A Q&A guide to non-compete agreements between employers and employees for private employers in Massachusetts. This Q&A addresses enforcement and drafting considerations for restrictive covenants such as post-employment covenants not to compete and non-solicitation of customers and employees. Federal, local or municipal law may impose additional or different requirements. Answers to questions can be compared across a number of jurisdictions (see Non-compete Laws: State Q&A Tool (http://us.practicallaw.com/1-505-9589)).

OVERVIEW OF STATE NON-COMPETE LAW

1. If non-competes in your jurisdiction are governed by statute(s) or regulation(s), identify the state statute(s) or regulation(s) governing:
   - Non-competes in employment generally.
   - Non-competes in employment in specific industries or professions.

GENERAL STATUTE AND REGULATION

Currently, Massachusetts does not have a general statute governing non-competes.

However, in 2014, the Massachusetts Legislature introduced the following legislation, all of which did not pass:

- **House Bill 4045.** Governor Patrick introduced HB 4045, which sought to ban employee non-competition agreements except in very limited situations. Governor Patrick later filed and proposed H.4401 to the Massachusetts Legislature.

- **House Bill 4082.** HB 4082 was filed by the Joint Committee on Labor and Workforce Development. This bill also sought to ban enforcement of non-competition agreements, but only those not incident to a sale of a business. HB 4082 also sought to have Massachusetts adopt the Uniform Trade Secrets Act (USTA).

- **Senate Bill 2231.** The Massachusetts Senate voted to amend SB 2231 to provide a compromise bill, which created presumptions addressing a non-complete agreement’s duration and scope.

Neither HB 4045 nor HB 4082 would have affected an employer’s use of employment agreements containing non-solicitation or non-disclosure clauses.

Currently, there is a new bill already proposed in the new legislative to adopt the USTA. If passed, it would take effect on January 1, 2016.

INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION

**Lawyers:** Mass. R. Prof’l Conduct 5.6

Rule 5.6 of the Massachusetts Rules of Professional Conduct governs non-compete agreements in the legal industry.

**Physicians:** Mass. Gen. Laws ch. 112, § 12X

Chapter 112, Section 12X of the Massachusetts General Laws addresses non-compete agreements for physicians licensed by the Massachusetts Board of Registration in Medicine.

**Nurses:** Mass. Gen. Laws ch. 112, § 74D

Chapter 112, Section 74D of the Massachusetts General Laws governs non-compete agreements for nurses certified by the Massachusetts Board of Registration in Nursing.

**Social Workers:** Mass. Gen. Laws ch. 112, § 135C

Chapter 112, Section 135C of the Massachusetts General Laws addresses non-compete agreements for social workers licensed under the Massachusetts Board of Registration for Social Workers.

**Broadcasters:** Mass. Gen. Laws ch. 149, § 186

Chapter 149, Section 186 of the Massachusetts General Laws governs non-compete agreements for employees in the broadcasting industry.
2. For each statute or regulation identified in Question 1, identify the essential elements for non-compete enforcement and any absolute barriers to enforcement identified in the statute or regulation.

**GENERAL STATUTE AND REGULATION**

Massachusetts does not have a general statute governing non-competes.

**INDUSTRY- OR PROFESSION-SPECIFIC STATUTE OR REGULATION**

**Lawyers:** Mass. R. Prof’l Conduct 5.6

A lawyer cannot offer or make a:
- Partnership or employment agreement that restricts lawyers from practicing law after ending the relationship, except for an agreement about retirement benefits.
- Settlement agreement that restricts lawyers from practicing law. (Mass. R. Prof’l Conduct 5.6.)

**Physicians:** Mass. Gen. Laws ch. 112, § 12X

A physician’s employment or partnership agreement may not have a non-compete provision. (Mass. Gen. Laws ch. 112, § 12X.)

**Nurses:** Mass. Gen. Laws ch. 112, § 74D

A nurse’s employment or partnership agreement may not have a non-compete provision. (Mass. Gen. Laws ch. 112, § 74D.)

**Social Workers:** Mass. Gen. Laws ch. 112, § 135C

A non-compete provision in a social worker’s employment or partnership agreement is void. (Mass. Gen. Laws ch. 112, § 135C.)

**Broadcasters:** Mass. Gen. Laws ch. 149, § 186

A non-compete provision is void in an employment contract for an employee in the broadcasting industry. Violators are liable for the affected party’s reasonable attorneys’ fees and costs. (Mass. Gen. Laws ch. 149, § 186.)

