

SENATE . . . . . No. 2418

~~HOUSE . . . . . No.~~

4434

~~Substituted by the House, on motion of Mr. Seibak of South Hadley, for a bill with the same title (House, No. 4323). June 27, 2016.~~

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court  
(2015-2016)

~~An Act relative to the judicial enforcement of noncompetition agreements.~~

~~Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:~~

SENATE, Monday, July 11, 2016

The committee on Rules, to whom was referred the House Bill relative to the judicial enforcement of noncompetition agreements (House, No. 4434); reports, recommending that the same ought to pass with an amendment striking out all after the enacting clause and inserting in place thereof the text of Senate document numbered 2418; and by inserting before the enacting clause the following emergency preamble:- “Whereas, The deferred operation of this act would tend to defeat its purpose, which is to further provide for the judicial enforcement of trade secrets and noncompetition agreements, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.”

For the committee,  
Mark C. Montigny

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court  
(2015-2016)

SENATE . . . . . No. 2418

1 SECTION 1. Sections 42 and 42A of chapter 93 of the General Laws are hereby  
2 repealed.

3 SECTION 2. The General Laws are hereby amended by inserting after chapter 93K the  
4 following chapter:--:-

5 CHAPTER 93L

6 UNIFORM TRADE SECRETS ACT

7 Section 1. As used in this chapter, the following words, shall have the following  
8 meanings unless the context clearly

9 requires otherwise, ~~have the following meanings~~:

10 (1) ~~"Improper means"~~, includes, ~~without limitation~~ but is not limited to, theft, bribery,  
11 misrepresentation,

unreasonable intrusion into private physical or electronic space, or breach or inducement of a  
breach of a confidential relationship or other duty to limit acquisition, disclosure or use of

SENATE . . . . . No. 2418

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12 information; provided, however, that “improper means” shall not include reverse engineering  
13 from properly accessed materials or information~~is not~~

~~13 improper means;~~

14 (2) “Misappropriation”,

~~15~~ ”, (i) an act of acquisition of a trade secret of another by a person

15 who knows or who has

~~16~~ reason to know that the trade secret was acquired by improper means; or

~~17~~

~~16~~ (ii) an act of disclosure or of use of a trade secret of another without that person's express

~~18~~ or

~~17~~ implied consent by a person who

~~19~~—: (A) used improper means to acquire knowledge of the trade

~~18~~ secret; or

~~20~~—(B) at the time of the actor’s disclosure or use, knew or had reason to know that the

~~21~~ actor’s knowledge of the trade secret was

~~22~~—: [I] derived from or through a person who had utilized

~~20~~ improper means to acquire it;

~~23~~—[II] acquired under circumstances giving rise to a duty to limit its

~~21~~ acquisition, disclosure;

~~24~~ or use; or

~~25~~—[III] derived from or through a person who owed a duty to the

~~22~~ person seeking relief to

~~26~~ limit its acquisition, disclosure; or use; or

~~27~~—(C) before a material change of

~~23~~ the actor’s position, knew or had reason to know that it

~~28~~ was a trade secret and that the actor’s

~~24~~ knowledge of it had been acquired by accident, mistake; or

~~29~~ through another person’s act

~~25~~ described in violation of subsections 1(2)(clause (i) or 1(2)(ii)(subclause (A) or (B) of clause (ii).



30 (3) "Person," a natural person, corporation, business trust, estate, trust, partnership,  
3127 association, joint venture, government, governmental subdivision or agency; or any other legal  
or  
3228 commercial entity.

3329 (4) "Trade secret," specified or specifiable information, whether or not fixed in tangible  
3430 form or embodied in any tangible thing, including, but not limited to, a formula, pattern,  
3531 compilation, program, device, method, technique, process, business strategy, customer list,  
3632 invention; or scientific, technical, financial or customer data that

37—[i], at the time of the alleged

33 misappropriation; [i] provided economic advantage, actual or

38— potential, from not being generally

34 known ~~to~~, and not being readily ascertainable by proper

39— means by; others who might obtain

35 economic advantage from its acquisition, disclosure or use;

40— and

41— [ii] ~~at the time of the alleged misappropriation~~ was the subject of efforts that

36 were

42— reasonable under the circumstances, which may include reasonable notice; to protect against

37 it

43— being acquired, disclosed or used without the consent of the person properly asserting rights

4438 therein or such person's predecessor in interest.

