



Sen. Mattie Hunter

**Filed: 5/18/2021**

10200SB1838sam002

LRB102 11384 JLS 26448 a

1 AMENDMENT TO SENATE BILL 1838

2 AMENDMENT NO. \_\_\_\_\_. Amend Senate Bill 1838, AS AMENDED,  
3 by replacing everything after the enacting clause with the  
4 following:

5 "Section 5. The Illinois Freedom to Work Act is amended by  
6 changing Sections 5 and 10 and by adding Sections 7, 15, 20,  
7 25, 30, 35, and 97 as follows:

8 (820 ILCS 90/5)

9 Sec. 5. Definitions. In this Act:

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

1 benefits or merely professional or financial benefits adequate  
2 by themselves.

3 "Covenant not to compete" means an agreement: ~~(1)~~ between  
4 an employer and an a low wage employee that is entered into  
5 after the effective date of this amendatory Act of the 102nd  
6 General Assembly that restricts the such low wage employee  
7 from performing:

8 (1) (A) any work for another employer for a  
9 specified period of time;

10 (2) (B) any work in a specified geographical area;  
11 or

12 (3) (C) work for another employer that is similar  
13 to ~~such low wage~~ employee's work for the employer  
14 included as a party to the agreement, ~~and~~

15 ~~(2) that is entered into after the effective date of~~  
16 ~~this Act.~~

17 "Covenant not to compete" also means an agreement between  
18 an employer and an employee, entered into after the effective  
19 date of this amendatory Act of the 102nd General Assembly,  
20 that by its terms imposes adverse financial consequences on  
21 the former employee if the employee engages in competitive  
22 activities after the termination of the employee's employment  
23 with the employer.

24 "Covenant not to compete" does not include (1) a covenant  
25 not to solicit, (2) a confidentiality agreement or covenant,  
26 (3) a covenant or agreement prohibiting use or disclosure of

1 trade secrets or inventions, (4) invention assignment  
2 agreements or covenants, (5) a covenant or agreement entered  
3 into by a person purchasing or selling the goodwill of a  
4 business or otherwise acquiring or disposing of an ownership  
5 interest, (6) clauses or an agreement between an employer and  
6 an employee requiring advance notice of termination of  
7 employment, during which notice period the employee remains  
8 employed by the employer and receives compensation, or (7)  
9 agreements by which the employee agrees not to reapply for  
10 employment to the same employer after termination of the  
11 employee.

12 "Covenant not to solicit" means an agreement that is  
13 entered into after the effective date of this amendatory Act  
14 of the 102nd General Assembly between an employer and an  
15 employee that (1) restricts the employee from soliciting for  
16 employment the employer's employees or (2) restricts the  
17 employee from soliciting, for the purpose of selling products  
18 or services of any kind to, or from interfering with the  
19 employer's relationships with, the employer's clients,  
20 prospective clients, vendors, prospective vendors, suppliers,  
21 prospective suppliers, or other business relationships.

22 "Earnings" means the compensation, including earned  
23 salary, earned bonuses, earned commissions, or any other form  
24 of taxable compensation, reflected or that is expected to be  
25 reflected as wages, tips, and other compensation on the  
26 employee's IRS Form W-2 plus any elective deferrals not

1 reflected as wages, tips, and other compensation on the  
2 employee's IRS Form W-2, such as, without limitation, employee  
3 contributions to a 401(k) plan, a 403(b) plan, a flexible  
4 spending account, or a health savings account, or commuter  
5 benefit-related deductions.

6 "Employee" means any individual permitted to work by an  
7 employer in an occupation.

8 "Employer" has the meaning given to such term in  
9 subsection (c) of Section 3 of the Minimum Wage Law.

10 "Employer" does not include governmental or quasi-governmental  
11 bodies.

12 "Construction" means any constructing, altering,  
13 reconstructing, repairing, rehabilitating, refinishing,  
14 refurbishing, remodeling, remediating, renovating, custom  
15 fabricating, maintenance, landscaping, improving, wrecking,  
16 painting, decorating, demolishing, and adding to or  
17 subtracting from any building, structure, highway, roadway,  
18 street, bridge, alley, sewer, ditch, sewage disposal plant,  
19 water works, parking facility, railroad, excavation or other  
20 structure, project, development, real property or improvement,  
21 or to do any part thereof, whether or not the performance of  
22 the work herein described involves the addition to, or  
23 fabrication into, any structure, project, development, real  
24 property or improvement herein described of any material or  
25 article of merchandise.

