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HR Insights

How Do You Protect Your Business?

A Practical Guide for Massachusetts Businesses

Introduction

Every business has valuable assets worth protecting. Whether it's confidential business information, trade secrets, customer relationships, intellectual property, or a highly trained workforce, these assets often represent a company's competitive advantage. Whether you're launching a new business or leading an established organization, it's only natural to want to protect what you're building.

For many years, noncompetition agreements were a common tool used to help protect those interests. However, effective October 1, 2018, the Massachusetts Noncompetition Agreement Act (MNAA) established new rules governing when and how noncompetition agreements may be used. As a result, employers should carefully consider whether a noncompetition agreement is the right choice or whether another type of agreement might be a better fit for their business objectives.

Fortunately, employers have several options available. Depending on what an employer is trying to protect, a confidentiality agreement, nondisclosure agreement, nonsolicitation agreement, or invention assignment agreement may provide the appropriate level of protection without imposing the broader restrictions associated with a noncompetition agreement.

This *HR Insight* provides a practical overview of the most common business protection agreements available to Massachusetts employers, explains when each may be appropriate, and highlights key considerations under the Massachusetts Noncompetition Agreement Act.

> ***Companion HR@Work Tool***
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> Looking for a quick way to compare your options? Be sure to download our companion **HR@Work Tool, *Choosing the Right Agreement to Protect Your Business***. The tool includes a chart designed to help identify which agreement may best fit your organization's needs and 7 common mistakes to avoid. Download the tool at www.YourHRatWork.com and select Publications/HR@Work Tools.

1. Start with Your Business Objective

Before selecting any agreement, ask yourself one simple question: **What do we need to protect?**

The answer should guide your choice of agreement. Every agreement should protect a legitimate business interest, not simply prevent an employee from accepting another job. Examples of common business interests include:

- Confidential business information
- Trade secrets
- Customer relationships and goodwill
- Intellectual property and inventions
- Key employees and workforce stability
- Investments in specialized training

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Once you identify what you are trying to protect, it becomes much easier to determine which agreement best aligns with your business objectives.

In the sections that follow, we'll look at the most common types of agreements available to Massachusetts employers, explain what each agreement is designed to protect, discuss when it may be appropriate, and highlight important considerations for employers.

2. Understanding Your Options

Once you have identified what you are trying to protect, the next step is choosing the agreement that best aligns with your business objective.

Massachusetts employers have several types of agreements available, each designed to protect a different business interest. Understanding the purpose of each agreement can help you select the one that best meets your organization's needs.

The table below provides a high-level overview of the most common agreements used by Massachusetts businesses.

If your business objective is to protect…	The agreement that may best align with your objective is…
Confidential business information	Confidentiality/Nondisclosure Agreement
Trade secrets	Confidentiality Agreement
Customer relationships and goodwill	Customer Nonsolicitation Agreement
Your workforce	Employee Nonsolicitation Agreement
Intellectual property and inventions	Invention Assignment Agreement
Against competitive employment after separation	Noncompetition Agreement

The sections that follow explain the purpose of each agreement, when it may be appropriate, and key considerations for Massachusetts employers.

3. A Closer Look at Each Agreement

Each agreement serves a different purpose and offers a different level of protection. Some are designed to protect confidential information or customer relationships, while others help safeguard intellectual property or limit certain activities during or after employment. Understanding how these agreements differ can help you choose the one that best aligns with your business objectives.

Confidentiality and Nondisclosure Agreements

Confidentiality agreements and nondisclosure agreements (NDAs) are among the most common business protection agreements used by employers. While the terms are often used interchangeably, both are designed to help protect confidential business information from unauthorized use or disclosure.

These agreements may be appropriate for employees who have access to sensitive information such as customer lists, pricing information, financial data, business strategies, marketing plans, proprietary processes, or other information that is not publicly available.

Unlike a noncompetition agreement, a confidentiality or nondisclosure agreement generally does not limit where an employee may work after leaving the organization. Instead, it helps protect confidential information regardless of where the employee works in the future.

