

HB4976



97TH GENERAL ASSEMBLY

State of Illinois

2011 and 2012

HB4976

Introduced 2/3/2012, 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, 2013.

LRB097 17554 JLS 62760 b

A BILL FOR

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: (i) has substantial
18 involvement in the executive management of the promisee's
19 business, (ii) has direct and substantial contact with
20 customers of the promisee, (iii) has knowledge of bona fide
21 trade secrets or other proprietary information of the promisee,
22 (iv) has such unique skills that the person has achieved a high
23 degree of public or industry notoriety, fame, or reputation as

1 a representative of the promisee, or (v) is among the highest
2 paid 5% of the promisee's employees or independent contractors
3 in the year preceding a separation from service by the key
4 employee or key 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) "News media" means a newspaper or other periodical
11 issued at regular intervals whether in print or electronic
12 format, a news service whether in print or electronic format, a
13 radio station, a television station, a television network, a
14 community antenna television service, or a person or
15 corporation engaged in making news reels or other motion
16 picture news for public showing.

17 (g) "Trade secrets" means any trade secrets as defined in
18 the Illinois Trade Secrets Act and the common law under such
19 Act.

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

24 (a) the promisee is a key employee or key independent
25 contractor;

1 (b) the promisor either: (i) informs the key employee or
2 key independent contractor in a written offer at least 2 weeks
3 prior to the first day of the employment or contractor
4 relationship that a covenant not to compete is required as a
5 condition of employment or services, or (ii) enters into the
6 covenant not to compete with the promisee upon: (A) a material
7 advancement or promotion of the key employee or key independent
8 contractor, or (B) payment of a material bonus or material
9 increase in rate of regular compensation; and

10 (c) the covenant not to compete is narrowly tailored to
11 support the protection of a legitimate business interest of the
12 promisee against actual or threatened infringement by the
13 promisor.

14 Section 15. Rebuttable presumptions.

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

1 during the one year preceding termination of the employment or
2 independent contractor relationship.

3 (b) A promisee may introduce evidence to rebut the
4 presumptions in subsection (a) of this Section upon a showing
5 that more extensive restrictions are necessary to protect a
6 legitimate business interest.

7 Section 20. Remedies and procedures in actions to enforce
8 covenants not to compete.

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

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

1 (c) Declaratory Judgment. Any promisor has the right to
2 file an action under Section 2-701 of the Code of Civil
3 Procedure for a declaration of his or her rights under a
4 covenant not to compete, and in the event the promisor is the
5 prevailing party in such a proceeding, the court may award him
6 or her reasonable attorney's fees and court costs.

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

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

11 (b) any confidentiality agreement;

12 (c) any agreement between: (i) a corporation, partnership,
13 limited liability partnership, or limited liability company,
14 and (ii) its shareholders, partners, or members; and

15 (d) an agreement between an employer and employee under
16 which an employee receives incentive compensation of any kind,
17 and where the employer is entitled to forfeiture of such
18 compensation for competition.

19 Section 30. Act not applicable to news media. Nothing in
20 this Act applies to news media.

21 Section 99. Effective date. This Act takes effect January
22 1, 2013.