26 ~~"Low wage employee" means an employee whose earnings do~~

1 ~~not exceed the greater of (1) the hourly rate equal to the~~  
2 ~~minimum wage required by the applicable federal, State, or~~  
3 ~~local minimum wage law or (2) \$13.00 per hour.~~

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

5 (820 ILCS 90/7 new)

6 Sec. 7. Legitimate business interest of the employer. In  
7 determining the legitimate business interest of the employer,  
8 the totality of the facts and circumstances of the individual  
9 case shall be considered. Factors that may be considered in  
10 this analysis include, but are not limited to, the employee's  
11 exposure to the employer's customer relationships or other  
12 employees, the near-permanence of customer relationships, the  
13 employee's acquisition, use, or knowledge of confidential  
14 information through the employee's employment, the time  
15 restrictions, the place restrictions, and the scope of the  
16 activity restrictions. No factor carries any more weight than  
17 any other, but rather its importance will depend on the  
18 specific facts and circumstances of the individual case. Such  
19 factors are only non-conclusive aids in determining the  
20 employer's legitimate business interest, which in turn is but  
21 one component in the 3-prong rule of reason, grounded in the  
22 totality of the circumstances. Each situation must be  
23 determined on its own particular facts. Reasonableness is  
24 gauged not just by some, but by all of the circumstances. The  
25 same identical contract and restraint may be reasonable and

1 valid under one set of circumstances and unreasonable and  
2 invalid under another set of circumstances.

3 (820 ILCS 90/10)

4 Sec. 10. Prohibiting covenants not to compete and  
5 covenants not to solicit for low wage employees.

6 (a) No employer shall enter into a covenant not to compete  
7 with any employee unless the employee's actual or expected  
8 annualized rate of earnings exceeds \$75,000 per year. This  
9 amount shall increase to \$80,000 per year beginning on January  
10 1, 2027, \$85,000 per year beginning on January 1, 2032, and  
11 \$90,000 per year beginning on January 1, 2037. A covenant not  
12 to compete entered into in violation of this subsection is  
13 void and unenforceable. ~~No employer shall enter into a~~  
14 ~~covenant not to compete with any low wage employee of the~~  
15 ~~employer.~~

16 (b) No employer shall enter into a covenant not to solicit  
17 with any employee unless the employee's actual or expected  
18 annualized rate of earnings exceeds \$45,000 per year. This  
19 amount shall increase to \$47,500 per year beginning on January  
20 1, 2027, \$50,000 per year beginning on January 1, 2032, and  
21 \$52,500 per year beginning on January 1, 2037. A covenant not  
22 to solicit entered into in violation of this subsection is  
23 void and unenforceable. ~~A covenant not to compete entered into~~  
24 ~~between an employer and a low wage employee is illegal and~~  
25 ~~void.~~

1       (c) No employer shall enter into a covenant not to compete  
2 or a covenant not to solicit with any employee who an employer  
3 terminates or furloughs or lays off as the result of business  
4 circumstances or governmental orders related to the COVID-19  
5 pandemic or under circumstances that are similar to the  
6 COVID-19 pandemic, unless enforcement of the covenant not to  
7 compete includes compensation equivalent to the employee's  
8 base salary at the time of termination for the period of  
9 enforcement minus compensation earned through subsequent  
10 employment during the period of enforcement. A covenant not to  
11 compete or a covenant not to solicit entered into in violation  
12 of this subsection is void and unenforceable.

13       (d) A covenant not to compete is void and illegal with  
14 respect to individuals covered by a collective bargaining  
15 agreement under the Illinois Public Labor Relations Act or the  
16 Illinois Educational Labor Relations Act and individuals  
17 employed in construction. This subsection (d) does not apply  
18 to construction employees who primarily perform management,  
19 engineering or architectural, design, or sales functions for  
20 the employer or who are shareholders, partners, or owners in  
21 any capacity of the employer.

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

23       (820 ILCS 90/15 new)

24       Sec. 15. Enforceability of a covenant not to compete or a  
25 covenant not to solicit. A covenant not to compete or a

1 covenant not to solicit is illegal and void unless (1) the  
2 employee receives adequate consideration, (2) the covenant is  
3 ancillary to a valid employment relationship, (3) the covenant  
4 is no greater than is required for the protection of a  
5 legitimate business interest of the employer, (4) the covenant  
6 does not impose undue hardship on the employee, and (5) the  
7 covenant is not injurious to the public.

