Massachusetts Noncompetition Agreement Act: A Rose of a Different Color

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“America’s competitive advantage lies in its human talent. All of us should be doing everything we can to cultivate and develop our work force.” ¹

I. INTRODUCTION

A noncompete agreement or a noncompete clause in an employment contract (collectively referred to herein as the “noncompete(s)” is a popular instrument among employers to prevent their employees from working for their rivals post-employment. ² However, courts across the nation are divided on the enforceability of noncompetes due to the constraints that they impose on employees’ post-employment mobility. ³ On one end of the spectrum, states in favor of protecting employees’ mobility have completely banned

² See Mitchel v. Reynolds, 24 Eng. Rep. 347, 351–52 (Courts of King’s Bench 1711) (noting landmark case that established precedent for noncompete in American employment law); see also Christine M. O’Malley, Note, Covenants Not to Compete in the Massachusetts Hi-Tech Industry: Assessing the Need for A Legislative Solution, 79 B.U. L. REV. 1215, 1216 (1999) (asserting businesses’ increasing reliance on noncompetes “to protect not only trade secrets and confidential business information, but also their investment in a particular employee.”). Most noncompetes “contain a strong bias in the employer’s favor” because they compel “the prospective employee, who lacks bargaining power and legal sophistication, to sign it as a condition of employment.” O’Malley, 79 B.U. L. Rev. at 1216.
³ See Greg T. Lembrich, Note, Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants, 102 COLUM. L. REV. 2291, 2291–94 (2002) (stating noncompetes enforceable in some states); see also Norman D. Bishara & Michelle Westermann-Behaylo, The Law and Ethics of Restrictions on an Employee’s Post-Employment Mobility, 49 AM. BUS. L. J. 1, 15 (2002) (“[C]ourts will allow enforcement when the restrictions are reasonable and legitimate business interests are being protected.”). Courts that recognize noncompetes often engage in a balancing test between businesses’ interests and the employee’s mobility. Bishara, 49 AM. BUS. L. J. at 15. Courts take into consideration factor such as, the balancing test are the length of the restricted period, the scope of the restricted activities, and “the significance of the employee’s skills.” Id. at 16–18.
noncompetes.\(^4\) On the other end of the spectrum, states in favor of protecting employers' business interests understand the importance of noncompetes, but historically have been reluctant to enforce them.\(^5\) Massachusetts falls in the latter category.\(^6\)

In Massachusetts, a state driven by its skilled workforce and technological innovation, noncompetes are popular instruments that employers use to prevent the transfer of skills and knowledge of their employees to competitors.\(^7\) However, there is no clear framework as to how

\(^4\) See CAL. BUS. & PROF. CODE § 16600 (Deering 2018) (prohibiting noncompete in California); see also Lembrich, supra note 3, at 2297–302 (asserting noncompetes impede competition and result in unequal bargaining power between employers and employees); Nina B. Ries, Understanding California's Ban on Non-Compete Agreements, HUFFPOST (Feb. 23, 2017, 12:12 PM), https://www.huffpost.com/entry/understanding-californias-ban-on-non-compete-agreements_b_58af1626e4b0e5fbd6196f04 (https://perma.cc/9HXT-6XNV) (explaining California's strict ban on noncompete due to strong policy reasons, such as keeping "residents gainfully employed, able to provide for themselves and their families, and off the welfare and social service rolls.").

\(^5\) See New England Canteen Serv., Inc. v. Ashley, 363 N.E.2d 526, 527–28 (Mass. 1977) (holding noncompete unenforceable because of broad language and geographic restriction of agreement); Richmond Bros., Inc. v. Westinghouse Broad. Co., 256 N.E.2d 304, 307 (Mass. 1970) (holding noncompete unenforceable because agreement was "no longer reasonably necessary for the protection of the plaintiff's business."); see also Lembrich, supra note 3, at 2294–97 (stating noncompetes are "commonly used by employers to protect their businesses from the dangers inherent when key employees terminate their employment.").

\(^6\) See Bear Stearns & Co. v. Sharon, 550 F. Supp. 2d 174, 177 (D. Mass. 2008) (finding plaintiff is likely to prevail on merits because "if not all, of Sharon's clients have transferred their accounts at Bear Stearns to Morgan Stanley"); Bear Stearns & Co. v. McCarron, SUCV2008-00979-BLS1, 2008 Mass. Super. LEXIS 503, at *9 (Mass. Super. Ct. Mar. 5, 2008) (finding plaintiff unlikely to prevail due to lack of evidence showing "employees solicited their sales assistants to leave the employer or that the employees took with them confidential client financial information."). Massachusetts recognizes information and skills unique to a business are paramount to that business's success; however, to prevail, the business must demonstrate the noncompete is imperative to the business' success. Sharon, 550 F. Supp. 2d at 177.

