"Garden" Against Competition: Codification of Garden Leave and Non-Compete Reform

Meredith Gramann*

Introduction

On August 18, 2018, Massachusetts became the first state in the United States to sign into law a statute providing for what are known as "garden leave" payments. Garden leave provides remuneration 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: 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.[1] 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 (1) a garden leave clause, providing for pro-rata payment during the restricted period (limited generally to twelve months) of at least fifty percent of the employee's highest annualized base salary, or (2) such other mutually agreed upon consideration specified in the agreement.[2] Noncompetition agreements are now required to be in writing, signed by both the employer and the employee, and are subject to new notice requirements.[3] The Act codified safe harbors for both an agreement's geographic scope and the scope of

*J.D., 2020, Seton Hall University School of Law. I thank my parents and my husband for their constant support and encouragement. Thank you to Charles A. Sullivan for his suggestion of this topic, his excellent feedback on prior drafts of this article, and his mentorship throughout my law school career. I also thank the College of Labor and Employment Lawyers and ABA Section Labor and Employment Law for their selection of this article.

1. Mass. Gen. Laws ch. 149, § 24L (2018).
2. *Id.* § 24L(b)(vii).
3. *Id.* § 24L(b)(i), (ii).

prohibited competitive activities.[4] Finally, the Act prohibited enforcement of non-competes against large classes of low-wage employees.[5]

Part I explains the history of non-competes in Massachusetts and offers an explanation for the impetus behind the Act. This article 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's 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.[6] Both Silicon Valley and the Massachusetts Route 128 high-tech industrial districts started out nearly even in total technology employment in the post-WWII years.[7] 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.[8] In Massachusetts, the focal point for this research and development was MIT and Harvard in the greater Boston area.[9] In California, the focal point was Stanford and U.C. Berkeley in the greater San Francisco area.[10] By the turn of the twenty-first century, however, the Silicon Valley high-tech district had invented and re-invented itself through spin-offs and start-ups, fueled

4. *Id.* § 24L(b)(iii).
5. *Id.* § 24L(c)(i)–(iv).
6. Cal. Bus. & Prof. Code § 16600 (2018).
7. 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).
8. *Id*. at 588–89.
9. *Id*. at 588.
10. *Id*. at 589.

by technological innovations mostly spawned from the industrial district itself and not its academic support institutions.[11] 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 continues into the new century.[12]

This well-documented history has offered a "natural experiment" in "economic geography," a field pioneered by Alfred Marshall in the 1960s.[13] Marshall identified what he called "agglomeration industries" that achieved economies of scale in production through interrelationship among multiple firms within an industry focused in a specific geographic location. An agglomeration economy is 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."[14] The U.S. auto industry in the Detroit metropolitan area is just such a case, as were the tech industries in Silicon Valley and Route 128.[15] Two seminal works, a 1994 book by AnnaLee Saxenian and a 1999 law review article by Ronald J. Gilson, were especially influential in cultivating this narrative by comparing Silicon Valley and Route 128 as high-tech agglomeration industries on opposite U.S. coasts.[16] Each geographic area achieved significant initial industrial district economies of scale from agglomeration from the end of World War II through the 1980s, based primarily upon the semiconductor revolution in communication and information technology. Only 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.[17]

In 1995, Saxenian argued that the combination of (1) 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 (2) high production demand in the form of military contracts, contributed to the creation of a location-specific dynamic in both geographic locales.[18] It also increased the potential for "spillover" of technology and innovation from these respective East

11. *Id*. at 590–92.
12. *Id.* at 587.
13. *Id*. at 586.
14. *Agglomeration*, Merriam-Webster Dictionary (2019), https://www.merriam-webster.com/dictionary /agglomeration [perma.cc/YTC6-59EE].
15. Gilson, *supra* note 7, at 580–81.
16. AnnaLee Saxenian, Regional Advantage: Culture and Competition in Silicon Valley and Route 128 (1994); Gilson, *supra* note 7, at 575.
17. Willem Hulsink, Dick Manuel & H. Bouwman, *Clustering in ICT: From Route 128 to Silicon Valley, from Dec to Google, from Hardware to Content* (ERIM Report Series Reference No. ERS-2007-064-ORG, Nov. 27, 2007), https://ssrn.com/abstract=1032751.
18. Saxenian, *supra* note 16, at 11–14.

Coast and West Coast universities, through the vehicle of the workers that they trained and educated, which induced companies to locate in their respective industrial districts.[19]

Saxenian, however, went on to argue that 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 along Route 128; and she attributed this to a difference in employee/employer culture in each locale.[20] In 1999, Gilson refined this analysis by identifying California's statutory prohibition against enforcement of post-employment covenants not to compete as the key factor in creating Silicon Valley's high-mobility employee culture.[21] Persuaded by the narrative that non-competes accounted for this result, many in Massachusetts have been trying to catch up ever since.[22]

Some, however, have questioned Gilson's conclusion. Could this be a case of correlation without causation? The East Coast focused on one type of technology,[23] and the West Coast focused on a different type.[24] As Ted Sichelman from the University of San Diego put it, "[t]he 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 . . . . [and PC's] won out."[25] 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

19. Gilson, *supra* note 7, at 593.

20. *Id.* at 593–94.