45

39 Section 2. (a) Actual or threatened misappropriation may be enjoined upon principles of  
4640 equity, including, but not limited to, consideration of prior party conduct and circumstances of  
4741 potential use, upon a showing that information qualifying as a trade secret has been or is  
4842 threatened to be misappropriated. Upon application to the court, an injunction shall be  
4943 terminated when the trade secret has ceased to exist, but the injunction may be continued for an  
5044 additional reasonable period of time in order to eliminate any economic advantage that  
otherwise  
5145 would be derived from misappropriation.

52

46 (b) In exceptional circumstances, an injunction may condition future use upon payment  
5347 of a reasonable royalty for ~~no~~not longer than the period of time for which use could have been  
5448 prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial  
5549 change of position prior to acquiring knowledge or reason to know of misappropriation that  
5650 renders a prohibitive injunction inequitable.

5751 (c) In appropriate circumstances, affirmative acts to protect a trade secret may be  
5852 compelled by court order.

5953 Section 3. (a) Except to the extent that a material and prejudicial change of position prior  
6054 to acquiring knowledge or reason to know of misappropriation renders a monetary recovery  
6155 inequitable, a complainant is entitled to recover damages for misappropriation of information  
6256 qualifying as a trade secret. Damages can include both the actual loss caused by  
6357 misappropriation and the unjust enrichment caused by misappropriation that is not taken into  
6458 account in computing actual loss. In lieu of damages measured by any other methods, the  
6559 damages caused by misappropriation may be measured by the imposition of liability for a  
6660 reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

67



61 (b) If willful and malicious misappropriation exists, the court may award exemplary  
6862 damages in an amount not exceeding twice ~~any~~the amount of an award made under subsection  
(a).

6963 Section 4. The court may award reasonable ~~attorney's~~s attorneys' fees and costs to the  
prevailing

7064 party if: (i) a claim of misappropriation is made or defended in bad faith;; (ii) a motion to enter  
or

7165 to terminate an injunction is made or resisted in bad faith;; or (iii) willful and malicious

7266 misappropriation exists. In considering ~~such~~-an award of reasonable attorneys' fees, the court  
may

67 take into account the

~~73~~ claimant's specification of trade secrets and the proof that ~~such~~the alleged trade

~~68~~ secrets were

~~74~~ misappropriated.

~~75~~69 Section 5. (a) In an action under this chapter, a court shall preserve the secrecy of an  
~~76~~70 alleged trade secret by reasonable means, which may include granting protective orders in  
~~77~~71 connection with discovery proceedings, holding in-camera hearings, sealing the records of the  
~~78~~72 action; and ordering any person involved in the litigation not to disclose an alleged trade secret  
~~79~~73 without prior court approval.

~~80~~74 (b) In an action under this chapter, in alleging trade secrets misappropriation a party  
~~must~~shall  
~~81~~75 state with reasonable particularity the circumstances thereof, including the nature of the trade  
~~82~~76 secrets and the basis for their protection. Before commencing discovery relating to an alleged  
~~83~~77 trade secret, the party alleging misappropriation shall identify the trade secret with sufficient  
~~84~~78 particularity under the circumstances of the case to allow the court to determine the appropriate  
~~85~~79 parameters of discovery and to enable reasonably other parties to prepare their defense.

~~86~~80 Section 6. An action for misappropriation ~~must~~shall be brought within 3 years after the  
~~87~~81 misappropriation is discovered or, by the exercise of reasonable diligence should have been

~~88~~

82 discovered. For the purposes of this chapter, a continuing disclosure or use constitutes a single 8983 claim.

9084 Section 7. (a) Except as provided in subsection (b), this chapter shall supersede any 9185 conflicting laws ~~of the Commonwealth~~ providing civil remedies for the misappropriation of a 92 trade secret.