enforceability is determined and thus, for over a decade, the Massachusetts legislature has attempted to pass legislation to regulate noncompetes.\footnote{See Beck, supra note 7 (outlining Massachusetts's noncompete reform history).} After years of debate, Massachusetts passed a bill that not only codified Massachusetts' noncompete law for the first time, but also made Massachusetts the first state in the United States to provide employees with the benefit of getting compensated for refraining from engaging in employment with their employers' competitors, such right is known as garden leave.\footnote{See \textit{MASS. GEN. LAWS ANN.} ch. 149, § 24(L) (West 2018) (pointing to newly enacted noncompete law); \textit{Mass. Noncompete Law Takes Effect on Monday}, \textit{BOS. GLOBE} (Sept. 30, 2018, 7:27 PM), https://www.bostonglobe.com/business/talking-points/2018/09/30/mass-include-garden-leave-provision-noncompete-law/7o1PMjoozyjWYKg8vJr3Kk/story.html [https://perma.cc/VBT3-7VVU] (describing new Massachusetts law that expands garden leave protection to Massachusetts workers).}

\section*{II. HISTORY}

\subsection*{A. The Origin of Garden Leave}

Garden leave is a well-established British phenomenon commonly referred to as being paid "while you tend your garden," or in other words, "being paid while doing nothing."\footnote{See \textit{Evening Standard Co. v. Henderson}, I.C.R. 588, 594 (A.C. 1987) (showing first garden leave enforced in Great Britain). In \textit{Evening Standard Co.}, an employee a provided his employer two-month notice and was barred from joining rival newspaper companies while being paid his full salary. \textit{Id.}} The doctrine is a variation of a traditional notice provision.\footnote{See Jena McGregor, \textit{Massachusetts Bill Would Require Employers to Pay Up When Enforcing Noncompetes-But There's a Loophole}, \textit{WASH. POST} (Aug. 2, 2018 7:59 PM), https://www.washingtonpost.com/business/2018/08/02/massachusetts-bill-would-require-employers-pay-up-when-enforcing-noncompetes-theres-loophole/?utm_term=.af6b2574217a [https://perma.cc/53PV-8WZZ] (explaining Massachusetts garden leave legislation); Peter A. Steinneyer & Lauri F. Rasnick, Epstein, Becker & Green, P.C., Practice Note, \textit{Garden Leave Provisions in Employment Agreements}, \textit{PRAC. L. LAB. \\ & EMP'T}, w-007-3506, at 1 (explaining garden leave is similarities to traditional notice provisions). Generally, a notice period is a clause in the employment contract requiring the employee to provide their employer a minimum period of notice that they are terminating their employment. \textit{Id. See Will Kenton, Notice of Termination}, \textit{INVESTOPEDIA}, https://www.investopedia.com/terms/n/notice-of-termination.asp (last updated June 17, 2019) [https://perma.cc/XM2U-FBVJ] (explaining what notice of termination is generally). A notice period rarely appears in an American employment contract because the vast majority of American employment agreements are "at-will." \textit{Id.} "An at-will employment arrangement gives both the employer and the employee the ability to end the employment relationship at any time" with or without cause. Patricia Hunt Sinacole, \textit{At-will Employees Have Few Options When Fired}, \textit{BOS. GLOBE} (Sept. 9, 2016, 6:57 PM), https://www.bostonglobe.com/business/2016/09/09/will-employees-have-few-options-when-fired/9COTyBAWZy5LVmQkz2pUuN/story.html [https://perma.cc/PET2-B2JP].}
work during the notice period, is relieved from his or her duties and responsibilities; however, the employee is employed with his or her employer, and hence, cannot commence work for a competitor.\textsuperscript{12} The development of garden leave in Britain was largely in response to judicial hostility toward noncompetes concerning fairness to employees.\textsuperscript{13} The garden leave is the product of judicial system's favoritism towards freedom of contract where the British courts want to ensure that employees can freely choose their employers, or for a lack of better word, to compete.\textsuperscript{14} Ironically, the concept of garden leave portrays exactly what it is trying to prevent – restricting employees' mobility to move from one employer to another.\textsuperscript{15} Nevertheless, British courts have enforced garden leave if the undue burden of the restrictions placed on employees are alleviated through some form of monetary compensation.\textsuperscript{16} Garden leave in Britain continues to develop through case law and is widely and judicially recognized and enforced through the remedy of an injunction.\textsuperscript{17}

\textbf{B. Garden Leave In The United States}

Garden leave is relatively new in the United States and thus, there are no precedents explicitly addressing its enforceability.\textsuperscript{18} However, some states, such as New York and Delaware, where human capital is highly valued, have enforced similar benefits as garden leave.\textsuperscript{19} When disputes