21. Gilson points out that the main method for preventing knowledge transfers with heightened employee mobility is with the Uniform Trade Secrets Act (UTSA), Cal. Civ. Code § 3426.1. At the time that 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." Gilson, *supra* note 7, at 598. Massachusetts adopted the UTSA when it passed the Massachusetts Noncompetition Agreement Act. *Id.* at 597–600.

22. Orly Lobel, Talent Wants to Be Free 67–75 (2013).

23. 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 (July 1, 2016), https://www.vox.com/2016/4/12/11349248/noncompetes-silicon-valley-route-128 [perma.cc/5ENU-YS6W].

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

25. *Id*.

that, in Silicon Valley, "members of the 'PayPal Mafia' went on to found Tesla, YouTube, LinkedIn and Yelp."[26]

In the two decades since the Gilson article, there has been much research into the economic impact of non-competes.[27] Some of the research tentatively confirms Gilson's hypothesis that non-competes reduce labor mobility to some extent.[28] Whether this small, but statistically significant, impact is sufficient, in itself, to account for the dramatic Silicon Valley v. Route 128 Narrative remains unresolved.[29] 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.[30] So, apparently, notice matters.

In 2016, the U.S. Treasury published a report entitled "Non-Compete Contracts: Economic Effects and Policy Implications."[31] The report found that research suggests that eighteen percent of all workers are covered by non-competes and even nineteen percent of workers

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26. *Id*.

27. Matt Marx, Jasjit Singh & Lee Flemming, *Regional Disadvantage? Non-Compete Agreements and Brain Drain*, 44 Res. Pol'y 394 (2011); White House, Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [https://perma.cc/3BUQ-5AWQ]; Evan Starr, J.J. Prescott & Norman D. Bishara, *Understanding Noncompetition Agreements: The 2014 Survey Project*, 2016 Mich. St. L. Rev. 369 (2016) [hereinafter Starr, Prescott & Bishara, *Understanding Noncompetition Agreements*]; Ted Sichelman & Jonathan Barnett, *Revisiting Labor Mobility in Innovation Markets*, (USC Law Legal Studies Paper No. 16-15, 2016), https://ssrn.com/abstract=2758854; Evan Starr, *Consider This: Wages, Training, and Enforceability of Covenants Not to Compete*, 72 Indus. & Lab. Rel. Rev. 783 (2019); 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* (U.S. Census Bureau Ctr. for Econ. Stud. Paper No. CES-WP-17-090, 2017), https://www2.census.gov/ces/wp/2017/CES-WP-17-09.pdf;; Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes and Employee Mobility*, (Univ. of Mich. L. & Econ Research Paper No. 16-032, 2019), https://ssrn.com/abstract=2858637 [hereinafter, Starr, Prescott & Bishara, *Mobility*].

28. *E.g.*, Sichelman & Barnett, *supra* note 27; Balasubramian, Chang, Sakakibara, Sivadasan & Starr, *supra* note 27; Starr, Prescott & Bishara, *Mobility*, *supra* note 27.

29. 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 [https://perma.cc/F83J-FXWH].

30. Evan Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & Econ. 53, 75–76 (2021).

31. Off. of Econ. Pol'y, U.S. Dep't of Treasury, Non-Compete Contracts: Economic Effects and Policy Implications (2016), https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf [https://perma.cc/8TQW-FT4E]; *see also Petition for Rulemaking to Prohibit Worker Non-Compete Clauses*, Open Markets Inst. (Mar. 2019), https://openmarketsinstitute.org/wp-content/uploads/2019/03/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf.

in California are bound by non-competes, despite the general lack of enforceability in that state.[32] 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 that "[j]ob 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*."[33] 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."[34] 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. This was especially the case in Massachusetts. It was an argument that focused on the public interest, glossing over the obvious self-interest that 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.[35] By 1940, it was considered settled law in Massachusetts that "a covenant restraining trade or competition, inserted in a contract for personal service, is not in itself invalid if the interest to be protected is consonant with public policy and if the restraint is limited reasonably in time and space."[36] The courts, however, have always engaged in a balancing act. Contracts restraining freedom of employment were enforceable only when such restraints were "reasonable and not wider than is necessary for the protection to which the employer is entitled and when not injurious

32. Off. of Econ. Pol'y, *supra* note 31, at 3–4 (citing Starr, *supra* note 27).

33. *Id*. at 4 (emphasis added).

34. *Id*. at 5.

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

36. New Eng. Tree Expert Co. v. Russell, 28 N.E.2d 997, 999 (Mass. 1940) (citing *Becker College*, 183 N.E. at 766).

to the public interest."[37] In Massachusetts, the courts engaged in balancing "the reasonable needs of the former employer for protection against harmful conduct of the former employee . . . against both the reasonableness of the restraint imposed on the former employee and the public interest."[38]

In general, noncompetition agreements that have arisen out of the sale of a business, have been subject to less scrutiny than those arising out of an employer-employee relationship because "[i]n the former situation there is more likely to be equal bargaining power between the parties; the proceeds of the sale generally enable the seller to support himself temporarily without the immediate practical need to enter into competition with his former business."[39] Post-employment restraints, as opposed to post-sale restraints, have been scrutinized more carefully to ensure that they go no further than necessary to protect an employer's legitimate business interests, such as trade secrets, other confidential information, or the good will of the employer acquired through dealings with his customers.[40] There is, however, a "public policy in favor of every person carrying on his trade or occupation freely."[41] 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."[42] Such agreements are often entered into by parties with very different bargaining power, and enforcing a noncompetition agreement might deprive an employee of his ability to earn a living. Recognizing this, the court in *Kroeger v. Stop & Shop Cos.* succinctly summarized the policy considerations that underlie

