

2015 DRAFTING REQUEST

Bill

Received: 10/6/2014 Received By: gmalaise
Wanted: As time permits Same as LRB:
For: Paul Farrow (608) 266-9174 By/Representing: Lindsey Brabender
May Contact: Drafter: gmalaise
Subject: Employ Priv - miscellaneous Addl. Drafters:
Extra Copies:

Submit via email: YES
Requester's email: Sen.Farrow@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

No specific pre topic given

Topic:

Restrictive covenants in employment contracts

Instructions:

See attached--redraft 13-1395/1 with attached changes

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	gmalaise 10/29/2014	scalvin 11/10/2014		_____			
/P1	gmalaise 11/20/2014		rschluet 11/10/2014	_____	srose 11/10/2014		
/1	gmalaise 2/19/2015	scalvin 11/21/2014	jfrantze 11/21/2014	_____	sbasford 11/21/2014		
/2		kfollett	jfrantze	_____	mbarman	mbarman	

Vers. Drafted

Reviewed
2/19/2015

Typed
2/20/2015

Proofed

Submitted
2/20/2015

Jacketed
2/23/2015

Required

FE Sent For:

<END>

Not
Needed

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/2		kfollett	jfrantze	_____	mbarman		

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/P1	gmalaise 11/20/2014		rschlue 11/10/2014	_____	srose 11/10/2014		
/1		scalvin 11/21/2014	jfrantze 11/21/2014	_____	sbasford 11/21/2014		

FE Sent For:

12/5/14
2/1/15
JF
2/28/15
<END>

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Received By: gmalaise

Wanted: As time permits

Same as LRB:

For: Paul Farrow (608) 266-9174

By/Representing: Lindsey Brabender

May Contact:

Drafter: gmalaise

Subject: Employ Priv - miscellaneous

Addl. Drafters:

Extra Copies:

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Requester's email: Sen.Farrow@legis.wisconsin.gov
Carbon copy (CC) to:

Pre Topic:

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Topic:

Restrictive covenants in employment contracts

Instructions:

See attached--redraft 13-1395/1 with attached changes

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Table with columns: Vers., Drafted, Reviewed, Typed, Proofed, Submitted, Jacketed, Required. Rows include drafters gmalaise, scalvin, rschluet, and srose with dates.

FE Sent For: 1/ SAC 11/21/2014 1/ SAC 11/21/2014 (with handwritten signatures and dates)

<END>

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Instructions:

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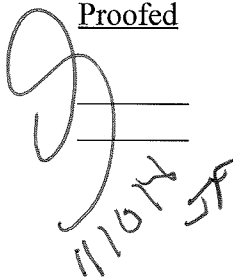
Drafting History:

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

/? gmalaise

/P1 SAC
11/10/2014

/P1 SAC
11/10/2014



FE Sent For:

<END>

Malaise, Gordon

From: Brabender, Lindsey
Sent: Wednesday, October 01, 2014 9:58 AM
To: Malaise, Gordon
Subject: 2013 LRB 1395/1
Attachments: Draft Restrictive Covenant Legislation - change to first draft.pdf; Draft Restrictive Covenant Legislation - Updated Changes.pdf

Attorney Malaise,

Quite a ways back you prepared a draft for our office, 2013 LRB 1395/1 re: restrictive covenants. I know it has been awhile but I have been working with some other groups on this and have some changes that I was hoping to have incorporated into a new draft of the bill for us to introduce during this upcoming session. I have attached two documents with those changes.

There is one part of the proposed changes that we are still ironing out concerning initial applicability, so please either skip that part for now or put it off to the last thing you do so we can figure out what exactly we want to do.

Please do not hesitate to contact me with any questions as you look over these documents.

Sincerely,
Lindsey

Lindsey Brabender
Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

Malaise, Gordon

From: Malaise, Gordon
Sent: Wednesday, October 01, 2014 1:55 PM
To: Brabender, Lindsey
Subject: RE: 2013 LRB 1395/1

Lindsey:

I have not yet reviewed the documents in detail, but on first impression I agree that the Initial Applicability provision needs some more work. So I figure that I should weigh in now so that your working group can consider my comments before going too much further.

I see two problems with the Initial Applicability language:

1. The language provides that prior decisions of the courts are invalid. I'm not sure whether that language is intended to be retroactive or prospective only. If it is intended to be retroactive, then in addition to any due process, separation of powers, and impairment of contract problems that you might have legally, you have the practical problem of trying to "unring the bell." The case is over and the parties have moved on. Plus, other businesses, relying on the precedent, have entered into agreements and otherwise ordered their business in accordance with the law as it existed at the time. So apart from the legal problems, I don't see how you can go back and change something that has already happened. If the language is intended to be prospective only, then you don't need it. The legislature overrules court decisions going forward all the time. If a court gets a case after the effective date of the bill, it will decide the case in accordance with the new law. To the extent that the new law conflicts with prior precedent, of course the court will decide the case in accordance with the new law and not in accordance with the legislatively overruled prior precedent.
2. The language also calls for the bill to be interpreted in accordance with the Florida statute and cases interpreting it. Here I see a glaring delegation of powers problem. Under the Wisconsin Constitution, the legislative power is vested in the senate and assembly, but by saying that Wisconsin law shall be construed in accordance with Florida law, we are in effect delegating Wisconsin's lawmaking power to Florida. For example, if the Florida legislature subsequently amends s. 542.335, Fla. Stats., the Florida legislature is in effect changing Wisconsin law. Under the Wisconsin Constitution they can't do that; only the Wisconsin legislature can change Wisconsin law. Fortunately, you don't need that language anyway because of the canon of statutory interpretation known as the borrowed statute rule, which holds that when a statute has received a judicial construction in another state and is then adopted by Wisconsin, it is taken with the construction which has been so given it. *Industry to Industry v. Hillsman Modular Modeling*, 2002 WI 51, par. 20 and n. 6, 252 Wis. 2d 544. It is well documented in the drafting file that this draft is based on the Florida statute, so if it found to be ambiguous, the court will construe it in accordance with the Florida law and any Florida cases construing it.