\begin{itemize}
  \item \textsuperscript{12} See Steinmeyer, \textit{supra} note 11, at 1–2 (distinguishing traditional notice provision and garden leave).
  \item \textsuperscript{13} See Bishara, \textit{supra} note 3, at 2–6 (explaining historical development of garden leave).
  \item \textsuperscript{14} See Lembrich, \textit{supra} note 3, at 2306–08 (outlining inception of garden leave).
  \item \textsuperscript{15} See id. at 2313–14 (asserting that employees essentially forced to stay at current employment for set period of time). Garden leave's mandatory salary payment makes it "fair" to constrain an employee from choosing who he or she wants to work for. \textit{Id.}
  \item \textsuperscript{16} See id. (emphasizing court's focus on compensation as tradeoff for noncompete not to compete).
  \item \textsuperscript{17} See id. at 2314 ("Due largely to the greater certainty surrounding their enforceability, garden leave clauses have become common in the contracts of key employees in English businesses looking to protect themselves against the departure of such personnel for competitors.").
  \item \textsuperscript{18} See Bishara, \textit{supra} note 3, at 41–43 (noting lack of case development pertaining to garden leave).
  \item \textsuperscript{19} See Natsource L.L.C. v. Paribello, 151 F. Supp. 2d 465, 467 (S.D.N.Y. 2001) (granting thirty day period notice termination provision with ninety day period noncompete); Lumex, Inc. v. Highsmith, 919 F. Supp. 624, 629–36 (E.D.N.Y. 1996) (upholding six-month noncompete if employee was paid salary and health and life insurance premiums); Maltby v. Harlow Meyer Savage Inc., 633 N.Y.S.2d 926, 930 (Sup. Ct. 1995) (finding noncompete reasonable "on condition that plaintiffs continue to receive their salaries for six months while not employed by a competitor"); Estee Lauder Co. Inc. v. Batra, 430 F. Supp. 2d 158, 182 (S.D.N.Y. 2006) (focusing on employee-executive was entitled to full salary and salary from non-competitive work); Steinmeyer, \textit{supra} note 11, at 1 (explaining how garden leave is incorporated in New York's
arise in the aforementioned courts, enforceability is determined by "weigh[ing] the need to protect the employer’s legitimate business interests against the employee’s concern regarding the possible loss of livelihood."20 When restrictions are counterbalanced with some payment of employee’s salary and entitlements, such as health and life insurance premiums, courts appear to be more willing to enforce such restrictions.21

C. Massachusetts Noncompetition Agreement Act

On August 10, 2018, Governor Charlie Baker signed a Massachusetts Noncompete Reform Bill, which codified Massachusetts’ noncompete law for the first time.22 The statute, Massachusetts Noncompetition Agreement Act ("Act"), became effective on October 1, 2018.23 The Act binds all noncompete contracts or employment contracts containing noncompete clauses entered from that day onwards.24 The Act

noncompetes). See generally Jeffrey S. Klein & Nichols J. Pappas, ‘Garden Leave’ Clauses in Lieu of Non-Competes, N.Y.L.J. (Feb. 5, 2009), https://www.weil.com/-/media/files/pdfs/garden_leave.pdf [https://perma.cc/WL6D-F5LY] (stating that New York’s financial services industry uses garden leave provisions in noncompetes). New York courts consider the agreements’ “necessity and reasonableness” when determining the enforceability of noncompetes containing garden leave alike provisions. See Steinmeyer, supra note 11, at 1. When such agreements include provisions ensuring departing employees are paid during the agreed upon noncompete period, New York courts were more willing to find such agreements necessary and reasonable and thus, enforceable. Id.; cf Credit Suisse Securities (USA) LLC v. Ebling, No. 06 Civ. 11339, 2006 WL 3457693, at *1, *3-4 (S.D.N.Y. Nov. 27, 2006) (failing to enforce thirty day period provision because employee already commenced work with competitor). In Ebling, the court refused to enforce the provision – even though the employee already commenced work with the competitor – because the employer failed to demonstrate that they will suffer from irreparable harm absent injunctive relief as it already suffered the harm it alleged to support its injunctive relief claim. 2006 WL 3457693, at *3.

20 See Natsource, 151 F. Supp. 2d at 472 (explaining how courts determine enforceability). An employee loses “livelihood” when he or she is not engaged in the work he or she did for too long and as a result, he or she is rendered unemployable within the industry they once worked in. Id.

21 See sources cited supra note 19 and accompanying text (emphasizing compensation as determinative factor for enforcing noncompetes in garden leave provisions). Typically, a restrictive covenant is a clause in an employment contract that prohibits an employee from competing with a former employer for a certain period of time after the employment relationship has ended. Restrictive Covenants, Non-Compete Agreements, and California Law, BONA LAW PC, https://www.businessjustice.com/restrictive-covenants-and-non-compete-agreements-and-california.html (last visited Nov. 17, 2018) [https://perma.cc/9Q7H-32LB]. A restrictive covenant, other than its name, serves identical purposes in an employment contract as a noncompete agreement. Id.

22 See MASS. GEN. LAWS ANN. ch. 149, § 24(L) (West 2018) (stating date Governor Charlie Baker signed bill).

23 See id. (indicating law’s effective date).

24 See id. (highlighting how Act pertains to all noncompetes prospectively).
maintains aspects of existing law, including the requirement that noncompetes are necessary to protect recognized legitimate business interests, such as trade secrets. Additionally, the Act requires that terms of agreement regarding time, space, and scope are reasonable, noncompetes align with public policy, and courts have the power to amend the terms of noncompete if the terms are deemed overly broad. The Act requires that there must be a garden leave or some “other mutually-agreed upon consideration” provision in order to have a noncompete to be effective.