37. Sherman v. Pfefferkorn, 135 N.E. 568, 569 (Mass. 1922); Edgecomb v. Edmonston 153 N.E. 99, 101 (Mass. 1926).

38. All Stainless, Inc. v Colby, 308 N.E.2d 481, 487 (Mass. 1974); Walker Coal & Ice v. Westerman, 160 N.E. 801, 802 (Mass. 1928); Econ. Grocery Stores Corp. v. McMenamy, 195 N.E. 747, 749 (Mass. 1935); Cedric G. Chase Photographic Labs., Inc. v. Hennessey, 97 N.E.2d 397, 398 (Mass. 1951); Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 376 (Mass. 1961); 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."). Other states have similar standards. *See* Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835, 841–42 (Mo. 2012); Solari Indus. v. Malady, 264 A.2d 53, 56 (N.J. 1970); Assurance Data, Inc. v. Malyevac, 747 S.E.2d, 804, 808 (Va. 2013); Valley Med. Specialist v. Farber, 982 P.2d 1277, 1283 (Ariz. 1999).

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

40. Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 920 (Mass. 1974); New Eng. Canteen Serv. Inc. v. Ashley, 363 N.E.2d 526, 528 (Mass. 1977).

41. Routhier Placement Specialists, Inc. v. Brown, No. 02-3532-E, 2002 WL31248032, at *1 (Mass. Super. Ct. Sept. 26, 2002) (citing Woolley's Laundry, Inc. v. Silva, 23 N.E.2d 899, 901 (Mass. 1939)); Commonwealth v. Mass. CRINC, 466 N.E.2d 792, 797 (Mass. 1984).

42. *Alexander & Alexander, Inc.*, 488 N.E.2d at 28.

> [r]eluctance to give full effect to post-employment restraints [that has] a long history in the law. . . . Is the restraint greater than necessary to protect legitimate interests of the employer? What circumstances surround its making, in terms of bargaining power of the parties? Is the restraint unduly harsh or oppressive? Is the restraint injurious to the public? Does the employee's work for a rival in fact injure the former employer?[43]

If it could not be demonstrated that the employer has a legitimate business interest at risk, Massachusetts courts have concluded that the employer's purpose can only be "to enforce the covenant . . . to protect itself from ordinary competition. This it cannot do."[44] Protection from ordinary competition is not a legitimate business interest, and a noncompetition agreement designed solely for that purpose will not be upheld.[45] 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."[46]

The Massachusetts courts have taken particular care to scrutinize the period of the restraint on competitive employment and the geographic scope of the restriction on post-termination competitive employment. Older cases allowed longer periods of restriction, from three to five years.[47] More recent cases have favored restricted periods of one to two years.[48] If the case involved the sale of a business, however, a longer period has still been upheld.[49] Special circumstances, such as a noncompetition agreement that formed part of a former employee's restitution following criminal theft from the employer has also appeared to warrant a longer period of restriction.[50]

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43. Kroeger v. Stop & Shop Cos., Inc., 432 N.E.2d 566, 568, 571 (Mass. App. Ct. 1982) ("Commonly it is a fault of postemployment restraints that they have aspects of a contract of adhesion: the employee, anxious for the job, is ready to mortgage the future and, in any event, is in a poor position to argue about the terms of the employment contract."); *see also* KNF&T Staffing Inc. v Muller, 31 Mass. L. Rptr. 561, 563 (Super Ct. 2013).

44. *New Eng. Canteen Serv. Inc.*, 363 N.E.2d at 529.

45. *Marine Contractors Co.*, 310 N.E.2d at 920; Richmond Bros. v. Westinghouse Broad. Co., Inc., 256 N.E.2d 304, 307 (Mass. 1970).

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

47. Sherman v. Pfefferkorn, 135 N.E. 568, 571 (Mass. 1922) (three years); Edgecomb v. Edmonston, 153 N.E. 99, 102 (Mass. 1926) (five years); Becker Coll. of Bus. Admin. & Secretarial Sci. v. Gross, 183 N.E. 765, 766 (Mass. 1933) (five years); S. New Eng. Ice Co. v. Ferrero, 4 N.E.2d 359, 361 (Mass. 1936) (five years); New Eng. Tree Expert Co. v. Russell, 28 N.E.2d 997 (Mass. 1940) (three years).

48. Cedric G. Chase Photographic Labs., Inc. v. Hennessey, 97 N.E.2d 397, 398 (Mass. 1951) (two years); *Marine Contractors Co.*, 310 N.E.2d at 921 (less than three years) ("The original five-year duration of the agreement might be somewhat troublesome."); Boulanger v Dunkin' Donuts Inc., 815 N.E.2d 572, 575 (Mass. 2004) (two years).

49. Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 29 (Mass. App. Ct. 1986) (five years).

50. Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 376 (Mass. 1961) (three years).