8 (820 ILCS 90/20 new)

9 Sec. 20. Ensuring employees are informed about their  
10 obligations. A covenant not to compete or a covenant not to  
11 solicit is illegal and void unless (1) the employer advises  
12 the employee in writing to consult with an attorney before  
13 entering into the covenant and (2) the employer provides the  
14 employee with a copy of the covenant at least 14 calendar days  
15 before the commencement of the employee's employment or the  
16 employer provides the employee with at least 14 calendar days  
17 to review the covenant. An employer is in compliance with this  
18 Section even if the employee voluntarily elects to sign the  
19 covenant before the expiration of the 14-day period.

20 (820 ILCS 90/25 new)

21 Sec. 25. Remedies. In addition to any remedies available  
22 under any agreement between an employer and an employee or  
23 under any other statute, in a civil action or arbitration  
24 filed by an employer (including, but not limited to, a



1 complaint or counterclaim), if an employee prevails on a claim  
2 to enforce a covenant not to compete or a covenant not to  
3 solicit, the employee shall recover from the employer all  
4 costs and all reasonable attorney's fees regarding such claim  
5 to enforce a covenant not to compete or a covenant not to  
6 solicit, and the court or arbitrator may award appropriate  
7 relief.

8 (820 ILCS 90/30 new)

9 Sec. 30. Attorney General enforcement.

10 (a) Whenever the Attorney General has reasonable cause to  
11 believe that any person or entity is engaged in a pattern and  
12 practice prohibited by this Act, the Attorney General may  
13 initiate or intervene in a civil action in the name of the  
14 People of the State in any appropriate court to obtain  
15 appropriate relief.

16 (b) Before initiating an action, the Attorney General may  
17 conduct an investigation and may: (1) require an individual or  
18 entity to file a statement or report in writing under oath or  
19 otherwise, as to all information the Attorney General may  
20 consider necessary; (2) examine under oath any person alleged  
21 to have participated in or with knowledge of the alleged  
22 violation; or (3) issue subpoenas or conduct hearings in aid  
23 of any investigation.

24 (c) Service by the Attorney General of any notice  
25 requiring a person or entity to file a statement or report, or

1 of a subpoena upon any person or entity, shall be made:

2 (1) personally by delivery of a duly executed copy  
3 thereof to the person to be served or, if a person is not a  
4 natural person, in the manner provided in the Code of  
5 Civil Procedure when a complaint is filed; or

6 (2) by mailing by certified mail a duly executed copy  
7 thereof to the person to be served at his or her last known  
8 abode or principal place of business within this State or,  
9 if a person is not a natural person, in the manner provided  
10 in the Code of Civil Procedure when a complaint is filed.

11 The Attorney General may compel compliance with  
12 investigative demands under this Section through an order by  
13 any court of competent jurisdiction.

14 (d) (1) In an action brought under this Act, the Attorney  
15 General may obtain, as a remedy, monetary damages to the  
16 State, restitution, and equitable relief, including any  
17 permanent or preliminary injunction, temporary restraining  
18 order, or other order, including an order enjoining the  
19 defendant from engaging in a violation, or order any action as  
20 may be appropriate. In addition, the Attorney General may  
21 request and the court may impose a civil penalty not to exceed  
22 \$5,000 for each violation or \$10,000 for each repeat violation  
23 within a 5-year period. For purposes of this Section, each  
24 violation of this Act for each person who was subject to an  
25 agreement in violation of this Act shall constitute a separate  
26 and distinct violation.

1       (2) A civil penalty imposed under this subsection shall be  
2 deposited into the Attorney General Court Ordered and  
3 Voluntary Compliance Payment Projects Fund. Moneys in the Fund  
4 shall be used, subject to appropriation, for the performance  
5 of any function pertaining to the exercise of the duties of the  
6 Attorney General, including but not limited to enforcement of  
7 any law of this State and conducting public education  
8 programs; however, any moneys in the Fund that are required by  
9 the court or by an agreement to be used for a particular  
10 purpose shall be used for that purpose.

11           (820 ILCS 90/35 new)

12       Sec. 35. Reformation.

13       (a) Extensive judicial reformation of a covenant not to  
14 compete or a covenant not to solicit may be against the public  
15 policy of this State and a court may refrain from wholly  
16 rewriting contracts.

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

1 authorizing such modifications in their agreement.

2 (820 ILCS 90/97 new)

3 Sec. 97. Severability. The provisions of this Act are  
4 severable under Section 1.31 of the Statute on Statutes.

5 Section 99. Effective date. This Act takes effect January  
6 1, 2022.".