So I will hold off on making any changes to the Initial Applicability provision and will begin working on the remainder of the redrafting instructions.

Gordon

From: Brabender, Lindsey
Sent: Wednesday, October 01, 2014 9:58 AM
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Subject: 2013 LRB 1395/1

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Sincerely,
Lindsey

Lindsey Brabender
Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

Malaise, Gordon

From: Brabender, Lindsey
Sent: Thursday, October 09, 2014 1:56 PM
To: Malaise, Gordon
Subject: RE: 2013 LRB 1395/1

Hey Gordon – Just go ahead and keep all of the problematic language in the initial applicability section out. We should be good to go with it as drafted.

Thanks!

Lindsey Brabender

Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

From: Malaise, Gordon
Sent: Wednesday, October 01, 2014 1:55 PM
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Please do not hesitate to contact me with any questions as you look over these documents.

Sincerely,
Lindsey

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Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 103.465 of the statutes is repealed and recreated to read:

103.465 Restrictive covenants in employment and other business contracts.

(1) DEFINITIONS. In this section:

(a) "Legitimate business interest" includes all of the following:

1. Any business or professional information that is valuable and confidential but that does not qualify as a trade secret.
2. Substantial relationships with specific existing or prospective customers, patients, or clients.
3. Customer, patient, or client goodwill associated with a specific geographic location; a specific marketing or trade area; or an ongoing business or professional practice by way of a trade name, trademark, service mark, or trade dress that identifies a good or service with the business or professional practice.
4. Extraordinary or specialized training provided by a business or professional practice.

(b) "Posttermination restrictive covenant" means a restrictive covenant that applies after termination of the employment.

(c) "Restraint" means a restriction on or prohibition against competition provided in a restrictive covenant.

(d) "Restrictive covenant" means an agreement that restricts or prohibits competition as follows:

1. By an employee or agent of a business or professional practice during the term of the employment, agency, or employment contract or after termination of the employment, agency, or contract but shall not include an agreement that does not restrict or prohibit competition including, but not limited to, an agreement that limits the disclosure of business or professional information that is valuable and confidential to the employer but which is not valuable and confidential to a competitor or which may not be used by an employee or company to obtain a competitive advantage or an agreement that limits the solicitation and/or hire of employees that do not have restrictive covenants or extraordinary or specialized training provided by the employer including, but not limited to, unique, specialized or extraordinary skills or training obtained as a result of the employment relationship.

(2) ENFORCEMENT OF RESTRICTIVE COVENANTS.

(a) *Reasonableness.* Subject to sub. (3), enforcement of a restrictive covenant is not prohibited if the restrictive covenant is reasonable as to time, area, and line of business. A rebuttable presumption shall exist as to the reasonableness of any restrictive covenant that provides garden



leave during the term of the restrictive covenant term, as provided for in subsection 2.(k)2.f., below.

(b) *Legitimate business interest.* In any action for the enforcement of a restrictive covenant, a court may not enforce the restrictive covenant unless the restrictive covenant is in writing and signed by the person against whom enforcement is sought and the person seeking enforcement proves all of the following:

1. The existence of one or more legitimate business interests justifying the restrictive covenant. Any restrictive covenant not supported by a legitimate business interest is illegal, void, and unenforceable.
2. That the restraint specified in the restrictive covenant is reasonably necessary to protect the legitimate business interest justifying the restrictive covenant. If the person seeking enforcement of the restrictive covenant establishes a prima facie case that the restraint is reasonably necessary, the person against whom enforcement is sought has the burden of establishing that the restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest(s) identified. If the restraint is overbroad, overlong, or otherwise not reasonably necessary to protect that legitimate business interest, the court shall modify the restraint and grant only such relief as is reasonably necessary to protect the legitimate business interest(s) identified.
3. When considering whether a covenant is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest(s) and how to modify the restraint to ensure that it does so, a court shall consider: (a) the duration, nature and scope of the prior relationship between the party seeking to enforce the agreement and the employee or agent; (b) the duration, nature and scope of the threat, potential risk and/or harm, imminent, irreparable or otherwise, that an employee's violation of the restrictive covenant presents to the party seeking to enforce the agreement; (c) the prior conduct of the employee or agent from the date of execution of the restraint forward that is relevant to the duration, nature and scope of the restraint and/or its enforcement; and, (d) any evidence of common practice affecting the duration, nature and scope of restraints in the specific industry of the party seeking enforcement of the agreement.

(c) *Rebuttable presumptions.* In determining the reasonableness in time of a posttermination restrictive covenant, a court shall apply the following rebuttable presumptions:

1. In the case of a posttermination restrictive covenant sought to be enforced against a former employee, agent, or pursuant to an employment contract, the court shall presume a restraint of 6 months or less from the termination of the employment, agency, or contract to be reasonable and a restraint of longer than 2 years from the termination of the employment, agency, or contract to be unreasonable, unless the Court determines that clear and convincing evidence exists supports a restraint beyond 2 years from the termination of the employment, agency of contract.