With respect to geographic scope, the courts "rejected a rule which would arbitrarily limit the restriction to the geographic area of the place of employment."[51] Instead, they have taken care to ensure that the geographic scope restricted by the noncompetition agreement is no greater than is necessary to protect the employer's legitimate business interest.[52] The test is "reasonableness."[53] In furtherance of this end, "[i]f the restriction is too broad as to time . . . or territory . . . it may be enforced to the extent necessary to protect the plaintiff."[54] Nonetheless, the courts have held that restrictive covenants are enforceable even when they apply to very large geographic areas.[55] In *Marine Contractors*, for example, the covenant not to compete covering an area within one hundred miles of Boston was held to be reasonable.[56] Surprisingly, in *Novelty Bias Binding Co. v. Shevrin*, a covenant not to compete covering twenty-six named states, signed as partial restitution in a criminal case, was also upheld.[57] 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.[58]

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.[59] Second, continued employment has been held to be sufficient consideration to support a noncompetition agreement.[60] Third,

51. *Id.* at 376–77 (citing *New Eng. Tree Expert Co.*, 28 N.E.2d at 999).

52. Kroeger v. Stop & Shop Cos., Inc., 432 N.E.2d 566, 568 (Mass. App. Ct. 1982).

53. *New Eng. Tree Expert Co.*, 28 N.E.2d at 1000.

54. *Cedric G. Chase Photographic Labs., Inc.*, 97 N.E.2d at 398 (upholding the Master's decree that reduced the geographic scope of the restraint from a fifty mile radius to a thirty-five mile radius from Waltham City Hall); *see also 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," and 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).

55. Marine Contractors Co. v. Hurley, 310 N.E.2d 915, 921 (Mass. 1974); Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 377 (Mass. 1961).

56. *Marine Contractors Co.*, 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.").

57. *Novelty Bias Binding Co.*, 175 N.E.2d at 377.

58. Edgecomb v Edmonston, 153 N.E. 99, 102 (Mass. 1926); *New Eng. Tree*, 28 N.E.2d at 997; Cedric G. Chase Photographic Labs., Inc. v Hennessey, 97 N.E.2d 397, 399 (Mass. 1951); All Stainless, Inc v Colby, 308 N.E.2d 481, 486 (Mass. 1974).

59. Boulanger v. Dunkin' Donuts, Inc., 815 N.E.2d 572, 577 (Mass. 2004).

60. Sherman v. Pfefferkorn, 135 N.E. 568, 569 (Mass. 1922) (in a case where the defendant executed a noncompetition agreement while he was already employed by the plaintiff, holding, "The instrument was not void for lack of consideration. Reasonably

termination of employment at the initiative of the employer has not, by itself, invalidated a noncompetition provision.[61] While the Massachusetts courts have not adopted by that name the Blue Pencil doctrine (which permits a court to modify or revise a covenant to make the covenant enforceable), they have, in fact, adopted the concept with respect to noncompetition agreements.[62]

II. Garden Leave

A. United Kingdom Garden Leave

A means of balancing competing employer and employee interests has evolved in the United Kingdom 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 United Kingdom vary based upon length of employment.[63] 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.[64] 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.[65]

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construed, it contained a promise by the plaintiff thereafter to employ the defendant and by the defendant to work for the plaintiff."); Wilkinson v. QCC, Inc., No. 99-P-1854, 2001 WL 1646491, at *1 (Mass. App. Ct. Dec. 21, 2001) (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, 806 (10th Cir. 2011).

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

62. *New Eng. Tree*, 28 N.E.2d at 999 ("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 570; *Edgecomb*, 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, Inc. v. Colby, 308 N.E.2d 481, 485 (Mass. 1974) ("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, 399 (Mass. 1951); *Novelty Bias Binding Co.*, 175 N.E.2d at 377.

63. Employment Rights Act, 1996, c. 18, § 86(2)–(3).

64. *See generally* Bob Hepple, *Employee Loyalty in English Law*, 20 Comp. Lab. L. & Pol'y J. 205 (1999).

65. *Id*. at 205.

Law surrounding employee loyalty rests entirely on common law.[66] Garden leave provisions were a response to the somewhat uncertain landscape of what may or may not be an enforceable restriction.[67] These provisions seek to balance the employer's interest in reducing competition and protecting confidential client or business information with the employee's interest in earning a wage.

The leading case associated with garden leave in the United Kingdom 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.[68] 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.[69] The court granted the employer an injunction.[70] 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.[71]

Two years later, in 1989's *Provident Financial Group v. Hayward* case, the English court was confronted with an actual garden leave provision.[72] 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:

> [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* . . . .[73]

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.[74] Unlike in *Evening*

66. *Id*. at 207.
67. Credit Suisse Asset Mgmt. Ltd. v. Armstrong [1996] I.C.R. 882, 891–92 (Eng.); *see* Howard J. Rubin & Gregg A. Gilman, *Will Garden Leaves Blossom* in the *States?*, EMP. REL. L.J., Autumn 2007, at 3, 4.
68. Evening Standard Co. Ltd. v. Henderson, [1987] I.C.R. 588 (Eng.).
69. *Id*.
70. *Id*.
71. *Id*.
72. Provident Fin. Grp. v. Hayward, [1989] 3 All E.R. 298, 301 (Eng.).
73. *Id*. at 300 (emphasis added).
74. *Id*. at 298.