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Understanding Trade Secrets

Trade secrets are a specific type of confidential information that receives additional legal protection when employers take reasonable steps to keep the information confidential.

Examples may include proprietary formulas, manufacturing processes, software code, business methods, customer data, pricing strategies, or other information that provides a competitive advantage because it is not generally known.

While confidentiality and nondisclosure agreements help protect trade secrets, some businesses also implement workplace practices that safeguard sensitive information, for example, limiting access to confidential information, using appropriate security measures, marking sensitive documents as confidential, and educating employees about their responsibilities.

HR@Work Tip:
For this type of agreement, make sure you clearly identify what information you consider confidential and to educate employees about their responsibility to protect that information during and, if appropriate, after employment.

Customer Nonsolicitation Agreements

For many businesses, customer relationships are among their most valuable business assets. A customer nonsolicitation agreement is designed to help protect those relationships by restricting a departing employee from soliciting the employer's customers after employment ends.

These agreements may be appropriate for employees who develop customer relationships, manage key accounts, or have access to confidential customer information as part of their job responsibilities.

Unlike a noncompetition agreement, a customer nonsolicitation agreement generally does not prevent an employee from working for a competitor. Instead, it helps protect the employer's customer relationships by limiting the employee's ability to solicit customers covered by the agreement.

HR@Work Tip:
If your primary concern is protecting customer relationships rather than preventing a former employee from working for a competitor, a customer nonsolicitation agreement may provide the protection you need while placing fewer restrictions on future employment.

Employee Nonsolicitation Agreements

Employees often develop strong working relationships with their colleagues. An employee nonsolicitation agreement is designed to help protect an organization's workforce by restricting a departing employee from soliciting coworkers to leave the organization.

These agreements may be appropriate for employees in leadership, management, sales, or other positions where they have significant influence over other employees or are responsible for recruiting and developing talent.

Unlike a noncompetition agreement, an employee nonsolicitation agreement generally does not restrict where an employee may work after leaving the organization. Instead, it is intended to help protect workforce stability by limiting the solicitation of the employer's employees.

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HR@Work Tip:
For this type of agreement, tailor them to the employee's role and the business interests you want to protect.

Invention Assignment Agreements

An invention assignment agreement helps clarify who owns intellectual property and other work product created by an employee during the course of employment. Depending on how the agreement is written and applicable law, it may apply to inventions, designs, software, technical processes, research, written materials, or other work product developed as part of an employee's job responsibilities.

These agreements may be appropriate for employees who create intellectual property or develop proprietary products, technology, processes, or other innovations that provide value to the organization. They are commonly used by technology companies, engineering and architectural firms, manufacturers, research organizations, and other businesses where employees regularly create or improve products, services, or business processes.

Unlike a noncompetition agreement, an invention assignment agreement generally does not restrict where an employee may work after leaving the organization. Instead, it helps establish ownership of work created during employment and protects the organization's investment in developing new ideas, products, and innovations.

HR@Work Tip:
For this type of agreement, make sure you clearly define the types of work covered by the agreement and work with qualified legal counsel to ensure the agreement reflects applicable law and your organization's business needs.

Noncompetition Agreements

A noncompetition agreement is designed to limit an employee's ability to work for or start a competing business after employment ends. The purpose is to help protect your legitimate business interests, such as confidential information, trade secrets, and customer goodwill.

Noncompetition agreements may be appropriate for certain employees whose positions present a significant risk to the organization if they immediately join or establish a competing business. However, they are not appropriate for every employee or every situation.

Unlike the other agreements discussed above, noncompetition agreements restrict an employee's future employment opportunities. As a result, they are subject to specific legal requirements under the Massachusetts Noncompetition Agreement Act.

The next section discusses when a noncompetition agreement may be appropriate and highlights practical considerations for Massachusetts employers.

Is a Noncompetition Agreement the Right Choice?

By now, you've seen that a noncompetition agreement is only one of several agreements available to help protect your business. The question is not whether every employee should sign one. Rather, the question is whether a noncompetition agreement is the right tool for protecting your organization's legitimate business interests.