(d) *3rd-party beneficiaries, assignees, and successors.* A court may not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement of the restrictive covenant is a 3rd-party beneficiary of the restrictive covenant or is an assignee of or a successor to a party to the restrictive covenant if any of the following apply:

1. In the case of a 3rd-party beneficiary of the restrictive covenant, the restrictive covenant expressly identifies the person as a 3rd-party beneficiary of the restrictive covenant and expressly states that the restrictive covenant is intended for the benefit of that person.
2. In the case of an assignee of or a successor to a party to the restrictive covenant, the restrictive covenant expressly authorizes an assignee of or successor to the party to enforce the restrictive covenant.

(e) *Considerations in enforcing restrictive covenants.* In determining the enforceability of a restrictive covenant, a court shall consider the effect of enforcement of the restrictive covenant on the public health, safety, and welfare and shall consider all pertinent legal and equitable defenses, except as follows;

1. The court may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.
2. The court may consider as a defense to the enforcement of the restrictive covenant the fact that the person seeking enforcement is no longer in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if the discontinuance of business is not the result of a violation of the restrictive covenant.

(f) *Construction of restrictive covenants.* A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement of the restrictive covenant. A court may not employ any rule of contractual interpretation that requires a restrictive covenant to be construed narrowly, against the restraint, or against the drafter of the restrictive covenant.

(g) *Public policy.* No court may refuse to enforce an otherwise enforceable restrictive covenant on the ground that the restrictive covenant violates public policy unless the court specifically articulates the public policy and finds that the public policy substantially outweighs the intent of this section and the need to protect the legitimate business interests established by the person seeking enforcement of the restraint.

(h) *Remedies.* If a court determines that a restrictive covenant is enforceable, the court shall enforce the restrictive covenant by any appropriate and effective remedy, including a temporary or permanent injunction. Violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant. A court may not order a temporary injunction to enforce a restrictive covenant unless the person seeking enforcement of the restrictive covenant posts a bond upon such terms as the court considers proper to secure the rights of the person enjoined. The court may not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such a bond.

(i) *Effect.* The remedies provided by this section are cumulative of other remedies provided by Wisconsin law or other law. This section is not intended to displace, and should not be construed to displace, any existing claims or remedies at law or in equity as of the effective date.

(l) *Costs and attorney fees.* If an agreement contains a contractual provision authorizing the award of costs and attorney's fees to the prevailing party in an action seeking enforcement of, or challenging the enforceability of, a restrictive covenant, a court shall enforce the provision and shall not deny enforcement of the agreement or the provision. A court may not enforce any contractual provision limiting the court's authority under this paragraph.

(j) *Resolution.* Should the person seeking enforcement reach an agreement resolving a pending or threatened action against an employee or agent, a court may adopt the parties' agreement at the parties' request provided the agreement meets the intent of this section, subject to subsequent enforcement by either party.

(k) *Valid consideration for a restrictive covenant.* In determining whether valid consideration was provided for a restrictive covenant, a court shall determine whether or not valid consideration was provided at or within a reasonable time after the execution of the covenant(s) as set forth below. An employee and employer are free to enter into a restrictive covenant at any time. "Valid consideration" shall be found by a court reviewing a restrictive covenant where one or more of the following exist:

1. An employee executes a restrictive covenant at, or within a reasonable time frame of, the commencement of employment, *provided* the employment was contingent upon the execution of the covenant;
2. At or about the time of the execution during employment, an employee received one or more thing of monetary or other value, which shall include, but not necessarily be limited to, the following:
 - a. Monetary consideration;
 - b. A bonus or incentive payment;
 - c. Additional paid time off, *provided* the employee voluntarily acknowledges at the time of the covenant's execution that the amount of paid time off is adequate consideration for the restrictive covenant;
 - d. Access to a bonus or other incentive program or pool through which an employer provides additional compensation to the employee, *provided* the employee would not otherwise have had access to the bonus or incentive program or pool if the covenant had not been executed;
 - e. Continued employment, *provided* that the continued employment is contingent upon the execution of the covenant and, *provided* the employee continues employment at the same or greater rate of pay and benefits after the covenant's execution; or,
 - f. A promise of value provided to the employee at the time of execution, such as an employer's promise to provide garden leave to the employee during the term of the restrictive covenant after employee has provided adequate advanced notice of resignation to the employer, as set forth in a written agreement governing the terms of, and restraints

during, the garden leave, *provided* the employer makes a valid offer to fulfill its promise, and does so, when circumstances warrant under the written agreement; and,

3. At or about the time the employment relationship terminates *provided* the employer provides separate consideration for the restrictive covenant acceptable to the employee above and beyond any other compensation due to the employee or consideration provided by the employer for other covenants, releases and promises provided by the employee.

(1) *Bond*. A party seeking enforcement of a restrictive covenant shall not be required to post a bond in order to obtain injunctive relief, nor shall a court require a bond as a condition precedent to the issuance of an injunction, under this subsection. A court, acting in equity, may order the party seeking injunctive relief to provide adequate security to the party enjoined against damages that he or she may sustain by reason of the injunction that is sufficient to protect the security interests of the party enjoined.

(3) **ILLEGAL RESTRAINTS OF TRADE**. Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under s. 133.03 or any similar federal law.