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.[75] Thus, a structure for garden leave was established by the courts.[76]

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.[77] The key difference between American and English garden leave provisions is that American garden leave occurs post-employment termination.[78] Few published decisions have considered pure garden leave provisions.[79] Of those cases, two occurred in Massachusetts and bear some examination.

In 2008, Bear Stearns sought enforcement of a garden leave provision, which required a ninety-day notice period before resignation, or termination of employment.[80] This provision was "buried" in compensation documents that the defendants never signed.[81] 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."[82]

Later that same year, Bear Stearns sought an injunction preventing a broker from joining a competing firm.[83] In this case, curing the "stealth restrictive covenant" issue, Bear Stearns offered the broker a base salary raise in consideration for accepting a ninety-day garden leave provision.[84] 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

75. *Id*. at 304–05.

76. 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 (Eng.).

77. 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 (2016); Greg T. Lembrich, Note, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2002).

78. Sullivan, *supra* note 77, at 304.

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

80. Bear Stearns & Co. v. McCarron, No. SUCV2008-00979-BLS1, 2008 Mass. Super. LEXIS 503, at *1 (Mar. 5, 2008).

81. *Id*. at *9.

82. *Id*. at *8.

83. Bear, Stearns & Co. v. Sharon, 550 F. Supp. 2d 174, 175 (D. Mass. 2008).

84. *Id*. at 176.

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.[85] The court noted that as "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."[86]

These two cases indicate that Massachusetts courts have been reluctant to enforce garden leave provisions, treating such provisions as pure restrictive covenants. The Massachusetts Legislature, however, stepped in.

III. Legislative Attempts to Address Non-Competes in Massachusetts

A. Prior Legislative Attempts

Three fundamental arguments have been offered to justify prohibiting or limiting post-employment non-compete agreements: (1) such agreements represent an unwarranted restraint of trade, thus injuring the public by depriving it of the benefits of competition; (2) they are unfair to employees who are restricted in their ability to earn a living; and (3) non-compete agreements are economically inefficient because they stifle high-technology innovation and the growth of start-up businesses.[87]

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, or goodwill. 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-compete agreements.[88]

More recently, use of non-competes to restrict lower compensated employees, licensed professionals, and non-technical employees has

85. *Id*. at 179.

86. *Id*. at 178.

87. 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, 627–29 (1960).

88. Restatement (Second) of Contracts, § 188 cmts. b, g (Am. Law Inst. 1981); Russell Beck, Employee Noncompetes a State by State Survey (Jan. 13, 2019), https://www.beckreedriden.com/wp-content/uploads/2019/01/Noncompetes-50-State-Survey-Chart-20190113.pdf. [perma.cc/7KVY-T73T].

raised concerns about fairness to employees who may sign boilerplate non-competes without careful consideration when they take a new job; this development has focused attention on economic harm to individual employees in addition to abstract labor market concerns.[89] Employers often justify such non-competes as a means to protect their investments in employee training, rather than protecting technology, trade secrets, or goodwill.[90] Courts in Massachusetts and other states have, however, 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.[91]

Finally, in the Information Age,[92] 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 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").[93] The decade-long effort to reform the Massachusetts law regarding non-compete agreements[94] that culminated in the adoption of the Act in August 2018

89. Long, *supra* note 87, at 1301–03.

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

91. Mass. Gen. Laws ch. 112, § 12X (2018) (restrictive covenants on physicians non-enforceable); Mass. Gen. Laws ch. 112, § 74D (nurses); Mass. Gen. Laws ch. 112, § 135C (social workers); 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, 12:41 PM), https://www.forbes.com/sites/clareoconnor/2014/10/15/does-jimmy-johns-non-compete-clause-for-sandwich-makers-have-legal-legs/#78b6160c4107 [perma.cc/8MAE-BWU9].

92. 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 [perma.cc/72YV-F8YJ].

93. Gilson, *supra* note 7, at 578, 585–85, 628; Balasubramanian, Chang, Sakakibara, Sivadasan & Starr, *supra* note 27; Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . and Exit?*, 12 Innovation Pol'y & Econ. 39, 58 (2012); Matt Marx, Jasjut Singh & Lee Fleming, *Regional Disadvantage? Non-Compete Agreements and Brain Drain*, 44 Rsch. Pol'y 394, 395–96, 403 (2015); 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, 729, 733 (2001); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentive to Innovate or Impediments to Growth*, 57 Mgmt. Sci. 425, 428 (2011).

94. "'AIM has fought relentlessly for more than 11 years on behalf [of] 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 [perma.cc/D3U7-X5U6].

featured all three arguments, often wielded by different players in the legislative process.[95]

In 2014, Massachusetts Governor Duval Patrick sought a broad ban on non-competes similar to California's.[96] 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.[97] 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.[98] Although this proposed ban on post-employment non-compete agreements generated press interest and discussion of the Silicon Valley Narrative, the bill died in the legislature.

In 2016, proponents of legislative restrictions on non-compete agreements broadened their arguments by combining "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 Representative unanimously adopted a compromise, supported by AIM and many large employers, limiting the non-compete period to one year and featuring "garden leave" at the end of the 2016 session. That compromise embodied all three rationales: (1) it reflected the public policy/restraint of trade argument by largely codifying existing principles of Massachusetts common law regarding post-employment non-competes; (2) it addressed "employee fairness" by requiring protective notices and "cooling-off" periods, banning non-competes for lower compensated and certain other classes of employees, and prohibiting enforcement against employees terminated without cause or laid-off;

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95. MASS. GEN. LAWS ch. 149, § 24L (2018).

