

# Employment, Labor and Benefits Advisory: Massachusetts Inches towards Statutory Limitations on Noncompetition Agreements

5/7/2010

By [H. Andrew Matzkin](#) and [Paula Lyons](#)

Representatives in the Massachusetts legislature are continuing their attempt to codify requirements for enforceable noncompetition agreements in the Commonwealth.

Representatives Will Brownsberger (D-Belmont) and Lori Ehrlich (D-Marblehead) submitted a compromise bill (redraft of H1794 & H1799) last summer, entitled “An Act Relative to Noncompetition Agreements,” which attempted to impose specific requirements for valid non-compete agreements under Massachusetts law. Despite strong objections from certain state representatives and a number of private businesses and related business organizations, the bill was recently reported out of the Legislature’s Joint Committee on Labor and Workforce Development with a favorable recommendation.

The prior version of the bill had allowed noncompetition agreements to extend beyond one year if a “garden leave” provision was added to compensate the employee during the extended period. The two main changes from October’s original draft in the current version of the bill are that the garden leave provision has been eliminated, and the length of permissible noncompetition restrictions has been capped at one year following cessation of the employment relationship. The current version of the bill is notable, however, not only because it incorporates these additional revisions, but also because it signifies yet another concrete step toward codifying requirements for enforceable noncompetition agreements in Massachusetts.

Highlights of the current version of the bill include the following:

- **Existing noncompetition agreements not affected:** the bill’s requirements for enforceability will be applied *prospectively*
- **Threshold compensation:** noncompetition agreements can apply *only* to employees with minimum total compensation of \$75,000
- **Separate document:** the noncompetition agreement must be a distinct document signed by both the employer and the employee
- **Advance notice:** if a noncompetition agreement is a required condition of employment, then at least seven days notice must be given before employment commences
- **Consideration:** if the noncompetition agreement is entered into *after* the start of employment, additional consideration is required, with 10% of the employee’s current annual compensation presumptively adequate

- **Capped noncompetition length:** a restricted period of six months is presumptively reasonable, and in no event may a noncompetition period exceed one year from the date of cessation of employment
- **Attorneys' fees:** a court *shall* award attorneys' fees to an employee if the court declines to enforce a material restriction, and *may* award attorneys' fees to an employer if a court enforces agreement and finds that the employee acted in bad faith
- **Choice of law:** parties cannot avoid Massachusetts law via a choice of law provision, and Massachusetts law automatically will apply to a noncompetition agreement if an employee was, at minimum, a 30-day resident of or working in Massachusetts at the time of termination.

The bill, House 4607, currently is in the House Committee on Steering, Policy and Scheduling, the last stop before floor consideration of the bill. There are bound to be further revisions as the bill continues through the legislative process, and the bill ultimately may not become law. If the bill does become law, however, then the requirements for enforceable noncompetition agreements in Massachusetts will become more predictable—and an employer's need for robust and enforceable non-solicitation, non-interference, and non-disclosure restrictions will become even greater.

## Action Items for Employers

In light of the above, employers who do business in Massachusetts or who may employ residents of Massachusetts need to pay close attention to this legislation. If adopted, a full review of employers' standard noncompetition agreements and goals regarding the same is required. Although the law will *not* be retrospective, it will be important to know and to plan for the new statutory restraints. Actions to consider include a new emphasis on non-solicitation and non-disclosure agreements and a reevaluation of business practices involving employees under the \$75,000 earnings threshold who may still have access to proprietary information. Employers are encouraged to contact Mintz Levin with any questions regarding the enforceability of their current noncompetition agreements under current common law or this proposed bill.

---

*For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

### MEMBERS

**David Barmak**  
(202) 585-3507  
[DBarmak@mintz.com](mailto:DBarmak@mintz.com)

**Andrew J. Bernstein**  
(212) 692-6742  
[AJBernstein@mintz.com](mailto:AJBernstein@mintz.com)

**Richard H. Block**  
(212) 692-6741  
[RHBlock@mintz.com](mailto:RHBlock@mintz.com)

**Bret A. Cohen**  
(617) 348-3089  
[BCohen@mintz.com](mailto:BCohen@mintz.com)

**Raymond D. Cotton**  
(202) 434-7322  
[RDCotton@mintz.com](mailto:RDCotton@mintz.com)

**Micha “Mitch” Danzig**  
(858) 314-1502  
[MDanzig@mintz.com](mailto:MDanzig@mintz.com)

**Robert M. Gault**  
(617) 348-1643  
[RMGault@mintz.com](mailto:RMGault@mintz.com)

**James R. Hays**  
(212) 692-6276  
[JRHays@mintz.com](mailto:JRHays@mintz.com)

**H. Andrew Matzkin**  
(617) 348-1683  
[HMatzkin@mintz.com](mailto:HMatzkin@mintz.com)

**Jennifer B. Rubin**  
(212) 692-6766  
[JBRubin@mintz.com](mailto:JBRubin@mintz.com)

**Donald W. Schroeder**  
(617) 348-3077  
[DSchroeder@mintz.com](mailto:DSchroeder@mintz.com)

**Henry A. Sullivan**  
(617) 348-1746  
[HASullivan@mintz.com](mailto:HASullivan@mintz.com)

## OF COUNSEL

**Martha J. Zackin**

(617) 348-4415

[MJZackin@mintz.com](mailto: MJZackin@mintz.com)

## ASSOCIATES

**Michael S. Arnold**

(212) 692-6866

[MArnold@mintz.com](mailto: MArnold@mintz.com)

**Katharine O. Beattie**

(617) 348-1887

[KOBeattie@mintz.com](mailto: KOBeattie@mintz.com)

**Gregory R. Bennett**

(212) 692-6842

[GBennett@mintz.com](mailto: GBennett@mintz.com)

**Jessica W. Catlow**

(212) 692-6843

[JCatlow@mintz.com](mailto: JCatlow@mintz.com)

**Jennifer F. DiMarco**

(212) 692-6260

[JFDiMarco@mintz.com](mailto: JFDiMarco@mintz.com)

**Kelley L. Finnerty**

(617) 348-1819

[KFinnerty@mintz.com](mailto: KFinnerty@mintz.com)

**David M. Katz**

(212) 692-6844

[DKatz@mintz.com](mailto: DKatz@mintz.com)

**Paula Lyons**

(617) 348-1831

[PLyons@mintz.com](mailto: PLyons@mintz.com)

**James M. Nicholas**

(617) 348-1620

[JNicholas@mintz.com](mailto: JNicholas@mintz.com)

**Maura M. Pelham**

(617) 348-1851

[MMPelham@mintz.com](mailto:MMPelham@mintz.com)

**Tyrone P. Thomas**

(202) 434-7374

[TPTThomas@mintz.com](mailto:TPTThomas@mintz.com)

**Brandon T. Willenberg**

(858) 314-1522

[BTWillenberg@mintz.com](mailto:BTWillenberg@mintz.com)