SECTION 2. Initial applicability.

(1) **RESTRICTIVE COVENANTS IN EMPLOYMENT**. This act first applies to a restrictive covenant, as defined in section 103.465 (1) (d) of the statutes, as repealed and recreated by this act, entered into or extended, modified, or renewed on the effective date of this subsection. Any decision of a Wisconsin court prior to the effective date of this subsection is void to the extent such decision directly or indirectly contravenes, or is inconsistent with, this subsection. In the absence of primary authority by a Wisconsin court, guidance in the interpretation and application of this subsection shall be found in Florida Statute § 542.335 "Valid restraints of trade or commerce" and cases interpreting and applying it. Absent any such guidance by Florida courts, the restrictive covenant statutes, cases and regulations and other interpretative guidance relating to similar provisions may be cited as persuasive authority.

AMENDMENT TO OTHER SECTION:

813.06 Security for damages. In proceedings under s. 767.225 the court or judge may, and in all other proceedings except proceedings under ss. 103.465, 813.12, 813.122, 813.125 and 823.113 the court or judge shall, require a bond of the party seeking an injunction, with sureties, to the effect that he or she will pay to the party enjoined such damages, not exceeding an amount to be specified, as he or she may sustain by reason of the injunction if the court finally decides that the party was not entitled thereto. Copies of such bond, affidavit or other pleading shall be served upon the party enjoined and the officer serving the same shall, within 8 days after such service, file his or her return in the office of the clerk of the court.

(END)

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 103.465 of the statutes is repealed and recreated to read:

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(1) DEFINITIONS. In this section:

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1. A trade secret, as defined in s. 134.90 (1) (c), or any other business or professional information that is valuable and confidential but that does not qualify as a trade secret.
2. Substantial relationships with specific existing or prospective customers, patients, or clients.
3. Customer, patient, or client goodwill associated with a specific geographic location; a specific marketing or trade area; or an ongoing business or professional practice by way of a trade name, trademark, service mark, or trade dress that identifies a good or service with the business or professional practice.
4. Extraordinary or specialized training provided by a business or professional practice.

(b) "Posttermination restrictive covenant" means a restrictive covenant that applies after termination of the employment, agency, or contract of an employee, agent, or independent contractor, after termination of the distributorship, dealership, franchise, or trademark or service mark license of a distributor, dealer, franchisee, or licensee of a trademark or service mark, or after the sale of a business or professional practice by a seller.

(c) "Restraint" means a restriction on or prohibition against competition provided in a restrictive covenant.

(d) "Restrictive covenant" means an agreement that restricts or prohibits competition as follows:

1. By an employee or, agent, or independent contractor of a business or professional practice during the term of the employment, agency, or employment contract or after termination of the employment, agency, or contract.
2. By a distributor, dealer, franchisee, or licensee of a trademark or service mark of a business or professional practice during the term of a distributorship, dealership, franchise, or trademark or service mark license or after termination of a distributorship, dealership, franchise, or trademark or service mark license.
3. By a seller of a business or professional practice after the sale of the business or professional practice.

(e) ~~“Sale of a business or professional practice” means the sale of all or part of the assets of a business or professional practice, the shares of a corporation engaged in a business or professional practice, an interest in a partnership engaged in a business or professional practice, membership in a limited liability company engaged in a business or professional practice, or any other equity interest in a business or professional practice.~~

(2) ENFORCEMENT OF RESTRICTIVE COVENANTS.

(a) *Reasonableness.* Subject to sub. (3), enforcement of a restrictive covenant is not prohibited if the restrictive covenant is reasonable as to time, area, and line of business.

(b) *Legitimate business interest.* In any action for the enforcement of a restrictive covenant, a court may not enforce the restrictive covenant unless the restrictive covenant is in writing and signed by the person against whom enforcement is sought and the person seeking enforcement proves all of the following:

1. The existence of one or more legitimate business interests justifying the restrictive covenant. Any restrictive covenant not supported by a legitimate business interest is illegal, void, and unenforceable.

2. That the restraint specified in the restrictive covenant is reasonably necessary to protect the legitimate business interest justifying the restrictive covenant. If the person seeking enforcement of the restrictive covenant establishes a prima facie case that the restraint is reasonably necessary, the person against whom enforcement is sought has the burden of establishing that the restraint is overbroad, overlong, or otherwise not reasonably necessary to protect ~~that~~ legitimate business interest(s) identified. If the restraint is overbroad, overlong, or otherwise not reasonably necessary to protect that legitimate business interest, the court shall modify the restraint and grant only such relief as is reasonably necessary to protect ~~that~~ legitimate business interest(s) identified.-

3. When considering whether a covenant is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest(s) and how to modify the restraint to ensure that it does so, a court shall consider: (a) the duration, nature and scope of the prior relationship between the party seeking to enforce the agreement and the employee or agent; (b) the duration, nature and scope of the threat, potential risk and/or harm, imminent, irreparable or otherwise, that an employee’s violation of the restrictive covenant presents to the party seeking to enforce the agreement; (c) the prior conduct of the employee or agent from the date of execution of the restraint forward that is relevant to the duration, nature and scope of the restraint and/or its enforcement; and, (d) any evidence of common practice affecting the duration, nature and scope of restraints in the specific industry of the party seeking enforcement of the agreement.

