

## Massachusetts restrictive covenants and trade secret law, recent developments: forfeiture-for-competition and no-recruit agreements

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As indicated in my last few posts, I am still behind in covering the recent developments in Massachusetts restrictive covenant law (noncompetes, nonsolicits, no-recruits, etc.), trade secret law, and related issues — but I have been catching up as quickly as I can. Today's update involves a case I previously discussed<sup>1</sup> when it was in the trial court: ***Miele v. Foundation Medicine, Inc.***,<sup>2</sup> concerning **nonsolicitation of employee agreements** (a/k/a **no-recruit agreements**)<sup>3</sup> with a **forfeiture** component.

As I explained in a prior post,<sup>4</sup> that case was important for the following holdings:

- The Massachusetts Noncompetition Agreement Act (**MNAA**), G.L. c. 149, § 24L,<sup>5</sup> **does not apply retroactively**. (That really should not come as a surprise to anyone.)
- “**Reaffirmation**” of an existing noncompete may be considered a **new agreement** subject to the MNAA. (That is a bit alarming, but manageable.)
- **Forfeiture-for-competition** provisions under the MNAA **include nonsolicit and no-recruit**<sup>1</sup> obligations. (That is quite a surprise, given (1) that no Massachusetts case of which I am aware has ever said that and (2) having written the definition in collaboration with various state legislators and others, that broad scope was never discussed or contemplated, as far as I recall.)

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<sup>1</sup> <https://faircompetitionlaw.com/2024/07/30/reaffirmation-of-old-noncompete-is-subject-to-massachusetts-noncompete-statute-forfeiture-for-competition-agreements-are-broader-than-you-think/>

<sup>2</sup> <https://faircompetitionlaw.com/wp-content/uploads/2024/07/MNAA-20240717-Miele-v.-Foundation-Medicine-Inc.-Civil-Action-No.-2184CV02722-July-17-2024.pdf>

<sup>3</sup> No-recruit covenants, sometimes called “employee nonsolicitation agreements” or just “nonsolicitation agreements,” are agreements by which an employee agrees, essentially, not to recruit former colleagues. The language in the 2017 Agreement in the case stated that during her employment and for one year after, Miele would refrain from “from ‘solicit[ing], entic[ing] or attempt[ing] to persuade any other employee or consultant of [Foundation Medicine] . . . to leave the services of [Foundation Medicine] . . . for any reason or otherwise participate in or facilitate the hire, directly or through another entity, of any person who is employed or engaged by [Foundation Medicine] . . . or who was employed or engaged by [Foundation Medicine] . . . within two (2) months of any attempt to hire such person.’” That is fairly common language.

<sup>4</sup> <https://faircompetitionlaw.com/2024/07/30/reaffirmation-of-old-noncompete-is-subject-to-massachusetts-noncompete-statute-forfeiture-for-competition-agreements-are-broader-than-you-think/>

<sup>5</sup> <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section24L>

The update is that, on August 5, 2024, Foundation Medicine filed an emergency motion to report the court’s interlocutory decision (*i.e.*, the holdings summarized above) to the Appeals Court.

The trial court granted that motion<sup>6</sup> on August 8, and reported the following issue<sup>7</sup>: Does G.L. c. 149, § 24L, the Massachusetts Noncompetition Agreement Act, apply to a non-solicitation agreement incorporated into a termination agreement if the termination agreement includes a forfeiture provision in the event that the employee breaches the non-solicitation agreement?

For clarity, the “non-solicitation agreement” that the court is referring to is a nonsolicitation of employees (*i.e.*, a no-recruit agreement).

On **November 4, 2024**, Foundation Medicine filed its opening brief<sup>8</sup> in the Massachusetts Appeals Court.

Its argument (referencing the MNAA as “the Act”) is broken down into four sections with subsections as follows:

- I. History of the Act and Its Requirements
  - A. History of the Act
  - B. Scope and Requirements of the Act
- II. The Nonsolicitation Covenant, Coupled With the Clawback, is Not a “Forfeiture for Competition Agreement” Under the Act
  - A. Solicitation is Not the Same as Competition
  - B. The Legislature Did Not Need To Explicitly Exclude Nonsolicitation Agreements From the Definition of a Forfeiture for Competition Agreement.
  - C. Massachusetts Law Has Always Treated Forfeiture For Competition Agreements The Same As True Noncompetition Agreements
- III. Separation Agreements Containing Nonsolicits (and Forfeiture Provisions) Are Not Subject to the Act
- IV. If The Act Applies To The Transition Agreement, The Trial Court Erred In Failing To Consider Whether The Agreement Satisfies the Act’s Minimum Requirements For

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<sup>6</sup> <https://faircompetitionlaw.com/wp-content/uploads/2024/11/Miele-v.-Foundation-Medicine-Order-on-motion-for-appeal-ocr.pdf>

<sup>7</sup> <https://faircompetitionlaw.com/wp-content/uploads/2024/11/Miele-v.-Foundation-Medicine-Order-on-motion-for-appeal-ocr.pdf>

<sup>8</sup> <https://faircompetitionlaw.com/wp-content/uploads/2024/11/Miele-v.-Foundation-Medicine-2024.11.04-FMI-Appellant-Brief.pdf>

## Noncompetition Agreements Made in Connection With the Cessation of Employment

You can read the details of their arguments here.<sup>9</sup>

Without getting into those details, I agree with their arguments.