96. 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 [perma.cc/GJ6Y-V74J]; 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 [perma.cc/8PED-NK9L].

97. 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 [perma.cc/VLB8-CGLY] (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]"); *id.* (quoting Jeff Bussgang, general partner at Flybridge Capital Partners, "Many studies have shown that non-compete agreements reduce R&D investment and stifle innovation").

98. 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 [perma.cc/5B88-7KXD].

and (3) it further addressed employee fairness by requiring "garden leave" or other compensation for former employees who were subject to restriction.[99] 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.[100]

Finally, in 2018, the legislative compromise from 2016 was revived and enacted by the legislature and signed by Governor Baker.[101] In the process, the "restraint of trade" and "employee fairness" arguments largely carried the day, while "innovative efficiency" was relegated to lip-service.

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 most recent legislative session that passed the Massachusetts Noncompetition Agreement Act, provided for such complete ban, including a ban on noncompetition agreements already in existence.[102] The other five bills supported

99. 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 [perma.cc/WG52-77UH].

100. 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 [perma.cc/RWV2-NVAQ].

101. 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 [https://perma.cc/8BN3-KZ5A]. "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 94.

102. 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 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

the concept of an enforceable non-compete agreement, each just differing in terms of the requirements to be met in order to be enforceable. The bills that failed offer an insight into the full range of options that the Legislature considered. Most of the remaining five bills provided for a restriction on competition (for a period no longer than twelve months[103] or, in one case, three months[104]). Three of the bills provided for variations of garden leave payment;[105] two provided for payments equal to 100% of the terminated employee's annualized earnings over the two-year period preceding termination of employment.[106] One bill even went so far as to include bonus payments and employer-paid benefit premiums when calculating the 100% garden leave payment.[107] Of

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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, 190th Gen. Court, Reg. Sess. § 11 (Mass. 2017).

103. S. 840, 190th Gen. Court, Reg. Sess. § 3(b)(5) (Mass. 2017); S. 988, 190th Gen. Court, Reg. Sess. § 3(b)(6) (Mass. 2017); S. 1017, 190th Gen. Court, Reg. Sess. § 3(b)(6) (Mass. 2017); H.R. 2366, § 3(b)(6), 190th Gen. Court, Reg. Sess. (Mass. 2017); H.R. 2371, § 1(b)(iv), 190th Gen. Court, Reg. Sess. (Mass. 2017).

104. The restricted period shall not be more than 3 months from the date of termination of employment, unless the employee has breached a fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration shall not be more than 2 years from the date of termination of employment.

S. 1017 § 3(b)(6).

105. Mass. S. 840 § 3(b)(10); Mass. S. 1017 § 3(b)(10); Mass. H.R. 2371 § 1(b)(vii).

106. 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).

107. 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).

the three bills that contained a specified garden leave provision and that permitted the tendering of some other "mutually-agreed upon consideration," two provided that such "other" consideration had to be negotiated during the thirty-day period *following* the employee's termination of employment.[108] In other words, the employer was precluded 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. Two bills required that such "other mutually-agreed upon consideration" equal or exceed the garden leave payment specified in each bill.[109] 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: every three years[110] or every five years.[111]

Three of the bills codified the "Blue Pencil doctrine," wherein a court finds valid and enforceable some provisions in a contract, but voids other provisions of the same contracts, or where a court revises or amends a provision in a contract, such as a noncompetition agreement, to render the limitations in the agreement reasonable and, therefore, enforceable.[112] Two bills, however, did the opposite and specifically rejected the Blue Pencil doctrine.[113]

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. Two mandated that, not later than ten 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 be the employer.[114] An exception to the automatic waiver was made for instances in which the employee unlawfully took employer property or breached any of

108. Mass. S. 1017 § 3(b)(10); Mass. S. 840 § 3(b)(10).

109. Mass. S. 1017 § 3(b)(10); Mass. S. 840 § 3(b)(10).

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

111. Mass. S. 1017 § 3(b)(4).

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

113. 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).

Mass. S. 840 §3(e); Mass. S. 1017 §3(e).

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

the specified covenants.[115] One contained a similar mandate (within ten days, not ten business days), but did not require that the written notification to the employee be made by certified mail.[116]

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. Non-competes continue to be 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 Unite States, 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 United States to adopt a statutory version of garden leave, providing Massachusetts employers with a "safe harbor" for noncompetition agreements if they follow the specified rules. 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.

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115. 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.R. 2366 § 3(b)(9); S. 988 § 3(b)(9).

116. 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.

Mass. S. 1017 § 3(b)(9).

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."[117] Garden leave, as defined under the Act, requires (1) payment "consistent with the requirements for the payment of wages under section 148 of chapter 149 of the general laws,"[118] (2) 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"),[119] and (3) payment of at least fifty percent of the employee's highest annualized base salary paid by the employer within the two years preceding the employee's termination of employment.[120]

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 U.K. law? It is unclear; the Act does not specifically address this matter.