(c) *Rebuttable presumptions.* In determining the reasonableness in time of a posttermination restrictive covenant, a court shall apply the following rebuttable presumptions:

1. ~~Subject to subds. 3. and 4.,~~ In the case of a posttermination restrictive covenant sought to be enforced against a former employee, agent, or independent pursuant to an employment contractor of a business or professional practice, the court shall presume a restraint of 6 months or less from the termination of the employment, agency, or contract to be reasonable and a restraint of longer than 2 years from the termination of the employment, agency, or contract to be unreasonable, unless the Court determines that clear and convincing evidence exists supports a restraint beyond 2 years from the termination of the employment, agency of contract.

2. ~~Subject to subds. 3. and 4., in the case of a posttermination restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark of a business or professional practice, the court shall presume a restraint of one year or less from the termination of the distributorship, dealership, franchise, or license to be reasonable and a restraint of longer than 3 years from the termination of the distributorship, dealership, franchise, or license to be unreasonable.~~

3. ~~Subject to subd. 4., in the case of a posttermination restrictive covenant sought to be enforced against a seller of a business or professional practice, the court shall presume a restraint of 3 years or less from the sale of the business to be reasonable and a restraint of longer than 7 years from the sale of the business to be unreasonable.~~

4. ~~In the case of a posttermination restrictive covenant predicated on the protection of a trade secret, the court shall presume a restraint of 5 years or less from the termination of the employment, agency, contract, distributorship, dealership, franchise, license, or sale of the business or professional practice to be reasonable and a restraint of longer than 10 years from the termination of the employment, agency, contract, distributorship, dealership, franchise, license or sale of the business or professional practice to be unreasonable.~~

(d) *3rd-party beneficiaries, assignees, and successors.* A court may not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement of the restrictive covenant is a 3rd-party beneficiary of the restrictive covenant or is an assignee of or a successor to a party to the restrictive covenant if any of the following apply:

1. In the case of a 3rd-party beneficiary of the restrictive covenant, the restrictive covenant expressly identifies the person as a 3rd-party beneficiary of the restrictive covenant and expressly states that the restrictive covenant is intended for the benefit of that person.

2. In the case of an assignee of or a successor to a party to the restrictive covenant, the restrictive covenant expressly authorizes an assignee of or successor to the party to enforce the restrictive covenant.

(e) *Considerations in enforcing restrictive covenants.* In determining the enforceability of a restrictive covenant, a court shall consider the effect of enforcement of the restrictive covenant on the public health, safety, and welfare and shall consider all pertinent legal and equitable defenses, except as follows;

1. The court may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

2. The court may consider as a defense to the enforcement of the restrictive covenant the fact that the person seeking enforcement is no longer in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if the discontinuance of business is not the result of a violation of the restrictive covenant.

(f) *Construction of restrictive covenants.* A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement of the restrictive covenant. A court may not employ any rule of contractual interpretation that requires a restrictive covenant to be construed narrowly, against the restraint, or against the drafter of the restrictive covenant.

(g) *Public policy.* No court may refuse to enforce an otherwise enforceable restrictive covenant on the ground that the restrictive covenant violates public policy unless the court specifically articulates the public policy and finds that the public policy substantially outweighs the intent of this section and the need to protect the legitimate business interests established by the person seeking enforcement of the restraint.

(h) *Remedies.* If a court determines that a restrictive covenant is enforceable, the court shall enforce the restrictive covenant by any appropriate and effective remedy, including a temporary or permanent injunction. Violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of the restrictive covenant. A court may not order a temporary injunction to enforce a restrictive covenant unless the person seeking enforcement of the restrictive covenant posts a bond upon such terms as the court considers proper to secure the rights of the person enjoined. The court may not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such a bond.

(i) *Effect.* The remedies provided by this section are cumulative of other remedies provided by Wisconsin law or other law. This section is not intended to displace, and should not be construed to displace, any existing claims or remedies at law or in equity as of the effective date.

(i) *Costs and attorney fees.* ~~In the absence of a~~ If an agreement contains a contractual provision authorizing the award of costs and attorneys fees to the prevailing party in an action seeking enforcement of, or challenging the enforceability of, a restrictive covenant, a court may shall award costs and attorneys fees to the prevailing party enforce the provision and shall not deny enforcement of the agreement or the provision. A court may not enforce any contractual provision limiting the court's authority under this paragraph.

(j) *Resolution.* Should the person seeking enforcement reach an agreement resolving a pending or threatened action against an employee or agent, a court may adopt the parties' agreement at the parties' request provided the agreement meets the intent of this section, subject to subsequent enforcement by either party.

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(3) ILLEGAL RESTRAINTS OF TRADE. Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under s. 133.03 or any similar federal law.

SECTION 2. Initial applicability.

(1) RESTRICTIVE COVENANTS IN EMPLOYMENT AND OTHER BUSINESS CONTRACTS. This act first applies to a restrictive covenant, as defined in section 103.465 (1) (d) of the statutes, as repealed and recreated by this act, entered into or extended, modified, or renewed on the effective date of this subsection.

(END)

Wednesday, October 01, 2014



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Garden Leave Clause

arbitration clause

fedarb.com

model arbitration contract clause best arbitration practices
Judg



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Definition of garden leave clause

A clause in an employment contract that provides for a long period of notice by the employer, during which the employee will be remunerated in full but will not be required to attend at the workplace. The use of such clauses is increasing by employers wishing to safeguard trade secrets or, more importantly, prevent a highly skilled employee from leaving to undertake work for a rival firm. An employee wishing to leave, or one who has been head-hunted, could be required to serve "garden leave" for a period of up to one year in order to lawfully terminate his existing contract. Throughout the period of garden leave an employee will be subject to all the normal contractual restraints. Management sees the use of such clauses as an expensive, but reliable and enforceable, alternative to traditional restraint of trade clauses. Moreover, these clauses may be enforced by way of injunction without encountering the difficulties that arise with respect to restraint of trade clauses, which are notoriously difficult to draft and enforce.

