pretence *(sic)*, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall . . . (ED. Under certain circumstances) be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years; or (ED. Under certain circumstances) shall be punished by imprisonment in jail for not more than one year or by a fine of not more than $1,500.
> (2) The term "property", as used in the section, shall include money, personal chattels, a bank note, bond, promissory note, bill of exchange or other bill, order or certificate, a book of accounts for or concerning money or goods due or to become due or to be delivered, a deed or writing containing a conveyance of land, **any valuable contract in force** . . . electronically processed or stored data, either tangible or intangible, data while in transit, telecommunications services . . .
> (4) Whoever steals, or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, secretes, unlawfully takes, carries away, conceals or copies with intent to convert **any trade secret** of another, regardless of value, whether such trade secret is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years. **The term "trade secret" as used in this paragraph means and includes anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or**

management information, design, process, procedure, formula, invention or improvement . . ." (Emphasis added)

This looks a lot better for the employer than it actually is. That is because of one key difference between the initiation of 'civil' litigation as compared with the initiation of 'criminal' litigation. And, that is this.

For a 'civil' case (e.g. a case seeking damages), a person or company needs no approval of a third party in terms of commencing litigation. The case might be dismissed by a judge at some point, due to procedural and/or substantive irregularities and/or for other reasons. But, at least, you can decide if and when you start some action.

'Criminal' cases, on the other hand, can only be commenced by a district attorney, an assistant Attorney General or by the clerk of a criminal court. You can bring your facts to such individuals and argue as forcefully as possible that some action along these lines *should* be taken. But, in the final analysis, what they say goes and other than going to someone's superior, I don't know of any way such action can be appealed.

IV. THE NEW EMPLOYEE NON-COMPETITION AGREEMENT STATUTE (EFFECTIVE AUGUST 10, 2018).

This is brand new, by the addition of the following section to the General Laws. Where this information is so important to protecting an employer's secrets and rights, the entire statute is set forth below:

M.G.L.A. 149 § 24L. Massachusetts Noncompetition Agreement Act

(a) As used in this section, the following words shall have the following meanings:-
"Business entity", any person or group of persons performing or engaging in any 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 of this chapter; provided, however, that the term "employee", as used in this chapter, shall also include independent contractors under section 148B.
"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 agreements.
"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, provided that such**

provision shall become effective upon termination of employment unless the restriction upon post-employment activities are waived by the employer or ineffective under subsection (c)(iii).

"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 he or she will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended. Noncompetition agreements include forfeiture for competition agreements, but do not include: (i) covenants not to solicit or hire employees of the employer; (ii) covenants not to solicit or transact business with customers, clients, or vendors of the employer; (iii) noncompetition agreements 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 or partnership, or division or subsidiary thereof, 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) noncompetition agreements outside of an employment relationship; (v) forfeiture agreements; (vi) nondisclosure or confidentiality agreements; (vii) invention assignment agreements; (viii) garden leave clauses; (ix) noncompetition agreements made in connection with the cessation of or separation from employment if the employee is expressly given seven business days to rescind acceptance; or (x) agreements 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 his or her employer.

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

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

(ii) **If the agreement is entered into after commencement of employment** but not in connection with the separation from employment, **it must be supported by fair and reasonable consideration independent from the continuation of employment**, and notice of the agreement must be provided at least 10 business days before the agreement is to be effective. Moreover, the agreement must be in writing and signed by both the employer and employee and expressly state that the employee has the right to consult with counsel prior to signing.

(iii) **The 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 goodwill**. A noncompetition 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 or a non-disclosure or confidentiality agreement.

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

(v) **The agreement must be reasonable in geographic reach in relation to the interests protected. 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 is presumptively reasonable.**

(vi) **The agreement must be reasonable in the scope of proscribed activities in relation to the interests protected. A restriction 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 is presumptively reasonable**.

(vii) **The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement**. To constitute a garden leave clause within the meaning of this section**, the agreement must (i) provide for the payment, consistent with the requirements for the payment of wages under section 148 of chapter 149** of the general laws, on a pro-rata basis **during the entirety of the restricted period**, of **at least 50 percent of the employee's highest annualized base salary** paid by the employer within the 2 years preceding the employee's termination; and (ii) 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 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 payments to the employee during the extension of the restricted period.

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

(c) **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. This section does not render void or unenforceable the remainder of the contract or agreement containing the unenforceable noncompetition agreement, nor does it 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.

(d**) 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**.