Garden leave is defined in two places under the statute. Section 24(L)(a) defines a garden leave clause as: “an employer agrees to pay the employee during the restricted period, provided that such provision shall become effective upon termination of employment unless the restriction upon post-employment activities are waived by the employer or ineffective under subsection (c)(iii).” Section 24(L)(b)(vii) points out that every noncompete must be “supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompete agreement.” Additionally, the statute provides that:

To constitute a garden leave clause within the meaning of this section, the agreement must (i) provide for the payment, consistent with the requirements for the payment of wages under section 148 of chapter 149 of the general laws, on a pro-rata basis during the entirety of the restricted period, of at least 50 percent of the employee’s highest annualized based salary paid by the employer within the 2 years preceding the employee’s termination; and (ii) except in the event of a breach by the employee, not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments; provided, however, if the restricted period has been increased beyond 12 months as a result of the employee’s breach of a of a fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, the

25 See id. (explaining existing portion of law adopted into new law).
26 See Beck, supra note 7 (stating provisions of existing law that were codified into statute).
27 See § 24(L)(a) (highlighting what is required for effective garden leave provision).
28 See id. §§ 24(L)(a), 24(L)(b)(vii) (showing locations in Act that garden leave is defined).
29 See id. (emphasizing definition of garden leave).
30 See id. § 24(L)(b)(vii) (pointing out substitutes that may replace garden leave provisions).
employer shall not be required to provide payments to the employee during the extension of the restricted period.\textsuperscript{31}

Neither § 24(L)(a) nor § 24(L)(b)(vii) provides a clear and concise interpretation of what constitutes "mutually-agreed upon consideration," which will later be discussed as a potential slippery slope for employers to choose.\textsuperscript{32}

III. ANALYSIS

A. Case Law Development

Caselaw in America involving garden leave or garden leave clauses is sparse because the instrument is relatively new to this country and "is not utilized by many employers in their standard employment contracts."\textsuperscript{33} As to the employers that do use it, not many employees affected by such clause would challenge the instrument because it is generally shorter in time and provides adequate compensation to departing employees.\textsuperscript{34} Garden leave clauses that are challenged often stem from a noncompete of an employer in the financial services industry "and are thus subject to the Financial Industry Regulator Authority (FINRA)."\textsuperscript{35}

\textsuperscript{31} See id. (providing requirements for effective garden leave provisions).

\textsuperscript{32} See id. § 24(L)(b)(vii) (finding that Act does not mention or explain what "mutually-agreed upon consideration" entails).

\textsuperscript{33} See Lembrich, supra note 3, at 2315 ("American courts, however, have not yet had much opportunity to examine the validity of garden leave clauses; so whether they will be found more enforceable than restrictive covenants remains an open question."). Although "American employers have begun inserting garden leave clauses into the employment contracts of their key employees," they are not pure garden leave clauses like the well-developed and widely enforced clause in Britain. \textit{Id.} at 2314–15.


\textsuperscript{35} See Steinmeyer, supra note 11, at 1 (highlighting garden leave clauses in financial services industry are subject to FINRA's mandatory arbitration). FINRA is a "not-for-profit organization ... authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly." About FINRA, FINRA, https://www.finra.org/about (last visited Sept. 13, 2019) [https://perma.cc/LBP5-5T69]. The garden leave clauses used in the financial industry fall under FINRA's regulations because the clauses govern the relationship between employees of broker-dealer firms, which is an "activity" of the broker-dealer business. Steinmeyer, supra note 11, at 2.
In recent cases involving noncompetes with provisions that resemble the Massachusetts garden leave provisions in the Act, courts across the nation have reached conflicting conclusions on the enforceability of such noncompetes. Massachusetts along with other jurisdictions such as Georgia have been reluctant to enforce garden leave provisions while New York and Delaware generally enforce those same provisions. In McCarron, Bear Stearns sought an injunction in Suffolk Superior Court’s Business Litigation Session to enforce a 90-day paid notice provision against three brokers that went to work for a competitor. The court ultimately refused to grant the requested injunction because the notice provision was never signed, and the notice provision was hidden in various deferred compensation plans instead of being clearly stated in an employment contract.

In Bear Stearns & Co., Inc v. Sharon, Bear Stearns attempted to enforce a similar 90-day notice provision against a senior broker. The notice provision arose from a previous contractual agreement between Bear Stearns and the senior broker where the senior broker agreed to the 90-day notice provision in exchange for a raise. Although Bear Stearns agreed to

36 See Steinmeyer, supra note 11 (indicating that “states such as California, North Dakota, and Oklahoma” prohibit enforcement of noncompete agreements). Since garden leave clauses are typically part of noncompete agreements, they fall under the general prohibition. Id. These states recognize “the ability of individuals to use their knowledge and expertise to seek better employment opportunities.” Charlotte Raab, Rivals Likely to Reach for Google’s ‘Wallet’, PHYS.ORG (May 30, 2011), https://phys.org/news/2011-05-rivals-google-wallet.html [https://perma.cc/9W9R-8CHQ].

37 See Sharon, 550 F. Supp. 2d at 178-79 (holding that enforcement of garden leave will be against public policy regarding at-will employment); see also Carvalho v. Credit Suisse Secs. (USA) LLC, No. 07-2612, 2007 U.S. Dist. LEXIS 80651, at *5 (N.D. Ga. Oct. 31, 2007) (denying enforcement reasoning that “[t]he income of these employees is substantially greater than their base salary . . . [and] the employer has the ability to significantly reduce their income and prohibit them from working for another employer of any kind during the notice period.”). Massachusetts appears to apply Georgia law, which is that non-competition agreements are enforceable so long as it is supported by consideration, a valid business interest, and reasonable in geographic area and the amount of time it covers, rather than New York law, where the courts tend to view garden leave clauses unfavorable and against public policy in general. Sharon, 550 F. Supp. 2d at 178-79.

