



Rep. Kelly M. Burke

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10100HB0789ham001

LRB101 03781 KTG 74581 a

1 AMENDMENT TO HOUSE BILL 789

2 AMENDMENT NO. _____. Amend House Bill 789 by replacing
3 everything after the enacting clause with the following:

4 "Section 5. The Illinois Freedom to Work Act is amended by
5 changing Sections 5 and 10 and by adding Sections 15, 20, 25,
6 and 30 and by adding Section 7 as follows:

7 (820 ILCS 90/5)

8 Sec. 5. Definitions. In this Act:

9 "Adequate consideration" means (1) the employee worked for
10 the employer for at least 2 years after the employee signed an
11 agreement containing a covenant not to compete or a covenant
12 not to solicit or (2) the employer otherwise provided
13 consideration adequate to support an agreement to not compete
14 or to not solicit, which could consist of the period of
15 employment plus additional consideration or merely other
16 consideration adequate by itself.

1 "Covenant not to compete" means an agreement:

2 (1) between an employer and an ~~a low wage~~ employee that
3 restricts the ~~such low wage~~ employee from performing:

4 (A) any work for another employer for a specified
5 period of time;

6 (B) any work in a specified geographical area; or

7 (C) work for another employer that is similar to
8 the ~~such low wage~~ employee's work for the employer
9 included as a party to the agreement; and

10 (2) that is entered into after the effective date of
11 this Act.

12 "Covenant not to compete" also means an agreement between
13 an employer and an employee, entered into after the effective
14 date of this amendatory Act of the 101st General Assembly, that
15 by its terms imposes adverse financial consequences on a former
16 employee if the employee engages in competitive activities
17 after the termination of the employee's employment with the
18 employer. "Covenant not to compete" does not include (i) a
19 covenant not to solicit, (ii) a confidentiality agreement or
20 covenant, (iii) a covenant or agreement prohibiting use or
21 disclosure of trade secrets or inventions, (iv) invention
22 assignment agreements or covenants, (v) a covenant or agreement
23 entered into by a person purchasing or selling the goodwill of
24 a business or otherwise acquiring or disposing of an ownership
25 interest, (vi) clauses or an agreement between an employer and
26 an employee requiring advance notice of termination of

1 employment, during which notice period the employee remains
2 employed by the employer and receives compensation, or (vii)
3 agreements by which the employee agrees not to reapply for
4 employment to the same employer after termination of the
5 employee.

6 "Covenant not to solicit" means an agreement that is
7 entered into after the effective date of this amendatory Act of
8 the 101st General Assembly between an employer and an employee
9 that (i) restricts an employee from soliciting for employment
10 the employer's employees or (ii) restricts an employee from
11 soliciting for the purpose of selling products or services of
12 any kind to, or from interfering with the employer's
13 relationships with, the employer's clients, prospective
14 clients, vendors, prospective vendors, suppliers, prospective
15 suppliers, or other business relationships.

16 "Earnings" means the compensation, including earned
17 salary, earned bonuses, earned commissions, or any other form
18 of taxable compensation, reflected or that is expected to be
19 reflected as wages, tips, and other compensation on the
20 employee's IRS Form W-2 plus any elective deferrals not
21 reflected as wages, tips, and other compensation on the
22 employee's IRS Form W-2, such as, without limitation, employee
23 contributions to a 401(k) plan, a 403(b) plan, a flexible
24 spending account, or a health savings account, or commuter
25 benefit-related deductions.

26 "Employee" has the meaning ascribed to that term in Section

1 2 of the Illinois Wage Payment and Collection Act and includes
2 individuals currently or formerly employed by an employer.

3 "Employer" has the meaning given to such term in subsection
4 (c) of Section 3 of the Minimum Wage Law. "Employer" does not
5 include governmental or quasi-governmental bodies.

6 ~~"Low wage employee" means an employee whose earnings do not~~
7 ~~exceed the greater of (1) the hourly rate equal to the minimum~~
8 ~~wage required by the applicable federal, State, or local~~
9 ~~minimum wage law or (2) \$13.00 per hour.~~

10 (Source: P.A. 99-860, eff. 1-1-17; 100-225, eff. 8-18-17.)