(e) No choice of law provision that would have the effect of avoiding the requirements of this section will be enforceable if the employee is, and has been for at least 30 days immediately

preceding his or her cessation of employment, a resident of or employed in Massachusetts at the time of his or her termination of employment.
(f) All civil actions relating to employee noncompetition agreements subject to this section shall be brought in the county where the employee resides or, if mutually agreed upon by the employer and employee, in Suffolk county; provided that, in any such action brought in Suffolk county, the superior court or the business litigation session of the superior court shall have exclusive jurisdiction." (Emphasis added)

V. CONCLUSION.

WOW! There's a lot there! Certainly, these words mean (whatever) they say. But, in interpreting statutes, ultimately, Massachusetts appellate courts are the arbiters of final meaning. And, for a litigation that commences today, there wouldn't be an appellate decision for at least three or four years, probably more like five or six years or even longer. Realistically, it will most likely take twenty years or more for there to be any kind of comprehensive evaluation of this statute by appellate judiciary. The law business thinks nothing of gulping down huge chunks of time within which to accomplish its work. (The Suffolk County Superior Courthouse in Boston, MA, completed in 1937, some eighty-one years ago, is still referred to as the 'new' courthouse.)

The following strikes me as being among its most important provisions.

If a business wishes for a current employee to execute such an agreement, that employee must receive some 'consideration', which ordinarily would be money or some kind of benefit.[3] This makes some sense and has elements of fairness to it. When an employee and employer commence an employment relationship, they reach agreement as to duties and compensation based upon what is in front of them at that time. It goes without saying that when a current employee not subject to a non-compete agreement is now made subject to a non-compete agreement, the nature of that employee's employment has changed to his/her disadvantage. That being the case, an argument can be fairly made that such an employee should receive greater compensation for agreeing to having fewer rights that he or she had when the employment initiated. I suspect that when the appellate courts finally get around to looking at this, they will say that agreements executed with existing employees for which no new consideration was given are invalid.[4]

"Good will" is covered. But, what, exactly, is 'good will'? That's likely to vary from judge to judge and from business to business and from situation to situation.

The agreement must not be for a time in excess of twelve months from the date the employment relationship ends in the usual case, although in some cases, this can be for a period of up to two years.

The geographic area governing the agreement must be 'reasonable'.[5] It can cover at least such geographical areas where an employee worked in his/her last two years of employment. Presumably, it might cover a larger area but the employer better be in a position to argue/justify why a larger geographical area is necessary.

The agreement most likely should be with regard to an employer's business interests (trade secrets) that the employee was involved with in his/her last two years of employment.

The word 'shall' in statutory construction is a mandatory word. That simply means that no party or court has the discretion of ignoring or waiving this word.

These 'garden leave' provisions appear to be mandatory and can cover 50% of an employee's wages during the 'restricted' period of the non-competition agreement. While business owners are likely to find such a provision abhorrent, it, can be at least partially supported by two rationales. The first is that if an employee can't work in his/her industry for a period of time, he/she has to be compensated to have money for that person and his/her family to live on. Secondly, an employer's knowing that such wages will have to be paid to an employee restricted by a non-competition agreement may cause that employer to think twice about actually enforcing such an agreement.[6] The fact that there is non-compete language in different employment contracts does not necessarily mean that such language has to be in such agreements due to the facts of any given situation. For example, it probably makes a lot more sense for an employer to have an estimator subject to such an agreement than it does to have such a limitation upon a job super.

This type of agreement cannot be enforced as to employees who have been 'terminated without cause' or 'laid-off'. While I can see some *miniscule* justification for such a distinction, I basically see this as an almost meaningless distinction and one that provides, yet again, another example of Massachusetts' governmental naivete and/or anti-business animus.

It is conceded that when an employee is fired for cause, there is likely to be bad feelings on the part of the employee. That employee might see the grounds of his/her dismissal as unfair. And, for a variety of reasons, it may very well be somewhat harder for that employee to get a new job because the termination for cause might scare off some new employers. If nothing else, that former employee will not be using his/her last employer as a source for references. This may cause some difficulty for the fired employee in having to explain a seeming lapse or blank spot in his/her employment history. These things could certainly cause the dismissed employee to want to do something to try to and hurt the former employer back. At the same time, it should be said that if an employee is fired for cause, s/he might have seen this coming. S/he knows there might be some justification for this, whether or not s/he would ever admit this to someone else.

For an employee terminated without cause or laid-off, this still is – as to that employee – an involuntary conclusion to the employment relationship. By definition, that employee had little or no say in his/her termination. OK. So, the employee was not actually '*fired*'. But,

that employee, just like the fired employee, is suddenly without the money and benefits that employee had been counting on to support his/her family. That employee will be angry at having his/her support mechanism (pay and benefits) suddenly ended, causing almost necessarily disruption, if not actual hardship, to the family. And, that employee, irrespective of the reasons for termination, will have the difficulties associated in obtaining substitute employment.