38 See Bear Stearns & Co. v. McCarron, SUCV2008-00979-BLS1, 2008 Mass. Super. LEXIS 503, at *4–5 (Mass. Super. Ct. Mar. 5, 2008) (showing garden leave-like provision in noncompete employment agreement). The notice provision was akin to a garden leave provision in that Bear Stearns agreed to pay the brokers’ salaries during the period where the broker was not allowed to seek alternative employment with competitors; however, it had an added provision where Bear Stearns reserved the right, during the period, to terminate the brokers immediately or to not assign them any work. Id.

39 See id. at *8–9 (finding “Stealth” restrictive covenants unenforceable where said restrictions are “buried in the Terms and Conditions”).

40 550 F. Supp. 2d at 176 (pointing out Massachusetts case discussing noncompete agreement with garden leave clause).

41 See id. (explaining how broker and Bear Stearns entered into contract with notice provision).
pay the senior broker his full salary during the notice period, the court still refused to grant an injunction that Bears Stearns requested. The court found the provision to be unenforceable because it required the employee to “continue an at-will employment against his will” by assigning the senior broker to perform during the period.

However, courts in other states are more willing to enforce noncompetes involving garden leave provisions. In New York, an employer sought to enforce a 30-day notice provision along with a 90-day paid noncompete to stop one of its commodities brokers from resigning and accepting a job offer with its competitor. The court found the provisions reasonable and enforced them because the commodities broker was paid his full salary during the 120-day period.

Since the Act came into effect in 2018, it has been mentioned in two published decisions. Unfortunately, neither of the decisions directly analyzed an agreement that was subject to the Act. However, the opinions serve instructive purposes to both employers and employees subject to the Act. In Tannatt v. Varonis Sys., Inc., Tannatt sought a declaration that the employment contract he signed in 2011, which contained a noncompete

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42 See id. at 179 (indicating court’s holding).
43 See id. at 178 (finding provision to be more than just “a simple restrictive covenant against competition”). The court emphasized that requiring a notice period and assigning work to an employee during that notice period is in conflict with America’s long-standing jurisprudence of employment at will. Id. Employment at will is where an employer and employee enter into an employment contract for “an indefinite period of time.” Employment At Will, BALLENTINE’S LAW DICTIONARY (3d ed. 1969). Either the employer or the employee may terminate their “employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between [the employer and the employee] . . . .” RESTATEMENT OF EMPLOYMENT LAW § 2.01 (AM. LAW INST. 2015). In addition, employment contracts in America are typically not subject to any notice period like the ones required in traditional English garden leave. See Charles A. Sullivan, Tending the Garden: Restricting Competition via “Garden Leave”, 37 BERKELEY J. EMP. & LAB. L. 293, 303 (2016).
45 See id. (pointing out enforced garden leave-like provision in New York employment contract).
46 See id. at 472 (emphasizing that enforcement is reasonable when employee is paid his salary during notice period).
48 See cases cited supra note 47 (reiterating although cases involved garden leave, they did not directly address loopholes in new law).
49 See cases cited supra note 47 (stating that cases demonstrate Massachusetts’s reading of garden leave).
provision, was unenforceable.\textsuperscript{50} Tannatt argued that Massachusetts law should apply despite the fact that the contract he signed had a New York choice of law provision.\textsuperscript{51} Tannatt further argued that under Massachusetts law, the noncompete he signed was invalid because it did not meet the following two requirements under the Act: 1) Varonis, the employer, did not sign it; and 2) the noncompete failed to explicitly state that he had the right to seek counsel.\textsuperscript{52} In support of his position that Massachusetts law should apply, Tannatt pointed to Massachusetts' strong policy in the application of its own law pertaining to noncompetes.\textsuperscript{53} Despite Tannatt's efforts, the court ultimately ruled that the Act did not apply because the noncompete was entered into prior to the enactment of the Act.\textsuperscript{54} Moreover, Massachusetts' policy does not prohibit the application of another state's law and noncompetes containing extraterritorial choice of law provisions will survive scrutiny under the Act.\textsuperscript{55} A few months later, the court reached a similar holding in \textit{NuVasive, Inc. v. Day}, where a former employee attempted to challenge the validity of his noncompete using similar arguments as Tannatt.\textsuperscript{56} While these decisions do not provide any direct guidance as to how courts will interpret noncompetes subject to the Act, they nevertheless demonstrate that employees will face an uphill battle when attempting to

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Tannatt}, 2019 WL 830482, at *1-2 (pointing to facts of case and plaintiff's arguments).
\item See id. (indicating facts of case).
\item See id. (pointing to plaintiff's theory as to why his noncompete should be deemed invalid); \textit{see also} Dawn Mertineit & Anne Dunne, \textit{For the First Time, a Massachusetts Court Weighs in on the New Noncompetition Agreement Act – Well, Sort Of}, SEYFARTH SHAW (Feb. 27, 2019), https://www.tradesecretslaw.com/2019/02/articles/noncompete-enforceability/for-the-first-time-a-massachusetts-court-weighs-in-on-the-new-noncompetition-agreement-act-well-sort-of?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link [https://perma.cc/3FLK-C4GK] (discussing how \textit{Tannatt} was first Massachusetts district court case post-enactment of Act).
\item See \textit{Tannatt}, 2019 WL 830482, at *3 (explaining Massachusetts's policy regarding application of Massachusetts law on noncompete).
\item See id. (highlighting that Act only applies to noncompetes entered into post enactment of Act).
\item See id. (holding that applying New York law was not contrary to Massachusetts public policy).
\end{enumerate}
\end{footnotesize}
invalidate noncompetes when attacking the validity of noncompetes using choice of law arguments.\textsuperscript{57}