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For some businesses and some positions, a noncompetition agreement may be appropriate. For others, a confidentiality agreement, customer or employee nonsolicitation agreement, invention assignment agreement, or a combination of these agreements may provide the protection needed without restricting an employee's future employment opportunities.

Before deciding whether to use a noncompetition agreement, consider the following questions:

- What legitimate business interest are you trying to protect?
- Would another type of agreement provide adequate protection?
- Does the employee's role justify a noncompetition agreement?
- Is the agreement appropriately tailored to the employee's responsibilities?
- Have you consulted qualified Massachusetts employment counsel?

Taking time to answer these questions can help your business choose the agreement that best aligns with business objectives while avoiding unnecessary restrictions.

Key Provisions of the Massachusetts Noncompetition Agreement Act

The Massachusetts Noncompetition Agreement Act establishes requirements for most noncompetition agreements entered into between employers and employees in Massachusetts. The law is intended to balance an employer's legitimate business interests with an employee's ability to earn a living.

While the law contains a number of detailed requirements, key provisions include:

- **Not every employee may be covered:** The Act does not permit noncompetition agreements for certain categories of workers, including nonexempt employees under the Fair Labor Standards Act, undergraduate and graduate students participating in internships or other short-term employment, employees who are 18 years of age or younger, and employees who are terminated without cause or laid off.
- **Noncompetition agreements must protect a legitimate business:** A noncompetition agreement should be designed to protect legitimate business interests, such as trade secrets, confidential information, or customer goodwill. The restrictions should be no broader than reasonably necessary to protect those interests.
- **Time and geographic restrictions matter:** The duration and geographic scope of a noncompetition agreement should be reasonable and appropriately tailored to the employee's role and the business interests being protected. In most cases, the restricted period may not exceed 12 months following the end of employment.
- **Consideration Is Required:** The Act requires that a noncompetition agreement be supported by either a garden leave clause or other mutually agreed-upon consideration that is specifically identified in the agreement.
- **Garden Leave Clause:** A garden leave clause generally requires the employer to continue paying the employee at least 50% of the employee's highest annualized base salary (earned during the two years preceding termination) throughout the entire restricted period. In other words, if the restricted period is six months, garden leave payments generally continue for six months. If the restricted period is 12 months, the payments generally continue for 12 months.
- **Other Consideration:** The Act also allows employers and employees to agree to another form of consideration instead of a statutory garden leave clause. Because the law does not define what constitutes sufficient "other mutually agreed-upon consideration," employers should consult qualified Massachusetts employment counsel when drafting or reviewing these provisions.
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HR@Work Perspective:
A noncompetition agreement should not be viewed as a standard employment document for every employee. Instead, start by identifying the legitimate business interest you are trying to protect. Then determine whether a noncompetition agreement or another type of agreement best aligns with your business objective.

Also, remember that some candidates and employees may be hesitant to sign a noncompetition agreement. When another type of agreement will adequately protect your business interests, it may reduce barriers in recruiting and hiring while still providing meaningful protection.

4. *Questions Every Business Should Ask*

Before asking an employee to sign a noncompetition agreement, take a step back and consider the following questions:

- ☐ What legitimate business interest are we trying to protect?
- ☐ Is a noncompetition agreement the best way to protect that interest, or would another agreement accomplish the same objective?
- ☐ Is the employee eligible to sign a noncompetition agreement under Massachusetts law?
- ☐ Are the proposed restrictions reasonable and appropriately tailored to the employee's role and responsibilities?
- ☐ Have we considered whether a confidentiality agreement, customer or employee nonsolicitation agreement, or invention assignment agreement would provide sufficient protection?
- ☐ If a noncompetition agreement is appropriate, have we addressed the Act's requirements regarding consideration, including a garden leave provision or other mutually agreed-upon consideration?

Bottom Line:
Protect your business by starting with your business objective. Then choose the agreement that best aligns with that objective, not necessarily the most restrictive one. In many cases, another type of agreement may provide the protection you need while allowing employees greater flexibility in their future employment. The right agreement is the one that appropriately protects your legitimate business interests while supporting a fair and productive workplace.