Related Topics:

1. Arbitration Clause
2. Objects Clause
3. Optional Clause
4. Exemption Clause
5. Honour Clause
6. Interpretation Clause
7. Break Clause
8. Romalpa Clause
9. Charging Clause
10. Clause
11. Calvo Clause
12. Maternity Leave

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Timeshare Practice Areas

Exactly how Paying Departing Workers to "Tend the actual Garden" Will benefit a good Employer's Business

... for a competitor prepared to contend. With this access, we are going to explore the different ways the garden leave term may the actual company. In following entries, we are going to consider problems associated with...

Utilizing Garden Leave regarding Departing Workers

... work of examining legislation about them. Just about all favor importing back garden leave clauses straight into employment agreements. Some lawyer (or much more likely a few firm)...

Yard Leave Employment Agreements

... Empire have a part of their work agreements famous " back garden leave" clauses. Within garden keep clause, member of staff promises to provide some discover...

Horticulture Leave Treatments

... associated with honesty, commitment and faithful assistance; and/or any kind of express term like a back garden leave clause that will prohibit member of staff from getting other business passions throughout...

Grammatically speaking, what is a complement?...

... Within grammar the word complement is utilized with various connotations. Your core muscles meaning associated with complement is really a term, phrase or even clause that is necessary in the sentence in order to d...

Would you agree with your spouse if they wanted to move into this type of neighborhood?...

... May be the neighborhood extremely weird or exactly what?? I actually wouldn't accept go reside somewhere like this. NO CHANCE! Which



State of Wisconsin
2013 - 2014 LEGISLATURE

IN 10129



LRB-1305/1
GMM:sac:ph
Stays

0379/PI

2013 BILL

1 AN ACT to repeal and recreate 103.465 of the statutes; relating to: restrictive
2 covenants in employment and other business contracts.

agency relationships

Analysis by the Legislative Reference Bureau

Current law

Covenants not to compete. Under current law, a covenant by an employee or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time (covenant not to compete) is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Currently, any covenant not to compete that imposes an unreasonable restraint on an employee or agent is illegal, void, and unenforceable even as to any part of the covenant that would be a reasonable restraint.

The bill

Restrictive covenants. This bill repeals ^{or} current law relating to covenants not to compete and instead creates a new provision relating to restrictive covenants in employment and ~~other business contracts~~. Under the bill, "restrictive covenant" means an agreement that restricts or prohibits competition: 1) by an employee, ^{or} ~~agent, or independent contractor~~ of a business or professional practice during the term, or after the termination, of the employment, agency, or contract; 2) by a distributor, dealer, franchisee, or licensee of a trademark or service mark of a business or professional practice during the term, or after the termination, of a

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(B) valid consideration

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~~distributorship, dealership, franchise, or trademark or service mark license; or 3) by a seller of a business or professional practice after the sale of the business or professional practice.~~

Reasonableness and ~~legitimate business interest~~. Specifically, the bill provides that enforcement of a restrictive covenant is not prohibited if the restrictive covenant is reasonable as to time, area, and line of business and that a court may not enforce a restrictive covenant unless the person seeking enforcement of the restrictive covenant proves the existence of a legitimate business interest justifying the restrictive covenant and that the restriction or prohibition on competition specified in the restrictive covenant (restraint) is reasonably necessary to protect that legitimate business interest. The bill defines "legitimate business interest" to include: 1) ~~a trade secret, or any other~~ business or professional information that is valuable and confidential but that does not qualify as a trade secret; 2) substantial relationships with specific existing or prospective customers, patients, or clients; 3) customer, patient, or client goodwill associated with a specific geographic location, a specific marketing or trade area, or an ongoing business or professional practice; or 4) extraordinary or specialized training provided by a business or professional practice.

that applies after the termination of an employment or agency relationship

Rebuttable presumptions. In addition, the bill requires a court, in determining the reasonableness ~~(in time)~~ of a restrictive covenant ~~that applies after the termination of a business relationship (posttermination restrictive covenant)~~, to apply the following rebuttable presumptions:

1. In the case of a ~~posttermination~~ restrictive covenant ~~sought to be enforced against a former employee, agent, or independent contractor~~, that a restraint of six months or less is presumed to be reasonable and a restraint of longer than two years is presumed to be unreasonable.

2. In the case of a ~~posttermination~~ restrictive covenant ~~sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark~~, that a restraint of one year or less is presumed to be reasonable and a restraint of longer than three years is presumed to be unreasonable.

3. In the case of a ~~posttermination~~ restrictive covenant ~~sought to be enforced against a seller of a business or professional practice~~, that a restraint of three years or less is presumed to be reasonable and a restraint of longer than seven years is presumed to be unreasonable.

4. In the case of a ~~posttermination~~ restrictive covenant ~~predicated on the protection of a trade secret~~, that a restraint of five years or less is presumed to be reasonable and a restraint of longer than ten years is presumed to be unreasonable.

Third-party beneficiaries, assignees, and successors. Under the bill, subject to certain conditions, a court may not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement of the restrictive covenant is a third-party beneficiary of the restrictive covenant or is an assignee of or a successor to a party to the restrictive covenant.