B. Projection In The Enforceability Of Garden Leave Provisions

Garden leave provisions have several benefits that may overcome many of the judicial objections to traditional noncompetes.\textsuperscript{58} Notwithstanding Massachusetts’ previous tendency to find garden leave provisions unenforceable, it is likely that courts will enforce garden leave provisions because they dissolve some of the concerns that courts often point to as a reason as for rendering garden leave provisions unenforceable.\textsuperscript{59} First, garden leave reserves the departing employee’s ability to earn income.\textsuperscript{60} Second, garden leave strengthens the job market.\textsuperscript{61} Third, garden leave levels the bargaining power between employers and employees.\textsuperscript{62} Lastly, garden leave eases the tension between post-employment mobility and business-interest protection.\textsuperscript{63}

The compensation element of Garden leave eliminates the relevance of the financial burden that is placed on a departing employee from a traditional restrictive covenant because the exiting employee is compensated

\textsuperscript{57} See cases cited supra note 47 (implying from holdings in cases that Massachusetts courts have decided in accordance with Act).

\textsuperscript{58} See Lembrich, supra note 3, at 2297 (introducing reasons why Massachusetts court should enforce garden leave).

\textsuperscript{59} See id. (foreseeing high likelihood of judicial enforcement to conform with Act and eliminate previous noncompete concerns).

\textsuperscript{60} See id. at 2315 (discussing how garden leave does not impede departing employees’ “ability to earn a living”). Courts that view garden leave provisions unfavorably tend to dislike the fact that the provisions prohibit “employees from working at their chosen trade, which inhibits their ability to earn a living.” Id. at 2298. In addition, courts take into consideration that these employees could potentially be a burden to the state if they are unable to find a similar position after the notice period because they have not been practicing in their realm of trade for an extended period of time. Id.

\textsuperscript{61} See Sullivan, supra note 43, at 305-11 (emphasizing courts’ unfavorable view toward general restriction over competition). Courts take the position that the purpose of noncompetition or variations of noncompetition clauses “is to deprive the public of the benefits of a competitive market.” Id. at 305-06.

\textsuperscript{62} See Lembrich, supra note 3, at 2317 (emphasizing employee on garden leave “has some bargaining chips of his own”). It is expensive for employers to use garden leave provisions in contracts with their employees because they not only have to pay their departing employees to “sit at home” and “tend their garden,” but also have to hire new employees or allocate resources that they could have used for something else to perform the duties and responsibilities of their departing employees. Id. at 2316-18. From a business standpoint, garden leave would be a loss in that case. Id.

\textsuperscript{63} See Bishara, supra note 3, at 25-27, 60–61 (“With garden leave the employer will more likely accurately value the true costs of restricting mobility and have an economic incentive to refrain from overreaching or any vindictive behavior.”).
with his or her salary and benefits. As with a traditional noncompete, the departing employee is generally not paid anything during the restricted period. "Starvation" is one major policy concern that holds back courts, such as Massachusetts, in enforcing noncompetes. Accordingly, by paying the departing employees during their restrictive period at the minimum mitigates that concern, which leads to greater probability of enforcement.

Enforcement of garden leave provisions could potentially boost competition in the job market. The motivation behind an employer's usage of a restrictive covenant is to protect the fruits of its investment from being taken by its competitors through one of its former employees. The consequences of an employee working for a competitor is worrisome for the employer because the employer has no control over the motivations and intentions of former employees, and whether those intentions and motivations are to take every piece of information available and every skill that he or she has acquired due to their employment at their former employer in order to benefit a competitor. Employers view noncompetes as the only shield it has to prevent irreparable consequences from a departing