9386 (b) This chapter ~~does~~shall not affect:

~~94~~ (1) contractual remedies, provided that, to the extent

~~87~~ such remedies are based on an

~~95~~ interest in the economic advantage of information claimed to be

~~88~~ confidential, ~~such~~

~~96~~ ~~that~~ confidentiality shall be determined according to the definition of trade secret in

~~89~~ subsection ~~4~~(4);

~~97~~ ~~of section 1~~, where the terms and circumstances of the underlying contract shall be

~~90~~ considered in such

~~98~~ determination;

~~99~~ (2) remedies based on submissions to governmental units;

~~100~~ (3)

~~91~~ other civil remedies to the extent that ~~they~~ those remedies are not based upon misappropriation of a

~~101~~ ~~92~~ trade secret; or

~~102~~ (4) criminal remedies, whether or not based upon misappropriation of a trade ~~secret~~.

~~103~~ ~~93~~ secret.

~~94~~ Section 8. This chapter shall be applied and construed to effectuate its general purpose to

~~104~~ ~~95~~ make uniform the law with respect to the subject of this chapter among ~~States~~ states enacting it.

~~105~~ ~~96~~ Section 9. This chapter shall be known and may be cited as the Uniform Trade Secrets

~~106~~ ~~97~~ Act.

~~107~~ ~~98~~ SECTION 3. Chapter 149 of the General Laws, ~~as appearing in the 2014 Official Edition,~~

~~108~~ is hereby amended by inserting after

~~99~~ section 24K the following section:-

~~12~~ ~~6~~ ~~12~~

~~109~~100 Section 24L. ~~Massachusetts Noncompetition Agreement Act~~

~~110~~ (a) As used in this section, the following words shall have the following ~~meanings:~~

101 meanings unless the context clearly requires otherwise:

102

~~111~~ “Business entity<sup>22</sup>,” any person or group of ~~persons~~people performing or engaging in ~~any~~an activity,

~~112~~103 enterprise, profession<sup>5</sup>, or occupation for gain, benefit, advantage<sup>6</sup>, or livelihood, whether for

~~113~~ profit

~~104~~ or not-for-profit, including, but not limited to, corporations, limited liability companies,

~~114~~ limited

~~105~~ partnerships, or limited liability partnerships.

~~115~~106 “Employee”, an individual who is considered an employee under section 148B of this

~~116~~ chapter; provided, however, that the term “employee”, as used in this chapter, shall also include

~~117~~ independent contractors under section 148B.

~~118~~

~~119~~107 “Forfeiture agreement”, an agreement that imposes adverse financial consequences on a

~~120~~108 former employee as a result of the termination of an employment relationship, regardless of

~~121~~109 whether the employee engages in competitive activities following ~~cessation~~termination of the employment

~~122~~110 relationship. ~~Forfeiture~~; provided, however, that “forfeiture agreements” do not include forfeiture for

111 competition agreements.

~~123~~112 “Forfeiture for competition agreement”, an agreement that by its terms or through the

~~124~~113 manner in which it is enforced imposes adverse financial consequences on a former employee as

~~125~~114 a result of the termination of an employment relationship if the employee engages in competitive

~~126~~115 activities.

~~127~~116 “Garden leave clause”, a provision within a noncompetition agreement by which an

~~128~~117 employer agrees to pay the employee during the restricted period, ~~provided that such provision~~.

~~129~~ shall become effective upon termination of employment unless the restriction upon post-

118

~~130~~ employment activities are waived by the employer or ineffective under subsection (e) (iii).

~~131~~ “Noncompetition agreement”<sup>22</sup>, an agreement between an employer and an employee, ~~or~~

~~132~~ otherwise 119 arising out of an existing or anticipated employment relationship, under which the

~~133~~ employee or

120 expected employee agrees ~~that he or she will~~ not to engage in certain specified



~~134~~ activities competitive with ~~his or her~~ the

121 employee's employer after the employment relationship has ended; provided, however, that

~~135~~ ~~Noncompetition~~ 122 "noncompetition agreements" shall include forfeiture for competition agreements, but ~~do~~ shall not

123 include: (i)

~~136~~ covenants not to solicit or hire employees of the employer; (ii) covenants not to

124 solicit or transact

~~137~~ business with customers, clients, or vendors of the employer; (iii) ~~noncompetition agreements~~

~~138~~ 125 noncompetition agreements made in connection with the sale of a business entity or substantially

126 all of the operating assets of

~~139~~ a business entity or partnership, or otherwise disposing of the

127 ownership interest of a business

~~140~~ entity or partnership ~~(, or division or subsidiary thereof),~~ when the

