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Testimony of Gregory Bialecki
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Dear Chairman Conroy and Senator Wolf,

Thank you for the opportunity to appear before you today. I am here to express the strong support of the Patrick Administration for substantial reform of the current rules on the enforceability of non-competition agreements in Massachusetts.

I gave very similar testimony to this committee almost two years ago. Now, as then, there are bills in the Legislature that call for changes to our current rules regarding the enforceability of non-competes and bills that call for the end to such enforceability.

I suggested two years ago that it seemed increasingly unlikely that we could achieve any meaningful consensus among the stakeholders on changes to our current system that left non-competes in place. I think that this has turned out to be the case, as the debates and disagreements that you will hear today are almost exactly the same as those that you heard two years ago.

I also suggested two years ago that if we could not achieve any meaningful consensus among the stakeholders on changes to our current system, then the best course for Massachusetts would be the outright elimination of enforceability of non-competition agreements. I am here today to affirm that the Patrick Administration now supports such outright elimination, combined with adoption of the Uniform Trade Secrets Act, which has been demonstrated in other states to protect the loss or disclosure of proprietary information by departing employees.

A key element of the Patrick Administration's economic development strategy has been to build on the strength of our world-class innovation economy. A key measure of success for our economic development and job creation policies and programs considers whether our policies and programs effectively support the innovation and entrepreneurship that has given us our critical competitive advantage for so many years. If our policies and programs do not provide this

support then we should simply re-consider them. Our policy on non-compete agreements needs reform because Massachusetts should do everything it can to (1) retain talented entrepreneurs; (2) support individual career growth and flexibility; and (3) encourage new innovative businesses that are the engines of economic growth. Massachusetts employers currently have tools to protect the stability of their businesses.

Retention is Key: We do an excellent job of educating talented people here in the Commonwealth. However, if they work here and sign a non-compete agreement, we are essentially asking those same talented people to leave and to become entrepreneurs elsewhere. If Massachusetts is not able to create an environment that gives entrepreneurial talent a chance to thrive, then the most effective job creating companies may be pushed to grow to scale in states like California. In fact, we have heard examples of entrepreneurs at MIT who were advised to start their businesses outside of Massachusetts as a result of non-compete agreements laws. Non-competes stifle movement and inhibit competition and we do not want that. The evidence is clear—we are not seeing the kind of spin-offs and starts up at the same rate that previously made Massachusetts an enviable model.

Individual career growth is good for the Commonwealth: We encourage our talent to be creative, to be innovative, and to network with other talented people. Furthermore, we encourage employers to recruit talented people. However, we send a mixed message: providing the talent needed to support the kind of explosive growth we want in the innovation economy is considerably more difficult if employees are legally unable to move between jobs in the innovation economy. The current law makes it considerably harder for employees to leave their current employers, whether due to the actual enforcement of a non-competition agreement, or more frequently, just due to the threat of enforcement. The individual has no effective recourse. The only thing to do is to suspend relevant work until the term of the non-compete agreement expires. Most individuals are not in a financial position to afford not working for the term of the non-compete. Being out of the market for the term is a major liability to the individual's career and future development. An individual who has 10 or 20 or 30 years of experience and expertise is forced to avoid using their expertise during the term of their non-compete agreement. We do not want this mixed message to continue.

We want innovative businesses. A priority of this Administration has been to support and enhance the innovation economy. Massachusetts has long had a vibrant and leading edge in research and the innovative community. Many of the fundamental technological advances like the Internet economy and digital media had beginnings in Massachusetts in the past couple of decades. However, we could do more. We need more start-ups, especially in the technology and bio-tech sectors. Start-ups are good; they create jobs, push innovation to new heights, and retain talent. Many of our current employers, larger and small, report they are unable to attract lateral or advanced talent due to our current laws limiting the mobility of our workforce.

Current employers should not feel threatened: Senators Brownsberger, Vice-Chairman Ehrlich, and Leader Bradley have championed the efforts in the legislature to reform the current system. While, we understand employers concerns that protecting their proprietary information is critical, non-compete agreements are neither the best option nor the only available vehicle to protect companies. By adopting the Uniform Trade Secrets Protection Act, and limiting or abolishing

non-compete agreements, we will have an opportunity to both grow our economy and protect a company's proprietary information.

The Uniform Trade Secret Act (UTSA) has been adopted in 47 other states and the District of Columbia. The UTSA and other tools protect an employer's trade secrets and proprietary information, which is fundamentally important. Patents, confidentiality agreements, and trade secrets are more than sufficient to protect legitimate company interests against former employees. Even without non-compete agreements, companies still have a disproportionate ability to litigate against the individual.

You will certainly hear today from businesses and business groups who would prefer to keep the current legal arrangements regarding non-competes intact. While holding onto their current employees may be convenient for employers, it is not at all clear that it is necessary to their business success. Our businesses could recruit the very talent they need without a non-compete agreement impeding the opportunity.

For these reasons, we support outright elimination of enforceability of non-competitive agreements in Massachusetts combined with adoption of the Uniform Trade Secrets Act.