As noted in my prior post,<sup>10</sup> I was the principal drafter of the language at issue and certainly know what the intention was — it was just as Foundation Medicine argues. In fact, although it was a long time ago, I believe we (meaning I and the key legislators) discussed it at the time.

In that regard, although not specifically argued by Foundation Medicine, the inclusion of forfeiture-for-competition agreements was specifically to distinguish them from “straight” forfeiture agreements in light of the SJC’s 2008 decision in *Pierce v. Morrison Mahoney LLP*,<sup>11</sup> 452 Mass. 718 (2008), holding that a forfeiture agreement — in contrast to a forfeiture-for-competition agreement — did not violate Rule 5.6<sup>12</sup> of the Rules of Professional Conduct applicable to lawyers. Accordingly, the idea of its inclusion was to allow straight forfeitures (as *Pierce* allowed), but not allow circumvention of the new statutory requirements for noncompetes by using a forfeiture-for-competition provision, similar how the SJC determined they had been used in *Pettingell v. Morrison, Mahoney & Miller*<sup>13</sup> to avoid Rule 5.6. That issue was at the forefront of mind in light of the *Pierce* decision, which was issued just before we started drafting the first version of the proposed legislation.

Relatedly, because we excluded nonsolicits and no-recruit agreements from the scope of the MNAA, there was no reason to address methods that might be used to circumvent preexisting common-law restrictions on nonsolicits or no-recruit agreements, unlike methods that might be used to circumvent the new noncompete restrictions.

Well, we’ll see what the plaintiff files and, more importantly, what the Appeals Court has to say.

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<sup>9</sup> <https://faircompetitionlaw.com/wp-content/uploads/2024/11/Miele-v.-Foundation-Medicine-2024.11.04-FMI-Appellant-Brief.pdf>

<sup>10</sup> <https://faircompetitionlaw.com/2024/07/30/reaffirmation-of-old-noncompete-is-subject-to-massachusetts-noncompete-statute-forfeiture-for-competition-agreements-are-broader-than-you-think/>

<sup>11</sup> <http://masscases.com/cases/sjc/452/452mass718.html>

<sup>12</sup> <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-56-restrictions-on-right-to-practice>

<sup>13</sup> <http://masscases.com/cases/sjc/452/452mass718.html>

***Firm resources:***

**We know how hard it is to keep up with the ever-changing requirements around the country. To help, we have created the following resources (available for free):**

- 50-State Noncompete Law Chart,<sup>14</sup> the *first of its kind and regularly updated* (**downloadable** PDF) (to be updated for the new exemptions in Illinois and Pennsylvania);
- Chart of Noncompete “Low-Wage” Thresholds and Criteria<sup>15</sup> (**downloadable**);
- Notice requirements summary chart,<sup>16</sup> providing details for each of the 8 states (plus D.C.) that has notice requirements related to noncompetes (**downloadable** PDF);
- 50-State and Federal Trade Secret Law Chart,<sup>17</sup> providing a comparison of the trade secrets laws nationally to the Uniform Trade Secrets Act (**downloadable** PDF).
- “Changing Trade Secrets | Noncompete Laws”<sup>18</sup> (**dedicated blog page**) now provides a current detailed summary of the changing landscape of trade secret laws and noncompete laws around the country, state by state and at the federal level;
- Trade secret and other legitimate business interest protection plan strategy and checklist;<sup>19</sup> and
- Ten Minute Trade Secret Training Series,<sup>20</sup> currently with three **training videos** and one “basics” video:
  - *Avoiding Mistakes When Starting A New Job*;<sup>21</sup>
  - *Protecting Trade Secrets While Working Remotely*;<sup>22</sup>
  - *The Exit Plan: Being a Good Leaver*;<sup>23</sup> and
  - *Fair Competition Law Basics – What is a Trade Secret?*<sup>24</sup>

We hope you find all of these resources useful. More are coming.

And please note, we are grateful for all of the input we’ve received over the years. We welcome any suggestions for improvements that you may be willing to share.

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<sup>14</sup> <https://beckreedriden.com/50-state-noncompete-chart-2/>

<sup>15</sup> <https://faircompetitionlaw.com/restrictive-covenant-charts/>

<sup>16</sup> <https://faircompetitionlaw.com/restrictive-covenant-charts/>

<sup>17</sup> <https://beckreedriden.com/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart/>

<sup>18</sup> <https://faircompetitionlaw.com/changing-trade-secrets-noncompete-laws/>

<sup>19</sup> <https://faircompetitionlaw.com/2023/12/04/a-primer-and-checklist-for-protecting-trade-secrets-and-other-legitimate-business-interests/>

<sup>20</sup> <https://faircompetitionlaw.com/2023/05/02/official-launch-of-the-trade-secret-training-series-videos/>

<sup>21</sup> <https://www.youtube.com/watch?v=VBMV9jVRJW4>

<sup>22</sup> <https://www.youtube.com/watch?v=ZqA7Dk0pl78>

<sup>23</sup> <https://www.youtube.com/watch?v=TLV1q0x0OM0>

<sup>24</sup> <https://www.youtube.com/watch?v=R9axFIYzLE>