**ENFORCEMENT CONSIDERATIONS**

3. If courts in your jurisdiction disfavor or generally decline to enforce non-competes, please identify and briefly describe the key cases creating relevant precedent in your jurisdiction.

Massachusetts courts generally disfavor non-competes agreements.

Non-compete agreements are interpreted in favor of the employee because:
- The employee has a weaker bargaining position.
- Courts do not want to take away an employee’s livelihood.


**EMPLOYER’S PROTECTABLE INTEREST**

Under Massachusetts case law, a non-compete must be:
- Necessary to protect a legitimate business interest.
- Reasonably limited in time and space, with terms no more restrictive than needed (New Eng. Canteen Serv., Inc. v. Ashley, 363 N.E.2d 526 (Mass. 1977)).
- Consistent with public policy. (Boulanger v. Dunkin’ Donuts Inc., 815 N.E.2d 572, 577 (Mass. 2004)).

Massachusetts courts generally find a legitimate business interest in protecting:
- Confidential information, such as:
  - business plans and marketing strategies (Marcam Corp. v. Orchard, 885 F. Supp. 294, 297 (D. Mass. 1995)).


Non-compete covenants may not be used to restrain free competition or to deprive an employee of the opportunity to use acquired skills and knowledge to secure other employment (Routhier Placement Specialists v. Brown, No. 02-3532-E, 2002 WL 31248032, at *1 (Mass. Super. Ct. Sept. 26, 2002)).

An employee may carry away and use the general skill and knowledge acquired during the course of the employment (Dynamics Research Corp. v. Analytic Science Corp., 400 N.E.2d 1274, 1282 (Mass. App. Ct. 1980)).

**MATERIAL CHANGE**

A pre-employment non-compete agreement must also have reasonable consideration (Stone Legal Res. Group, Inc. v. Clebus, No. CA025736, 2003 WL 914994, at *3 (Mass. Super. Ct. 2002)). It is unclear whether Massachusetts courts require additional consideration if the non-compete was entered after hire. The Massachusetts Appeals Court held that continued employment is sufficient consideration to support a non-compete agreement entered after hire (Wilkinson v. QCC, Inc., No. 99-P-1854, 53 Mass. App. Ct. 1109 (Mass. App. Ct. Dec. 21, 2001)). However, the Supreme Judicial Court has not resolved this issue.

While no appellate court in Massachusetts has expressed a clear position on the effect of a “material change” in the employment relationship on an existing non-compete agreement, several trial courts have refused to enforce a non-compete agreement where there has been a material change in the employment relationship and the employee has not executed a new non-compete agreement. For example, the Massachusetts Superior Court held that a change in an employee’s compensation structure or methodology creates a material change requiring the execution of a new non-compete agreement.

Later the same year, however, the Superior Court rejected a “material change” defense and limited the Grace Hunt holding to only those situations where an employee’s pay is reduced (Brennan v. Sentient Jet, LLC, No. 12-cv-11519-LTS, 2013 WL 2251002 (Mass. Super. Ct. May 21, 2013)). The Massachusetts Federal District Court, in a preliminary injunction hearing, found that a non-compete was likely unenforceable where an employee signed a non-compete agreement and was later promoted with more responsibilities and did not sign a new agreement (Rent-a-PC, Inc. v. March, No. 13-10978-GAO, 2013 WL 2394982 (D. Mass. May 28, 2013)).

4. Which party bears the burden of proof in enforcement of non-competes in your jurisdiction?

The employer has the burden of proof to enforce a non-compete (Lunt v. Campbell, 23 Mass. L. Rptr. 145 (Mass. Super. Ct. 2007)).

5. Are non-competes enforceable in your jurisdiction if the employer, rather than the employee, terminates the employment relationship?

Unless the non-compete provides otherwise, whether an employee was terminated or voluntarily resigned is irrelevant when enforcing non-compete agreements (Kroeger, 432 N.E.2d at 572).

BLUE PENCILING NON-COMPETES

6. Do courts in your jurisdiction interpreting non-competes have the authority to modify (or "blue pencil") the terms of the restrictions and enforce them as modified?

While the courts have not specifically adopted the blue pencil approach, Massachusetts courts may reform an unreasonable non-compete to the extent that the modification is reasonable (Ferriofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992); Inner-Tite Corp. v. Brozowski, 27 Mass. L. Rptr. 204 (Mass. Super. Ct. 2010)).

CHOICE OF LAW PROVISIONS

7. Will choice of law provisions contained in non-competes be honored by courts interpreting non-competes in your jurisdiction?


Massachusetts law generally applies if, at termination, the employee was either:

- A Massachusetts resident.
- Working in Massachusetts.

