



96TH GENERAL ASSEMBLY

State of Illinois

2009 and 2010

HB4040

Introduced 2/27/2009, by Rep. Rosemary Mulligan

SYNOPSIS AS INTRODUCED:

New Act

Creates the Illinois Covenants Not to Compete Act. Establishes criteria for enforceability of covenants not to compete. Creates certain rebuttable presumptions as to the enforceability of covenants not to compete. Establishes remedies and procedures for enforcing covenants not to compete. Effective January 1, 2010.

LRB096 09150 RLC 19299 b

1 AN ACT concerning business.

2 **Be it enacted by the People of the State of Illinois,**
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the
5 Illinois Covenants Not to Compete Act.

6 Section 5. Definitions. As used in this Act, the following
7 definitions apply:

8 (a) "Promisor" means a party against whom a covenant not to
9 compete is sought to be enforced.

10 (b) "Promisee" means a party seeking to enforce a covenant
11 not to compete.

12 (c) "Covenant not to compete" means a restriction which
13 prevents a promisor from working for or providing personal
14 services to a person or entity in competition with the
15 promisee.

16 (d) "Key employee" or "key independent contractor" means
17 any employee or independent contractor who has (i) substantial
18 involvement in the executive management of the promisee's
19 business, (ii) direct and substantial contact with customers of
20 the promisee, (iii) knowledge of bona fide trade secrets or
21 other proprietary information of the promisee, (iv) such unique
22 skills that the person has achieved a high degree of public or
23 industry notoriety, fame, or reputation as a representative of

1 the promisee, or (v) is among the highest paid 5% of the
2 promisee's employees or independent contractors in the year
3 preceding a separation from service by the key employee or key
4 independent contractor.

5 (e) "Legitimate business interest" means (i) customer
6 relationships developed and maintained by the promisee, (ii)
7 trade secrets or other proprietary information of the promisee
8 to which a promisor was granted meaningful or regular access,
9 or (iii) business goodwill of the promisee.

10 (f) "Trade secrets" means any trade secrets as defined in
11 the Illinois Trade Secrets Act and the common law under such
12 Act.

13 Section 10. Criteria for enforceability of covenants not to
14 compete. A covenant not to compete is void as an illegal
15 restraint of trade and may not be enforced by a court in this
16 State, unless:

17 (a) the promisee is a key employee or key independent
18 contractor;

19 (b) the promisor either (i) informs the key employee or key
20 independent contractor in a written offer at least 2 weeks
21 prior to the first day of the employment or contractor
22 relationship that a covenant not to compete is required as a
23 condition of employment or services, or (ii) enters into the
24 covenant not to compete with the promisee upon (A) a material
25 advancement or promotion of the key employee or key independent

1 contractor, or (B) payment of a material bonus or material
2 increase in rate of regular compensation; and

3 (c) the covenant not to compete is narrowly tailored to
4 support the protection of a legitimate business interest of the
5 promisee against actual or threatened infringement by the
6 promisor.

7 Section 15. Rebuttable presumptions.

8 (a) A covenant not to compete will be presumed not to meet
9 the criteria under subsection (c) of Section 10 if (i) the
10 duration of the covenant not to compete exceeds one year, (ii)
11 the geographic area of the covenant not compete extends beyond
12 any region in which the key employee or key independent
13 contractor provided employment or contractor services for the
14 promisee during the one year preceding termination of the
15 employment or independent contractor relationship, or (iii)
16 the type of personal services activity subject to the covenant
17 not to compete extends beyond the nature of work the key
18 employee or key independent contractor provided to the promisee
19 during the one year preceding termination of the employment or
20 independent contractor relationship.

21 (b) A promisee may introduce evidence to rebut the
22 presumptions in subsection (a) of this Section upon a showing
23 that more extensive restrictions are necessary to protect a
24 legitimate business interest.

1 Section 20. Remedies and procedures in actions to enforce
2 covenants not to compete.

3 (a) Modification. For any action brought to enforce a
4 covenant not to compete in which the covenant is found not to
5 meet the criteria in subsection (c) of Section 10, the court
6 retains discretion to modify the covenant not to compete to the
7 extent necessary to make the restraint reasonable under the
8 circumstances. If the court so modifies the covenant, the court
9 may not award the promisee any damages for a breach of the
10 covenant not to compete occurring before an order of
11 modification.

12 (b) Attorney's Fees and Costs of Litigation. For any action
13 brought to enforce a covenant not to compete in which the
14 subject agreement contains a provision granting the promisee a
15 right to recover attorney's fees or other costs of litigation
16 from the promisor, such provision shall be construed to provide
17 the promisor with a mutual entitlement to attorney's fees or
18 other costs of litigation should it be the prevailing party
19 against the promisee.

20 (c) Declaratory Judgment. Any promisor has the right to
21 file an action under Section 2-701 of the Code of Civil
22 Procedure for a declaration of his or her rights under a
23 covenant not to compete, and in the event the promisor is the
24 prevailing party in such a proceeding, the court may award him
25 or her reasonable attorneys' fees and court costs.

1 Section 25. Exceptions. This Act does not apply to and
2 shall not modify the common law with respect to:

3 (a) any agreement relating to the solicitation, hiring, or
4 contact with employees, vendors, or customers;

5 (b) any confidentiality agreement;

6 (c) any agreement between (i) a corporation, partnership,
7 limited liability partnership, limited liability company, and
8 (ii) its shareholders, partners, or members; and

9 (d) an agreement between an employer and employee under
10 which an employee receives incentive compensation of any kind,
11 and where the employer is entitled to forfeiture of such
12 compensation for competition.

13 Section 99. Effective date. This Act takes effect January
14 1, 2010.