128 party restricted by the

~~141~~ noncompetition agreement is a significant owner of, or member or partner

129 in, the business entity

~~142~~ who will receive significant consideration or benefit from the sale or

130 disposal of the business entity; (iv)

~~143~~ noncompetition agreements outside of an employment

131 relationship; (v) forfeiture agreements;

~~144~~ (vi) nondisclosure or confidentiality agreements; (vii)

132 invention assignment agreements; (viii)

~~145~~ garden leave clauses; (ix) noncompetition agreements

133 made in connection with the ~~cessation~~ termination of

~~146~~ or separation from employment if the employee is

134 expressly given ~~seven~~ 7 business days to rescind

~~147~~ acceptance; or (x) agreements by which an employee

135 agrees to not reapply for employment to

~~148~~ the same employer after termination of the employee.

~~149~~136 “Restricted period”~~”~~, the period of time after the date of ~~cessation~~termination of employment during

~~150~~137 which an employee is restricted from engaging in activities competitive with the employee’s

138 former employer by a noncompetition agreement ~~from engaging in activities,~~

~~139~~151 ~~competitive with his or her employer.~~

~~152~~ (b) (1) To be valid and enforceable, a noncompetition agreement ~~must~~shall meet the ~~minimum~~

~~153~~140 requirements of ~~subsections (i) through (viii) hereof~~this subsection.

~~154~~ ~~\_\_\_\_\_~~ ~~(i~~141 (2) If the noncompetition agreement is entered into in connection with the 142 commencement of employment,

~~155~~ it ~~must~~shall be in writing and signed by ~~both~~ the employer and employee ~~and expressly state that the~~

143

~~156~~ and shall expressly state that the employee has the right to consult with counsel prior to signing.

144 The agreement ~~must~~shall be provided

~~157~~ to the employee by the earlier of a formal offer of employment

145 or 10 business days before the

~~158~~ commencement of the employee's employment.

~~159~~ (ii)

146 \_\_\_\_\_ (3) If the noncompetition agreement is entered into after commencement of  
147 employment, but not in

~~160~~ connection with ~~the~~ separation from employment, it ~~must~~shall be supported by

148 fair and reasonable

~~161~~ consideration independent from the continuation of employment; and notice ~~of the agreement~~

~~162~~ ~~must~~ 149 of the noncompetition agreement shall be provided at least 10 business days before the

150 agreement is to be effective. ~~Moreover, the~~

~~163~~ ~~The noncompetition agreement must~~shall be in writing and signed by ~~both the employer and~~  
~~employee and expressly state~~

~~164~~ 151 the employer and employee and expressly state that the employee has the right to consult  
with

152 counsel prior to signing.

~~165~~ \_\_\_\_\_ (iii) ~~The~~ 153 (4) To remain valid and enforceable, the employer shall review a  
noncompetition

154 agreement with the employee not less than once every 5 years.

155 ~~must be no~~ \_\_\_\_\_ (5) The noncompetition agreement shall not be broader than necessary to protect  
~~one~~

156 or more of the

~~166~~ following legitimate business interests of the employer: (A) the employer's trade

157 secrets, as ~~that~~

~~167~~ ~~term is~~ defined in section 1 of chapter 93L; (B) the employer's confidential information that

~~168~~ ~~otherwise~~ 158 would not otherwise qualify as a trade secret; or (C) the employer's goodwill.  
A noncompetition

~~169~~ 159 agreement may be presumed necessary where ~~the~~ legitimate business interest cannot be  
adequately

~~170~~ ~~adequately~~ 160 protected through an alternative restrictive covenant, including, but not limited to,  
a

~~171~~ non-

~~166~~ 172

161 solicitation agreement ~~or~~, a non-disclosure agreement or a confidentiality agreement.

~~172~~ ~~(iv) In no event may the stated~~ 162 (6) The restricted period ~~exceed 12~~ shall not be more than 3 months from the date of

~~173~~ ~~cessation~~ 163 termination of employment, unless the employee has breached ~~his or her~~ fiduciary duty to the employer

~~174~~ ~~employer~~ 164 or the employee has unlawfully taken, physically or electronically, property belonging to the

~~175~~ ~~to the~~ 165 employer, in which case the duration ~~may~~ shall not ~~exceed~~ be more than 2 years from the date of ~~cessation of~~ termination

~~176~~ 166 of employment.