11 (820 ILCS 90/7 new)

12 Sec. 7. Legitimate business interest of the employer. In
13 determining the legitimate business interest of the employer
14 (consistent with the decision of the Supreme Court of Illinois
15 in Reliable Fire Equipment Company v. Arredondo, 2011 IL
16 111871), the totality of the facts and circumstances of the
17 individual case shall be considered. Factors that may be
18 considered in this analysis include, but are not limited to,
19 the employee's exposure to the employer's customer
20 relationships or other employees, the near-permanence of
21 customer relationships, the employee's acquisition, use, or
22 knowledge of confidential information through the employee's
23 employment, the time restrictions, the place restrictions, and
24 the scope of the activity restrictions. No factor carries any
25 more weight than any other, but rather its importance will

1 depend on the specific facts and circumstances of the
2 individual case. Such factors are only nonconclusive aids in
3 determining the employer's legitimate business interest, which
4 in turn is but one component in the three-prong rule of reason,
5 grounded in the totality of the circumstances. Each situation
6 must be determined on its own particular facts. Reasonableness
7 is gauged not just by some but by all of the circumstances. The
8 same identical contract and restraint may be reasonable and
9 valid under one set of circumstances and unreasonable and
10 invalid under another set of circumstances.

11 (820 ILCS 90/10)

12 Sec. 10. Prohibiting covenants not to compete for ~~low-wage~~
13 employees.

14 (a) A covenant not to compete shall not be valid or
15 enforceable unless the employee's actual or expected
16 annualized rate of earnings exceeds \$75,000 per year. This
17 figure shall increase to \$80,000 per year beginning on January
18 1, 2027, \$85,000 per year beginning on January 1, 2032, and
19 \$90,000 per year beginning on January 1, 2037. ~~No employer~~
20 shall enter into a covenant not to compete with any low-wage
21 employee of the employer.

22 (b) A covenant not to solicit shall not be valid or
23 enforceable unless the employee's actual or expected
24 annualized rate of earnings exceeds \$45,000 per year. This
25 figure shall increase to \$47,500 per year beginning on January

1 1, 2027, \$50,000 per year beginning on January 1, 2032, and
2 \$52,500 per year beginning on January 1, 2037. A covenant not
3 to compete entered into between an employer and a low-wage
4 employee is illegal and void.

5 (c) A covenant not to compete is void and illegal for any
6 employee who an employer terminates or furloughs as the result
7 of business circumstances or governmental orders related to the
8 COVID-19 pandemic, or under circumstances that are similar to
9 the COVID-19 pandemic, unless enforcement of the covenant not
10 to compete includes compensation equivalent to the employee's
11 base salary at the time of termination for the period of
12 enforcement minus compensation earned through subsequent
13 employment during the period of enforcement.

14 (Source: P.A. 99-860, eff. 1-1-17.)

15 (820 ILCS 90/15 new)

16 Sec. 15. Enforceability of a covenant not to compete or a
17 covenant not to solicit. A covenant not to compete or a
18 covenant not to solicit is illegal and void unless (i) the
19 employee receives adequate consideration, (ii) the covenant is
20 ancillary to a valid employment relationship, (iii) the
21 covenant is no greater than is required for the protection of a
22 legitimate business interest of the employer, (iv) the covenant
23 does not impose undue hardship on the employee, and (v) the
24 covenant is not injurious to the public.

1 (820 ILCS 90/20 new)

2 Sec. 20. Ensuring employees are informed about their
3 obligations. A covenant not to compete or a covenant not to
4 solicit is illegal and void unless (i) the employer advises the
5 employee in writing to consult with an attorney before entering
6 into the covenant and (ii) the employer provides the employee
7 with a copy of the covenant at least 14 calendar days before
8 the commencement of the employee's employment or the employer
9 provides the employee with at least 14 calendar days to review
10 the covenant.

11 (820 ILCS 90/25 new)

12 Sec. 25. Remedies. In addition to any remedies available
13 under any agreement between an employer and an employee or
14 under any other statute, in a civil action filed by an employer
15 (including, but not limited to, a complaint or counterclaim),
16 if an employee prevails on a claim to enforce a covenant not to
17 compete or a covenant not to solicit, the employee shall
18 recover from the employer all costs and all reasonable
19 attorney's fees regarding such claim to enforce a covenant not
20 to compete or a covenant not to solicit.

21 (820 ILCS 90/30 new)

22 Sec. 30. Reformation.

23 (a) Extensive judicial reformation of a covenant not to
24 compete or a covenant not to solicit may be against the public

1 policy of this State and a court may refrain from wholly
2 rewriting contracts.

3 (b) In some circumstances, a court may, in its discretion,
4 choose to reform a covenant not to compete or a covenant not to
5 solicit rather than hold such covenant unenforceable. Factors
6 which may be considered when deciding whether such reformation
7 is appropriate include the fairness of the restraints as
8 originally written, whether the original restriction reflects
9 a good-faith effort to protect a legitimate business interest
10 of the employer, the extent of such reformation, and whether
11 the parties included a clause authorizing such modifications in
12 their agreement.

13 Section 99. Effective date. This Act takes effect June 1,
14 2021.".