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 employee*."[121] 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 certainly 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

117. MASS. GEN. LAWS ch. 149, § 24L(b)(vii) (2018).
118. *Id*.
119. *Id.* § 24L(a).
120. *Id.* § 24L(b)(vii).
121. *Id.* § 24L(b)(vii) (emphasis added).

noncompetition agreement to a maximum of twelve months from date of cessation of employment.[122] The restricted period could be extended beyond twelve months to a period of no more than twenty-four months under two circumstances: (1) where the employee has "breached his or her fiduciary duty to the employer," or (2) where the employee has unlawfully taken, physically or electronically, property belonging to the employer.[123] 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."[124] The Act fails to clarify what "fiduciary duty to the employer" a former employee would have that he or she could breach. Certainly, under U.K. 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, during which period the employee is required to do the job of doing nothing.[125] 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.[126] 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?[127] 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.

122. *Id.* § 24L(b)(iv).

123. *Id*.

124. *Id.* §24L(b)(vii) (emphasis added).

125. Imam-Sadeque vs. BlueBay Asset Management (Services) Ltd [2012] EWHC 3511(QB) [145] (Eng.) (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).

126. Agero, Inc. v. Rubin, No. 14-P-932 (Mass. App. Ct. Sept. 8, 2015).

127. Nor, presumably, would garden leave payments be owing during the initial twelve 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.

New noncompetition agreements must now by in writing and signed by both the employer and the employee.[128] The agreement must expressly state that the employee has the right to consult with counsel prior to signing.[129] 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 consideration independent from the continuation of employment."[130] 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."[131] 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."[132] 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.[133]

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."[134] 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.

The Massachusetts Legislature saw fit to define, in part, 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

128. Mass. Gen. Laws ch. 149, § 24L(b)(i), (ii) (2018).
129. *Id*.
130. *Id.* § 24L(b)(ii); Sherman v Pfefferkorn, 135 N.E. 568, 569 (1922).
131. Mass. Gen. Laws ch. 149, § 24L(b)(i).
132. *Id.* § 24L(b)(ii).
133. *Id.* § 24L(b)(iii).
134. *Id*.

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 two years of employment, provided services or had a material presence of influence."[135] Of course, the question of what is an "area" still remains; the Legislature did not define this term. 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, perhaps drawing on prior case law to make their determination. Similarly, the Act addressed the scope of proscribed activities. They must be reasonable in relation to the interests protected, but a restriction on activities that (1) protects a legitimate business interest, and (2) 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."[136] 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."[137]

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 that the law of some other jurisdiction applies.[138] Henceforth, noncompetition agreements cannot be enforced against (1) employees who are classified as non-exempt under the Fair Labor Standards Act; (2) undergraduate or graduate students who partake in an internship or short-term employment while enrolled in an educational institution; (3) employees that have been terminated without cause or laid off; and (4) employees who are eighteen years of age or younger.[139] Obviously, the prohibitions of enforcement against hourly workers and workers under age eighteen 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.[140] Also,

135. *Id.* § 24L(b)(v).
136. *Id.* § 24L(b)(vi).
137. *Id.* § 24L(d).
138. *Id.* § 24L(a), (e).
139. *Id.* § 24L(c)(i-iv).
140. 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 ten percent or more derived from sandwich sales) located within two miles of a Jimmy

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.[141] 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 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

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Johns store for a period of two 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 lawsuit 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 [https://perma.cc/4UYA-DAEQ].

141. 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).

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 United States. 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"[142] to support an enforceable non-competition agreement, is a large loophole.[143] This language was a compromise, first introduced in the earlier 2016 legislative run at addressing non-competes.[144] 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.[145] As one practitioner stated, "It 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

142. *Id.* § 24L(b)(vii) (2018).

143. ""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 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 Non-competes—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 [https://perma.cc/Z9BW-HMU6].

144. 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, (June 28, 2016, 1:20 PM), https://blog.aimnet.org/aim-issueconnect/house-non-compete-bill-seeks-middle-ground [https://perma.cc/4ARB-HSTT].

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

a garden leave 'requirement' appears to be more of an optional contractual provision."[146]

Clearly, the 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-compete under the Act, and believes they are responsible for making that so.[147] 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, a great deal of opportunity for creative draftsmanship is still available, even though certain requirements as to notice, execution, duration of the restricted period, and 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*."[148] This wording 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

146. Erik Winton, *Massachusetts Legislature (Finally) Passes Non-Compete Law*, JACKSON LEWIS (Aug. 1, 2018), https://www.jacksonlewis.com/publication/Massachusetts-legislature-finally-passes-non-compete-law [https://perma.cc/XR9L-X8RE] (emphasis added).

147. "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 [https://perma.cc/28S4-KQVD].

148. MASS. GEN. LAWS ch. 149, § 24L(a) (2018).

excluded from coverage under the Act.[149] "A non-compete can be negotiated when someone leaves a company, and the restrictions in the new law would not apply."[150] 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.[151]

The legislative sessions in other states following the Massachusetts Noncompetition Agreement Act have been active in the area of non-competes. Nine other states have passed legislation banning the application of non-competes to workers in the state based on income: Illinois, Maine, Maryland, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, and Washington.[152] The focus of these successful legislative efforts has been on either defining broad categories of low-wage workers to whom a complete ban applies or establishing an income threshold below which a total ban applies, or both. Washington, D.C. passed a near-total ban on the use of non-competes, putting it in the company of California.[153]

Bans on non-competes now apply in Illinois for employees earning less than $13 per hour and has been amended to include those whose earnings are less than $75,000 per year; Maine for those earning below 300% of the federal poverty level; Maryland for employees earning $15 per hour or less; Nevada for all hourly workers; New Hampshire for those earning at or below 200% of the federal minimum wage or 200% of the state topped minimum wage; Oregon for employees

149. *Id*.