~~177~~ ~~(v)~~ ~~167~~ (7) The noncompetition agreement ~~must~~shall be reasonable in geographic reach in

168 relation to the interests

~~178~~ protected. A geographic reach that is limited to ~~only~~ the geographic areas in

169 which the employee,

~~179~~ ~~during any time within the last 2 years of employment,~~ provided services or had a material

~~180~~ presence or influence ~~is presumptively reasonable during the last 2~~

170 years of employment is presumptively reasonable.

171 (8

~~181~~ ~~(vi)~~ The noncompetition agreement ~~must~~shall be reasonable in the scope of proscribed

172 activities in relation to

~~182~~ the interests protected. A restriction on activities that protects a legitimate ~~business interest and~~

~~183~~ ~~173~~ business interest and is limited to ~~only~~ the specific types of services provided by the employee ~~at any time during the~~

~~184~~ ~~174~~ the last 2 years of employment is presumptively reasonable.

~~185~~ ~~(vii)~~ ~~The~~ 175 (9) Not later than 10 days after the termination of an employment relationship, the

176 employer shall notify the employee in writing of the employer's intent to enforce the

177 noncompetition agreement ~~shall be supported by a garden leave clause or other~~

~~186~~ ~~mutually agreed upon consideration between.~~ If the employer and the employee, provided ~~that fails to provide~~ such notice,

~~187~~ ~~consideration is specified in the noncompetition agreement~~ ~~To constitute a garden leave clause~~

~~188~~ ~~within the meaning of this section, the agreement must (i) provide for the payment, consistent~~

~~189~~ ~~with the requirements for the payment of wages under section 148 of chapter 149 of the general~~ 178 agreement shall be void. This paragraph shall

~~190~~ ~~laws, on a pro-rata basis during the entirety of the restricted period, of at least 50 percent of the~~

~~191~~ ~~employee's highest annualized base salary paid by the employer within the 2 years preceding the~~

~~192~~ ~~employee's termination; and (ii) except in the event of a breach by the employee, not permit an~~

apply

~~193 employer to unilaterally discontinue or otherwise fail or refuse to make the payments; provided,~~

~~194 however, if the restricted period employee has been increased beyond 12 months as a result of the~~  
~~breached~~

~~195 employee's breach of a fiduciary~~

~~179~~ duty to the employer or the employee has unlawfully taken,

~~196~~ physically or electronically, property

~~180~~ belonging to the employer, ~~the employer shall not be,~~

~~181 \_\_\_\_\_ (10) The noncompetition agreement shall be supported by a garden leave clause~~

~~182 or other mutually-agreed upon consideration between the employer and the employee which~~

~~183 shall be equal to or greater than 100 per cent of the employee's highest annualized earnings paid~~

~~184 by the employer within the 2 years preceding the employee's termination and is negotiated~~

~~185 during the 30-day period immediately following the termination of employment. If the~~

~~186 employer and employee fail to reach an agreement for other consideration within that 30-day~~

~~187 period, the garden leave clause shall become effective. To constitute a garden leave clause under~~

~~188 this section, the noncompetition agreement shall: (i) provide for the payment, consistent with the~~



189 requirements for the payment of wages, under section 148, of 100 per cent of the employee's  
190 highest annualized earnings paid by the employer within the 2 years preceding the employee's  
191 termination; and (ii) not permit an employer to unilaterally discontinue or otherwise fail or refuse  
192 to make the payments except in the event of a breach by the employee; provided, however, if the  
193 restricted period has been increased beyond 3 months as a result of the employee's breach of a  
194 fiduciary duty to the employer or the employee has unlawfully taken, physically or  
195 ~~197~~ electronically, property belonging to the employer, the employer shall not be required to  
provide  
196 payments to the employee during the extension of the restricted period.

~~198~~ ~~(viii)~~ 197(11) The agreement ~~must~~shall be ~~consonant~~consistent with public policy.

