



Sen. Mattie Hunter

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10200SB1838sam001

LRB102 11384 KTG 24496 a

1 AMENDMENT TO SENATE BILL 1838

2 AMENDMENT NO. _____. Amend Senate Bill 1838 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 7, 15, 20,
6 25, 30, and 35 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 a 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
3 that 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 102nd General Assembly,
15 that by its terms imposes adverse financial consequences on a
16 former employee if the employee engages in competitive
17 activities after the termination of the employee's employment
18 with the employer. "Covenant not to compete" does not include
19 (i) a covenant not to solicit, (ii) a confidentiality
20 agreement or covenant, (iii) a covenant or agreement
21 prohibiting use or disclosure of trade secrets or inventions,
22 (iv) invention assignment agreements or covenants, (v) a
23 covenant or agreement entered into by a person purchasing or
24 selling the goodwill of a business or otherwise acquiring or
25 disposing of an ownership interest, (vi) clauses or an
26 agreement between an employer and an employee requiring

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

6 "Covenant not to solicit" means an agreement that is
7 entered into after the effective date of this amendatory Act
8 of the 102nd General Assembly between an employer and an
9 employee that (i) restricts the employee from soliciting for
10 employment the employer's employees or (ii) restricts the
11 employee from soliciting for the purpose of selling products
12 or services of any kind to, or from interfering with the
13 employer's relationships with, the employer's clients,
14 prospective clients, vendors, prospective vendors, suppliers,
15 prospective 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

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

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

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

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

13 (820 ILCS 90/7 new)

14 Sec. 7. Legitimate business interest of the employer. In
15 determining the legitimate business interest of the employer
16 (consistent with the decision of the Supreme Court of Illinois
17 in Reliable Fire Equipment Company v. Arredondo, 2011 IL
18 111871), the totality of the facts and circumstances of the
19 individual case shall be considered. Factors that may be
20 considered in this analysis include, but are not limited to,
21 the employee's exposure to the employer's customer
22 relationships or other employees, the near-permanence of
23 customer relationships, the employee's acquisition, use, or
24 knowledge of confidential information through the employee's
25 employment, the time restrictions, the place restrictions, and

1 the scope of the activity restrictions. No factor carries any
2 more weight than any other, but rather its importance will
3 depend on the specific facts and circumstances of the
4 individual case. Such factors are only nonconclusive aids in
5 determining the employer's legitimate business interest, which
6 in turn is but one component in the three-prong rule of reason,
7 grounded in the totality of the circumstances. Each situation
8 must be determined on its own particular facts. Reasonableness
9 is gauged not just by some but by all of the circumstances. The
10 same identical contract and restraint may be reasonable and
11 valid under one set of circumstances and unreasonable and
12 invalid under another set of circumstances.

13 (820 ILCS 90/10)

14 Sec. 10. Prohibiting covenants not to compete for ~~low wage~~
15 employees.

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

24 (b) A covenant not to solicit shall not be valid or
25 enforceable unless the employee's actual or expected

1 annualized rate of earnings exceeds \$45,000 per year. This
2 figure shall increase to \$47,500 per year beginning on January
3 1, 2027, \$50,000 per year beginning on January 1, 2032, and
4 \$52,500 per year beginning on January 1, 2037. A covenant not
5 to compete entered into between an employer and a low wage
6 employee is illegal and void.

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

16 (d) A covenant not to compete is void and illegal for
17 individuals covered by a collective bargaining agreement under
18 the Illinois Public Labor Relations Act or the Illinois
19 Educational Labor Relations Act.

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

21 (820 ILCS 90/15 new)

22 Sec. 15. Enforceability of a covenant not to compete or a
23 covenant not to solicit. A covenant not to compete or a
24 covenant not to solicit is illegal and void unless (i) the
25 employee receives adequate consideration, (ii) the covenant is

1 ancillary to a valid employment relationship, (iii) the
2 covenant is no greater than is required for the protection of a
3 legitimate business interest of the employer, (iv) the
4 covenant does not impose undue hardship on the employee, and
5 (v) the covenant is not injurious to the public.

6 (820 ILCS 90/20 new)

7 Sec. 20. Ensuring employees are informed about their
8 obligations. A covenant not to compete or a covenant not to
9 solicit is illegal and void unless (i) the employer advises
10 the employee in writing to consult with an attorney before
11 entering into the covenant and (ii) the employer provides the
12 employee with a copy of the covenant at least 14 calendar days
13 before the commencement of the employee's employment or the
14 employer provides the employee with at least 14 calendar days
15 to review the covenant. An employer is in compliance with this
16 Section even if the employee voluntarily elects to sign the
17 covenant before the expiration of the 14-day period.

18 (820 ILCS 90/25 new)

19 Sec. 25. Remedies. In addition to any remedies available
20 under any agreement between an employer and an employee or
21 under any other statute, in a civil action or arbitration
22 filed by an employer (including, but not limited to, a
23 complaint or counterclaim), if an employee prevails on a claim
24 to enforce a covenant not to compete or a covenant not to

1 solicit, the employee shall recover from the employer all
2 costs and all reasonable attorney's fees regarding such claim
3 to enforce a covenant not to compete or a covenant not to
4 solicit.

5 (820 ILCS 90/30 new)

6 Sec. 30. Reformation.

7 (a) Extensive judicial reformation of a covenant not to
8 compete or a covenant not to solicit may be against the public
9 policy of this State and a court may refrain from wholly
10 rewriting contracts.

11 (b) In some circumstances, a court may, in its discretion,
12 choose to reform or sever provisions of a covenant not to
13 compete or a covenant not to solicit rather than hold such
14 covenant unenforceable. Factors which may be considered when
15 deciding whether such reformation is appropriate include the
16 fairness of the restraints as originally written, whether the
17 original restriction reflects a good-faith effort to protect a
18 legitimate business interest of the employer, the extent of
19 such reformation, and whether the parties included a clause
20 authorizing such modifications in their agreement.

21 (820 ILCS 90/35 new)

22 Sec. 35. Severability. The provisions of this Act are
23 severable under Section 1.31 of the Statute on Statutes.

1 Section 99. Effective date. This Act takes effect on
2 January 1, 2022."