Enforcement considerations. The bill also requires a court, in determining the enforceability of a restrictive covenant, to consider the effect of enforcement of the restrictive covenant on the public health, safety, and welfare and to consider all

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pertinent legal and equitable defenses, except that the court may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought and the court may consider as a defense to the enforcement of the restrictive covenant the fact that the person seeking enforcement is no longer in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if the discontinuance of business is not the result of a violation of the restrictive covenant.

Construction of restrictive covenants. Moreover, the bill requires a court to construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement of the restrictive covenant and not to employ any rule of contractual interpretation that requires a restrictive covenant to be construed narrowly, against the restraint, or against the drafter of the restrictive covenant.

the policy underlying the bill

Public policy. Further, the bill prohibits a court from refusing to enforce an otherwise enforceable restrictive covenant on the ground that the restrictive covenant violates public policy unless the court specifically articulates the public policy and finds that the public policy substantially outweighs the need to protect the legitimate business interests established by the person seeking enforcement of the restraint.

Insert A-5

Remedies; costs and attorney fees. Finally, the bill provides that if a court determines that a restrictive covenant is enforceable, the court must enforce the restrictive covenant by any appropriate and effective remedy, including a temporary or permanent injunction and that, in the absence of a contractual provision authorizing the award of costs and attorneys fees, a court may award costs and attorneys fees to the prevailing party.

Insert A-6

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

agency relationships

1 SECTION 1. 103.465 of the statutes is repealed and recreated to read:

2 **103.465 Restrictive covenants in employment and other business**

3 **contracts.** (1) DEFINITIONS. In this section:

4 (a) "Legitimate business interest" includes all of the following:

5 1. ~~A trade secret, as defined in s. 134.90 (1) (c), or any other~~ business or
6 professional information that is valuable and confidential but that does not qualify
7 as a trade secret.

Any

*s. 134.90 (1)(c)
, as defined in s. 134.90 (1)(c)*

to a business or professional practice

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1 2. Substantial relationships with specific existing or prospective customers,
2 patients, or clients. *of a business or professional practice*

3 3. Customer, patient, or client goodwill associated with a specific geographic
4 location; a specific marketing or trade area; or an ongoing business or professional
5 practice by way of a trade name, trademark, service mark, or trade dress that
6 identifies a good or service with the business or professional practice.

7 *Unique* 4. *↑* Extraordinary or specialized training provided by a business or professional
8 practice. *or obtained as a result of an employment or agency relationship with*
a business or professional practice

9 (b) "Posttermination restrictive covenant" means a restrictive covenant that
10 applies after termination of ~~the employment, agency, or contract of an employee,~~
11 ~~agent, or independent contractor, after termination of the distributorship,~~
12 ~~dealership, franchise, or trademark or service mark license of a distributor, dealer,~~
13 ~~franchisee, or licensee of a trademark or service mark, or after the sale of a business~~
14 ~~or professional practice by a seller.~~ *an employment or agency relationship*

15 (c) "Restraint" means a restriction on or prohibition against competition
16 provided in a restrictive covenant.

17 ~~(d) "Restrictive covenant" means an agreement that restricts or prohibits~~
18 ~~competition as follows:~~
19 1. ~~By an employee, agent, or independent contractor of a business or~~
20 ~~professional practice during the term of the employment, agency, or contract or after~~
21 ~~termination of the employment, agency, or contract.~~
22 2. ~~By a distributor, dealer, franchisee, or licensee of a trademark or service~~
23 ~~mark of a business or professional practice during the term of a distributorship,~~
24 ~~dealership, franchise, or trademark or service mark license or after termination of~~
25 ~~a distributorship, dealership, franchise, or trademark or service mark license.~~

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~~3. By a seller of a business or professional practice after the sale of the business or professional practice.~~

~~(e) "Sale of a business or professional practice" means the sale of all or part of the assets of a business or professional practice, the shares of a corporation engaged in a business or professional practice, an interest in a partnership engaged in a business or professional practice, membership in a limited liability company engaged in a business or professional practice, or any other equity interest in a business or professional practice.~~

Insert
5-8

(B)(1) and valid consideration

(2) ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) Reasonableness. Subject to sub. (3), enforcement of a restrictive covenant is not prohibited if the restrictive covenant is reasonable as to time, area, and line of business,

Insert
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and is supported by valid consideration, as determined under par. (b)

(c) Legitimate business interest. In any action for the enforcement of a restrictive covenant, a court may not enforce the restrictive covenant unless the restrictive covenant is in writing and signed by the person against whom enforcement is sought and the person seeking enforcement proves all of the following:

1. The existence of one or more legitimate business interests justifying the restrictive covenant. Any restrictive covenant not supported by a legitimate business interest is illegal, void, and unenforceable.

2. That the restraint specified in the restrictive covenant is reasonably necessary to protect the legitimate business interest justifying the restrictive covenant. If the person seeking enforcement of the restrictive covenant establishes a prima facie case that the restraint is reasonably necessary, the person against whom enforcement is sought has the burden of establishing that the restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate

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established by the person seeking enforcement

1 business interest. If the restraint is overbroad, overlong, or otherwise not reasonably
2 necessary to protect that legitimate business interest, the court shall modify the
3 restraint and grant only such relief as is reasonably necessary to protect that
4 legitimate business interest.