REASONABLENESS OF RESTRICTIONS

8. What constitutes sufficient consideration in your jurisdiction to support a non-compete agreement?

What constitutes a reasonable duration depends on the facts of the case. Courts in Massachusetts have enforced one to two year agreements (see Ikon Office Solutions, Inc. v. Belanger, 59 F. Supp. 2d 125, 129 (D. Mass. 1999); Empirix, Inc. v. Ivanov, No. SUCCV201101239, 2011 WL 3672038, at *3 (Mass. Super. Ct. May 17, 2011); Boulanger, 815 N.E.2d at 579). Massachusetts courts are more likely to enforce one year restrictions.

9. What constitutes a reasonable duration of a non-compete restriction in your jurisdiction?

Massachusetts courts generally enforce geographical limitations of:

- The former employee’s territory during his employment.
- The employer’s operating area.
- The company’s current clients within a geographic area.

Agreements restricting an employee from doing business in areas where his former employer operates are generally considered reasonable (Lombard Med. Tech., Inc. v. Johannesssen, 729 F. Supp. 2d 432, 439 (D. Mass. 2010)).

Massachusetts courts, however, have upheld nationwide and worldwide covenants because of the employer’s broad market area (see EMC Corp. v. Allen, No. 975972B, 1997 WL 1366836 (Mass. Super. Ct. 1997); Marcam, 885 F. Supp. at 299; Genzyme Corp. v. Laidlaw, 3 N.E.3d 110 (Mass. App. Ct. 2014)).

10. What constitutes a reasonable geographic non-compete restriction in your jurisdiction?

Massachusetts courts have not addressed this issue.

11. Does your jurisdiction regard as reasonable non-competes that do not include geographic restrictions, but instead include other types of restrictions (such as customer lists)?

Massachusetts courts have not addressed this issue.
12. Does your jurisdiction regard as reasonable geographic restrictions (or substitutions for geographic restrictions) that are not fixed, but instead are contingent on other factors?

Massachusetts courts have found reasonable restrictions based on either:
- The employee’s territory during his employment.
- The scope of the employer’s operation.


13. If there is any other important legal precedent in the area of non-compete enforcement in your jurisdiction not otherwise addressed in this survey, please identify and briefly describe the relevant cases.

There is no other important legal precedent in the area of non-compete enforcement in Massachusetts.

REMEDIES

14. What remedies are available to employers enforcing non-competes?

If the employee breaches the non-compete, a court may award the employer:

15. What must an employer show when seeking a preliminary injunction for purposes of enforcing a non-compete?

To get a preliminary injunction, the employer must prove:
- That success is likely on the merits.
- Irreparable harm if the injunction is denied.
- Risk of irreparable harm to the employer.

(Packaging Indus., 405 N.E.2d at 111.)

As a general rule, a breach of a non-compete agreement tied to trade secret concerns triggers a finding of irreparable harm (Aspect, 787 F. Supp. 2d at 130).

OTHER ISSUES

16. Apart from non-competes, what other agreements are used in your jurisdiction to protect confidential or trade secret information?

NON-SOLICITATION AGREEMENTS

Non-solicitation agreements are analyzed in Massachusetts courts as a covenant not to compete because of their similar purpose and ef-


NON-DISCLOSURE AGREEMENTS

Non-disclosure agreements are different from non-competes because non-disclosure statements prevent only the disclosure of trade secrets and confidential information.

Similar to non-competes, a non-disclosure agreement must be:
- Necessary to protect a legitimate business interest.
- Reasonably limited in time and space, with terms no more restrictive than needed.
- Consistent with the public interest.
- Supported by consideration if made before hire.

(Inner-Tite Corp., 27 Mass. L. Rptr. 204, at *16.)

17. Is the doctrine of inevitable disclosure recognized in your jurisdiction?

Massachusetts courts have not recognized the inevitable disclosure rule. A Massachusetts federal court declined to apply a broad interpretation of inevitable disclosure in a preliminary injunction ruling, finding that the doctrine:
- May be used to establish irreparable harm after a party seeking an injunction already proved a likelihood of success on the merits.
- Is not a basis for future misappropriation of trade secrets.


In Boston Scientific Corp. v. Lee, the US District Court for the District of Massachusetts refused to extend the inevitable disclosure doctrine where the court approved the preliminary injunction based on a non-disclosure agreement. However, the court allowed the former employee to work at the competing company where there was no non-compete agreement between them. (No. 13-13156, 2014 WL 1946687 (D. Mass. May 14, 2014).)