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64 See MASS. GEN. LAWS ANN. ch. 149, § 24(L)(a) (West 2018) (focusing on compensation rules).
65 See Steinmeyer, supra note 11 (showing what triggers "judicial scrutiny and concerns about fairness to the employee" in traditional noncompetes regarding ability to earn living); see also Hess v. Gebhard & Co., 808 A.2d 912, 916 (Pa. 2002) ("[C]ovenants not to compete were disfavored because prohibiting an employee from working under the supervision of one other than his original employer resulted either in his violation of the law or the deprivation of his right to earn a living . . ."); Wells v. Wells, 400 N.E.2d 1317, 1319 (Mass. App. Ct. 1980) (pointing out that court is reluctant to enforce noncompetes "[o]ut of concern for an individual's ability to earn a living").
66 See Nike, Inc. v. McCarthy, 379 F.3d 576, 587 (9th Cir. 2004) (holding that financial burden is mitigated by Nike's obligation to pay departing employee's full salary); Natsource LLC v. Paribello, 151 F. Supp. 2d 465, 470 (S.D.N.Y. 2001) (suggesting that financial burden on departing employee is eliminated through payment during restricted period). "Starvation" in this context refers to the immense impact that restrictions on one's ability to seek employment with competitors for an extended period of time can have on that one's ability to survive, in an economic sense, in today's society. See Estee Lauder Cos., Inc. v. Batra, 430 F. Supp. 2d 158, 181 (S.D.N.Y. 2006) ("[T]he concern that the breadth of such a prohibition would make it impossible for him to earn a living is assuaged by the fact that he will continue to earn his salary from Estee Lauder . . .").
67 See cases cited supra note 66 (stating that financial burden placed on individuals is mitigated by providing just compensation).
68 See Lembrich, supra note 3, at 2315 (showing that garden leave is less anti-competitive than traditional noncompetes).
69 See Bishara, supra note 3, at 2 ("The skills, relationships, and knowledge bound up in a firm's employees have long been recognized as a source of important competitive advantage."). Companies, especially in the technology industry, rely heavily on their human capital to generate revenue. Id. It is fair to say that a loss in human capital translates to a loss in revenue. Id.
70 See id. at 10 ("In a fast-moving business world where knowledge and the individuals who create and use that knowledge are key sources of competitive advantage, the legal mechanisms available to employers have become more important than ever.").
employee. The employers, especially ones that rely on the proprietary nature of their business product, specific knowledge, technology, or certain skills unknown to the public, fully expose these trade secrets to their employees and in turn, their competitors once an employee switches employers. Employers are placed in a vulnerable position with nothing more than a piece of paper that might protect everything that makes their business unique and economically successful in the market that they are in. Garden leave resolves such uncertainty and uneasiness in employers because it sends a signal to employers that there is a reliable means of protection, but only if they actually needed it. Knowing that the legal mechanism is legitimate, reliable, and enforceable rather than theoretical, employers will be prompted to only place restrictions on their key employees whose departure to a competitor will most certainly cause a detriment to his or her former employer. Courts would be less skeptical of the legitimacy and fairness of the restrictions imposed by garden leave provisions when knowing that enforcement is the employer’s last resort. Once it is established that garden leave is a reliable remedy, employers will have more confidence in the legal system to protect their business interests and will be more likely to invest in their employees and develop new technologies that

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71 See Bishara, supra note 3, at 3–4 (emphasizing why employers are desperate to enforce contracts that restrict post-employment mobility). In 2011, Bank of America Corporation (the “Bank”) “lost a financial adviser with $5.9 billion in client assets to a rival.” Hugh Son, BofA Forces ‘Garden Leave’ on Brokers After Defection, BLOOMBERG (Feb. 11, 2011, 12:00 AM), https://www.bloomberg.com/news/articles/2011-02-18/bofa-forces-garden-leave-on-advisers-after-top-broker-defects [https://perma.cc/4QWG-PSX6]. Immediately after, the Bank forced some workers to sign reduced-pay 60-days “garden leave” agreements. Id. Companies are trying to prevent irreparable human capital and financial harm such as the one that the Bank suffered. Id.

72 See Margo E. K. Reder & Christine Neylon O’Brien, Managing the Risk of Trade Secret Loss Due to Job Mobility in an Innovation Economy With the Theory of Inevitable Disclosure, 12 J. HIGH TECH. L. 373, 376 (2012) (highlighting that “[i]ntangible [IP] constitutes more than three-fourths of the assets in knowledge businesses whose main value derives from innovation, know-how, brand and reputation.”). In today’s world, employees in general are highly educated and mobile. Id. “Assets are defined more by brilliant restless employees and their coding creations than by legacy physical company assets.” Id. Accordingly, it is much harder for companies to protect their intangible assets, as they cannot just lock employees away in a vault like they can with their physical assets. Id. at 377.

73 See id. at 378–80 (pointing out examples of “what is at stake for companies in intensely competitive sectors whose very existence is attributable to innovation.”).

74 See Lembrich, supra note 3, at 2317 (explaining how garden leave resolve unfairness toward employees).

75 See Gillian Lester, Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis, 76 IND. L.J. 49, 50 (2001) (pointing out that employers’ investment in employee training is waning due to “decline of job stability and increasing mobility of labor”).

76 See id. (speculating courts’ rationale).
will benefit the public at large.77 As a result, the workforce will be stronger and the market will be more efficient.78

Garden leave balances the bargaining power between employers and employees.79 The Act’s fifty percent salary requirement makes it expensive for the employer to enforce Garden leave and similar provisions because the employer must pay the employee for every day that the employer holds the employee back from working for a competitor.80 This pushes employers to evaluate their employees thoroughly to determine whether it is actually necessary to enforce such a restriction.81 The employees that the employers deem necessary to place on garden leave are often highly educated and sophisticated individuals; thus, the bargaining power of the employees is comparable to that of their employer.82 If employees are able to protect themselves, it places less pressure on the court to be the last line of defense for the employees.83

Garden leave does not necessarily restrict an employees’ ability to seek employment with competitors.84 In fact, it could potentially give employees more freedom to seek employment.85 The reason being that garden leave provides an opportunity for employees to utilize the paid, notice period to seek employment with competitors.86 In other words, garden leave