150. 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 [https://perma.cc/AC7P-54UD].

151. Jennifer Budoff, *New Massachusetts Non-Compete Law Goes into Effect October 1, 2018*, Mintz Levin Insights Ctr. (Aug. 14, 2018), https://www.employmentmattersblog.com/2018/08/new-massachusetts-non-compete-law-goes-into-effect-october-1-2018 [https://perma.cc/8NMQ-KKJ4].

152. 820 Ill. Comp. Stat. 90/1-10 (2020); Me. Rev. Stat. Ann. tit. 26 § 599-A (2020), Md. Code Ann., Lab. & Empl. § 3-716 (2020), Nev. Rev. Stat. § 613.195 (2021); N.H. Rev. Stat. § 275:70-a (2020), Or. Rev. Stat. § 653.295 (2020), R.I. Gen. Laws §§ 28-59-1–3 (2020), Wash. Rev. Code §§ 49.62.005–900 (2020), Va. Code Ann. § 40.1-28.7:8; *see* John W. Lettieri, *A Better Bargain: How Noncompete Reform Can Benefit Workers and Boost Economic Dynamism*, Am. Enter. Inst. (Dec. 7, 2020), https://www.aei.org/research-products/report/a-better-bargain-how-noncompete-reform-can-benefit-workers-and-boost-economic-dynamism.

153. D.C. Code § 32-581.01–.05 (2020).

whose salary plus commissions do not exceed the U.S. Census Bureau's medium income level for a family of four; Rhode Island for those earning less than 250% of the federal poverty level; Virginia for those whose fifty-two-week earnings average is less than the weekly average for the Commonwealth; and Washington for those earning $100,000 or less.[154]

Only three states have ventured into the "garden leave" arena. Under the new law passed in Washington, if an employee is "terminated as the result of a layoff, [the noncompetition agreement will be void] unless enforcement of the noncompetition covenant includes compensation equivalent to the employee's base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement."[155] In Illinois, a covenant not to compete specifically does not include "clauses or an agreement between an employer and an employee requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation."[156] New Jersey attempted a law very similar to that of Massachusetts that would have prohibited non-competes for undergraduate and graduate students, seasonal or temporary workers, and other low-wage workers. Additionally, the law would have required garden leave payments of 100% of pay for the duration of the employee's restricted period.[157] This bill failed to pass, as did its renewed attempt.[158]

At the federal level, a total ban on non-competes, save for an exception involving the sale of goodwill or the ownership interest in a business was attempted, but failed to pass.[159] A plan for non-compete legislation at the federal level has renewed support.[160] In December 2020, then President-elect Biden released his "Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions" outlining the administration's labor and employment policy goals.[161] On July 9, 2021, President Biden issued his Executive Order on Promoting Competition in the American Economy, which encouraged the Federal Trade Commission (FTC) to exercise its rulemaking authority to "curtail the use of unfair non-compete clauses" that "may unfairly limit worker mobility."[162] On December 6 and 7, 2021, the FTC and the Department of

154. *Id.*
155. Wash. Rev. Code § 49.62.020 (2020).
156. 820 Ill Comp. Stat. 90/5 (2020).
157. A. 1769, 218th Leg. (N.J. 2018).
158. A. 1650, 219th Leg. (N.J. 2020).
159. Workforce Mobility Act, S. 2614, 116th Cong. (2019).
160. Susan Guerette, Chris Stief & Gabrielle Giombetti, *How A Federal Noncompete Law May Develop Under Biden*, Law360 (Dec. 3, 2020, 1:28 PM), https://www.law360.com/articles/1333314/how-a-federal-noncompete-law-may-develop-under-biden [https://perma.cc/899V-JJUP].
161. The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions, https://joebiden.com/empowerworkers [https://perma.cc/MW5S-W9S7].
162. Exec. Order No. 14036 § 5(g), 86 Fed. Reg. 36,987, 36,992 (July 14, 2021).

Justice held a public workshop entitled "Making Competition Work: Promoting Competition in Labor Markets."[163] The workshop brought together stakeholders from various sectors to discuss worker mobility.[164] It is unclear whether the FTC will take substantive action to limit the use of such agreements based upon Biden's Executive Order and any consensus that may have been reached as a result of this workshop. Biden's Executive Order makes clear, however, his Administration's stance on non-competition agreements.

Conclusion

Venture capitalists and start-up entrepreneurs began the legislative process in Massachusetts 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 (1) the exclusion from non-competes of large categories of lower-compensated employees and of employees terminated voluntarily without cause, and (2) 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 non-competes in Massachusetts may have ended by making non-competes stronger and more enforceable than they were before.

163. F.T.C. & U.S. Dep't of Justice, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6–7, 2021), https://www.ftc.gov/system/files/documents/public_events/1597830/making_competition_work_agenda.pdf (workshop agenda).

164. *Id.*