In some ways, I could see such an employee as being even angrier than an employee terminated for cause. "Why am *I* being fired? *I* didn't do anything wrong. And, *I* do more (or better) work than Joe or Mary. *I* am being unfairly singled out. The boss is practicing favoritism as to his/her pets."

And, the loss of a job is one of life's recognized major traumatic events. This will cause, in many cases, a loss of self-confidence and self-esteem for that employee who was 'terminated without cause' or 'laid-off'. This could even cause difficulties in his/her marriage.

So, *really,* how significant a distinction is this as between an employee fired for cause and one just let go for some reason not attributable to cause or laid-off? A likely result of this artificial distinction is that some employees in the future may be terminated for cause, even where the employer would rather have terminated them *not* for cause or simply laid them off. After all, employers may feel they have to do this to protect themselves and to have their non-compete agreements capable of being judicially enforced. And, they *are* entitled to protect themselves.

So, 'good employees' may suffer black marks to their reputations unnecessarily, just because some liberal do-gooder/nitwit legislator didn't bother to really think this through.

Allowing courts to 'reform' or 'revise a non-competition agreement' goes against everything I know about the law of contracts. Courts, ordinarily, have *no* authority to revise contracts placed in front of them. In the main, they are supposed to just enforce the contracts the parties enter into, even where one of the parties was dumb and/or may get screwed because of how tough it is.[7] What now gives a court the right to substitute its judgment for the judgment of employers and employees willingly entering into agreements?
And, what are the limitations of a court's power to re-write a contract? Judges who are more pro-consumer are more likely to make greater revisions to such agreements while judges who are more pro-business will likely make fewer revisions. Doesn't that amount to injustice, lack of predictability? In the superior court, every time one appears before a superior court judge – with very limited exceptions – that judge is different from the one who handled the prior stage in the case and different from who will handle the next stage in the case. Basically, one never knows who one is going to get. In many regards, this is good. But, it's not good for predictability.

Earlier, I mentioned injunctions involving bid law matters. I once had an action brought against my general contractor client in which case there were several subcontractor plaintiffs,

one or two general contractor plaintiffs and a couple of trade association plaintiffs, all looking for an injunction against my guy. At least six or seven plaintiffs. Maybe more.

Among those attorneys whose opinions I respect, it was thought that there was only *one* particular superior court judge in Massachusetts who would issue that injunction. The plaintiffs found which county this judge was sitting in and filed the case there. (At the time, there was a way of timing the filing of a case so that the case would go to a particular judge.)

And, this hoard of plaintiffs got their injunction. Was this fair? The answer to that question might depend on one's perspective as to the subject matter of the case. But, unfortunately, this kind of thing happens more often than one might think.

It is safe to say that there will be a lot of C. 93A claims involved with this statute. Employees who are terminated purportedly under this statute are likely to claim that any agreement an employer forced the employee to sign after August 10, 2018 was without full compliance with this statute and, as such, reflects unfair and deceptive trade practices. Under Chapter 93A, successful plaintiffs recover double or triple damages and reasonable attorneys' fees.

In any event, any employers within the sound of my digital voice should take this new legal requirement *very seriously*.

My experience has been over the course of several decades as a practicing attorney that small to mid-sized contractors generally do better when they can limit their participation in the court system as much as possible. Neither suing or being sued keeps the lawyers away! It helps, though, when one does what the smart ones tell you to do. *Capisce?*

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] There are, actually, *eight* requirements applicable to such agreements, although the eighth requirement is not an actual contractual provision. The eighth requirement is that "The agreement must be consonant with public policy." Whether such is the case or not would be the interpretation of the agreement by a judge, not something you actually put in such an agreement.

[3] 'Consideration' is one of the three elements required to make a contract. Do you know what the other two are?

[4] A word to the wise is sufficient!

[5] The word 'reasonable' can be terrifying. Because, what does it *mean*? It's not a 'rule' that can be

objectively measured. It is a 'standard' that can't, being something capable of multiple meanings and interpretations, which very well could vary from judge to judge (who might *reasonably* differ as to what 'reasonable' means!)

[6] Methinks the reason that Massachusetts provides for paying some degree of wages to ex-employees subject to such restrictions is less about real concern for the employee and his/her family and more about the fact that if it is between an ex-employer and the state as to who will be supporting such individuals financially, the state would prefer not having to incur those costs itself.

[7] I once had a subcontractor ask me to review a 187 page subcontract it had been given. This didn't take me much time at all and the charge to the client was very minimal: "Don't sign it." Representing both subcontractors and general contractors, for one general contractor, I wrote a really tough subcontract. It was eight pages in length. A common misconception on the part of the public (and some lawyers) is that good legal writing is long. Actually, good legal writing is as short as one can make it. Every word that is in a document is a word that someone might argue is ambiguous and, therefore, might lead to a dispute.