~~199~~

198 (c) A noncompetition agreement shall not be enforceable against the following types of

~~200~~199 workers: (i) an employee who is classified as nonexempt under the Fair Labor Standards Act, 29

~~201~~200 U.S.C. ~~201-219~~201 et. seq.; (ii) undergraduate or graduate students that partake in an internship or

201 otherwise

~~202~~ enter into a short-term employment relationship with an employer, whether paid or

202 unpaid, while

~~203~~ enrolled in a full-time or part-time undergraduate or graduate educational

203 institution; (iii)

~~204~~ employees that have been terminated without cause or laid off; ~~or~~ (iv) employees

204 ~~age not more than 18 or~~ years of age; (v) an employee whose average weekly earnings, calculated by

205 dividing the employee's earnings during the period of 12 calendar months immediately

206 ~~younger.~~ preceding the date of termination of employment by 52, or such number of weeks that the

207 employee was actually paid during that 52 week period, are less than 2 times the average weekly

208 wage in the commonwealth as determined pursuant to subsection (a) of section 29 of chapter

209 151A; or (vi) independent contractors under section 148B.

~~210~~ (d) This section ~~does~~shall not render ~~void or unenforceable~~ the remainder of the contract or

~~206~~ agreement containing the

~~211~~ unenforceable noncompetition agreement, ~~nor does~~ void or unenforceable and it shall not preclude the

~~207~~212 imposition of a noncompetition restriction by a court, whether through preliminary or permanent

~~208~~213 injunctive relief or otherwise, as a remedy for a breach of another agreement or a statutory or

~~209~~214 common law duty.

~~210~~ ~~(d)~~215 (e) A court ~~may, in its discretion,~~shall not reform or otherwise revise a noncompetition agreement

~~211~~ so as to

~~216~~ render it valid and enforceable to the extent necessary to protect the applicable legitimate

~~212~~217 business interests. A court shall not invoke the doctrine of inevitable disclosure to extend an

~~218~~ expired noncompetition agreement or otherwise render enforceable a noncompetition agreement

~~219~~ that fails to satisfy the requirements of paragraphs (2) to (11), inclusive, of subsection (c).

~~220~~ (f) A contractual provision that penalizes an employee for defending against or

~~221~~ challenging the validity or enforceability of the noncompetition agreement is void. The

~~222~~ substantive, procedural and remedial rights provided to the employee in this section shall not be

~~223~~

~~213~~ (e) No subject to advance waiver.

~~224~~ (g) A choice of law provision that would have the effect of avoiding the requirements of

~~214~~225 this section ~~will~~shall not be enforceable if the employee is; a resident of or employed in the

~~226~~ commonwealth at the time of the termination of employment and has been for at least 30 days

~~227~~ immediately

~~215~~ preceding ~~his or her cessation of employment, a resident of or employed in Massachusetts at the~~  
~~the employee's~~

~~216~~ ~~time of his or her~~ termination of employment. ~~276~~212

~~217~~ ~~(f228~~ (h) All civil actions relating to ~~employee~~ noncompetition agreements ~~or~~ subject to this section shall be

~~218~~ ~~section shall be~~ 229 brought in the county where the employee resides or, if mutually agreed upon by the employer

230 and employee, in Suffolk ~~County~~ The county; provided, however, that in any such action brought in Suffolk

~~219~~

231 county, the superior court or the business litigation session of the superior court ~~in Suffolk County~~  
shall have

~~220 exclusive jurisdiction of all civil actions relating to employee noncompetition agreements or  
221 subject to this section.~~

232 jurisdiction.

233

~~222 SECTION 4. Chapter 93L shall not apply to a misappropriation occurring prior to  
234 October 1, 2016 or to a continuing misappropriation that began prior to October 1, 2016 and  
235 continues after October 1, 2016.~~

236 SECTION 5. Section ~~324L~~ of chapter 149 of the General Laws may be referred to as  
the

237 Massachusetts Noncompetition

~~223 Agreement Act and shall apply to employee noncompetition~~

238 agreements entered into on or after October 1, 2016.

~~224 October 1, 2016.~~

225

239 SECTION ~~56~~. Section 2 of this Act shall take effect on October 1, 2016, and shall not  
226 apply to misappropriation occurring prior to the effective date. With respect to a continuing  
227 misappropriation that began prior to the effective date, the Act also does not apply to the  
228 continuing misappropriation that occurs after the effective date.