77 See id. at 51 (asserting employers’ dilemma). “An employer may wish to reveal business secrets to employees or introduce employees to clients it has cultivated, yet fear that doing so would be risky should the employees depart and try to exploit the information.” Id.
78 See Lembrich, supra note 3, at 2315–16 (explaining how garden leave can strengthen job market).
79 See id. (asserting that garden leave levels playing field for employees).
80 See MASS. GEN. LAWS ANN. ch. 149, § 24(L)(a) (West 2018 (pointing to fifty percent salary requirement). Employers do have the option of settling for a “mutually agreed upon consideration” instead of paying their departing employees as required under garden leave, but it is a slippery slope that would make enforcement harder to succeed. Id.
81 See Bishara, supra note 3, at 26–27 (“[B]ecause the employer has an immediate and tangible cost to restricting mobility, the employer will refrain from using garden leave to restrict the mobility of lower-level employees.”). It is likely that employers are only going to place such restrictions on their most skilled employees with distinguished knowledge. Id. at 27.
82 See Lembrich, supra note 3, at 2317 (“[I]f an employee is so important that an employer would rather pay him his full salary to stay at home than allow him to go to a competitor, that employee clearly has some bargaining chips of his own.”). Some bargaining items include the restricted period in which the employee is refrained from working for a competitor. Id.
83 See id. at 2316 (suggesting that courts object to enforcement of noncompetes because they are “product of unequal bargaining power between employer and employee”).
84 See Bishara, supra note 3, at 27 (explaining how garden leave actually provides departing employee with greater job mobility).
85 See id. at 41–42 (pointing out that garden leave does not actually restrict post-employment mobility).
86 See id. at 60–61 (explaining benefits of garden leave).
allows unhappy employees to quit their current position and look for their dream job while being paid.\textsuperscript{87}

C. The Alternative Route

Under the Act, if an employer does not want to pay its departing employee his or her salary as required, it has the option to negotiate with its departing employee on some “other mutually agreed upon consideration” so long as that the negotiation occurs prior to the signing of the employment contract.\textsuperscript{88} However, the Act provides absolutely no guidance as to what other consideration besides the dollar value of at least fifty percent of the departing employee’s base salary will be acceptable.\textsuperscript{89} The lack of language in the Act seems to provide employers and employees with the freedom to contract terms that both parties see fit.\textsuperscript{90} Nonetheless, an employer that chooses to pursue the alternative route should be particularly careful to not have terms of an agreement that may fall under one of Massachusetts’s past concerns with enforcement of traditional noncompetes.\textsuperscript{91}

An employer that is looking for compensation options in lieu of a direct monetary payment to its departing employee should consider tangible compensations, such as sign-on bonuses, stock options, health or insurance or retirement benefits, or a combination of other forms of non-monetary compensations.\textsuperscript{92}

\textsuperscript{87} See id. (expanding further how garden leave yields higher employee mobility after employment).

\textsuperscript{88} See Lembrich, supra note 3, at 2291–94 (explaining alternative option to fifty percent salary requirement). Once the employer has contracted with the employee and agrees to pay said employee their salary after their employment, the employer cannot turn back on such promise later on if it decided not to. \textit{Id.}

\textsuperscript{89} See id. (pointing to uncertainty in Act). It is safe to say that nominal consideration will mostly likely not be acceptable as a fair and reasonable replacement to garden leave. \textit{Id.}

\textsuperscript{90} See id. (emphasizing how broad language in Act provides employers and employees freedom to contract).

\textsuperscript{91} See id. (noting employers who prefer alternative options to contract should do so with extreme cautions). Employees who choose not to follow through with the garden leave provisions in the Act should make sure that the alternative options resemble the garden leave provision in the Act to ensure greater enforceability. \textit{Id.}

D. Other Concerns

As shown in the Massachusetts cases involving variations of garden leave provisions, courts were concerned with assigning departing employees duties during the restricted period. In *Sharon* and *McCarron*, the court pointed out that Bear Stearns Co., in reserving the right to assign duties other than the departing employee's normal duties, risk in violating America's long standing jurisprudence of at-will employment. Employers, who decide to enter into garden leave provisions with their key employees, should consider solely paying their departing employees to "stay home" and "work in his garden" to avoid potential obstacles that may arise from being in conflict with the at-will employment jurisprudence, which provides the court with a reason to not to enforce the garden leave.

IV. CONCLUSION

Garden leave may finally be a reliable instrument that eases the tension between businesses' rights to protect their competitive advantages and employees' rights to compete for the best possible employment suitable to their skills and expertise. The Act will most likely have higher enforcement success than previous versions of garden leave provisions because it alleviates the financial burden on employees, fosters competition in the job market, and levels the bargaining power of employees and employers, all of which were reasons that the previous versions of garden leave failed. Employers who take the alternate route to negotiate with their departing employees on some other "mutually agreed upon consideration" should understand that Massachusetts places a lot of emphasis on whether the departing employee is compensated during the period that he or she is restricted from working for a competitor and therefore, having consideration resembling the compensation requirement under garden leave will likely be considered valid than consideration that is remote from the statutory requirements.

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93 See cases cited supra note 34 (showing courts' general concern with assigning other duties in conflict with idea of at-will employment).


95 See Lembrich, supra note 3, at 2305-08 (noting underlying purpose of garden leave).