5 ~~(c) *Rebuttable presumptions.* In determining the reasonableness in time of a~~
6 ~~posttermination restrictive covenant, a court shall apply the following rebuttable~~
7 ~~presumptions:~~

8 1. Subject to subds. 3. and 4., in the case of a posttermination restrictive
9 covenant sought to be enforced against a former employee, agent, or independent
10 contractor of a business or professional practice, the court shall presume a restraint
11 of 6 months or less from the termination of the employment, agency, or contract to
12 be reasonable and a restraint of longer than 2 years from the termination of the
13 employment, agency, or contract to be unreasonable.

14 2. Subject to subds. 3. and 4., in the case of a posttermination restrictive
15 covenant sought to be enforced against a former distributor, dealer, franchisee, or
16 licensee of a trademark or service mark of a business or professional practice, the
17 court shall presume a restraint of one year or less from the termination of the
18 distributorship, dealership, franchise, or license to be reasonable and a restraint of
19 longer than 3 years from the termination of the distributorship, dealership,
20 franchise, or license to be unreasonable.

21 3. Subject to subd. 4., in the case of a posttermination restrictive covenant
22 sought to be enforced against a seller of a business or professional practice, the court
23 shall presume a restraint of 3 years or less from the sale of the business to be
24 reasonable and a restraint of longer than 7 years from the sale of the business to be
25 unreasonable.

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~~4. In the case of a posttermination restrictive covenant predicated on the protection of a trade secret, the court shall presume a restraint of 5 years or less from the termination of the employment, agency, contract, distributorship, dealership, franchise, license, or sale of the business or professional practice to be reasonable and a restraint of longer than 10 years from the termination of the employment, agency, contract, distributorship, dealership, franchise, license or sale of the business or professional practice to be unreasonable.~~

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^{e(I) Third}
(f) (d) 3rd-party beneficiaries, assignees, and successors. A court may not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement of the restrictive covenant is a 3rd-party beneficiary of the restrictive covenant or is an assignee of or a successor to a party to the restrictive covenant if any of the following apply:

1. In the case of a 3rd-party beneficiary of the restrictive covenant, the restrictive covenant expressly identifies the person as a 3rd-party beneficiary of the restrictive covenant and expressly states that the restrictive covenant is intended for the benefit of that person.

2. In the case of an assignee of or a successor to a party to the restrictive covenant, the restrictive covenant expressly authorizes an assignee of or successor to the party to enforce the restrictive covenant.

(g) (e) Considerations in enforcing restrictive covenants. In determining the enforceability of a restrictive covenant, a court shall consider the effect of enforcement of the restrictive covenant on the public health, safety, and welfare and shall consider all pertinent legal and equitable defenses, except as follows;

1. The court may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.

BILL

1 2. The court may consider as a defense to the enforcement of the restrictive
 2 covenant the fact that the person seeking enforcement is no longer in business in the
 3 area or line of business that is the subject of the action to enforce the restrictive
 4 covenant only if the discontinuance of business is not the result of a violation of the
 5 restrictive covenant.

6 (h) (P) *Construction of restrictive covenants.* A court shall construe a restrictive
 7 covenant in favor of providing reasonable protection to all legitimate business
 8 interests established by the person seeking enforcement of the restrictive covenant.
 9 A court may not employ any rule of contractual interpretation that requires a
 10 restrictive covenant to be construed narrowly, against the restraint, or against the
 11 drafter of the restrictive covenant.

the the
the policy underlying this section and

12 (i) (g) *Public policy.* No court may refuse to enforce an otherwise enforceable
 13 restrictive covenant on the ground that the restrictive covenant violates public policy
 14 unless the court specifically articulates ^e public policy and finds that the public
 15 policy substantially outweighs the need to protect the legitimate business interests
 16 established by the person seeking enforcement of the restraint.

Insert
8-16/16

17 (k) (h) *Remedies.* (i) If a court determines that a restrictive covenant is enforceable,
 18 the court shall enforce the restrictive covenant by any appropriate and effective
 19 remedy, including a temporary or permanent injunction. Violation of an enforceable
 20 restrictive covenant creates a presumption of irreparable injury to the person
 21 seeking enforcement of the restrictive covenant.

~~A court may not order a temporary
 injunction to enforce a restrictive covenant unless the person seeking enforcement
 of the restrictive covenant posts a bond upon such terms as the court considers proper
 to secure the rights of the person enjoined. The court may not enforce any contractual~~

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~~provision waiving the requirement of an injunction bond or limiting the amount of such a bond.~~

If a restrictive covenant contains

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(b) (1) Costs and attorney fees. In the absence of a contractual provision authorizing the award of costs and attorneys fees to the prevailing party in an action seeking enforcement of, or challenging the enforceability of, a restrictive covenant, a court may award costs and attorneys fees to the prevailing party. A court may not enforce any contractual provision limiting the court's authority under this paragraph.

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(3) ILLEGAL RESTRAINTS OF TRADE. Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce that is otherwise illegal or unenforceable under s. 133.03 or any similar federal law.

11

SECTION 2. Initial applicability.

(CS) relationships
(1) AGENCY RELATIONSHIPS

all lower case

- 12

(1) RESTRICTIVE COVENANTS IN EMPLOYMENT AND ~~OTHER BUSINESS CONTRACTS~~. This act first applies to a restrictive covenant, as defined in section 103.465 (1) (d) of the statutes, as repealed and recreated by this act, entered into or extended, modified, or renewed on the effective date of this subsection.

- 16

(END)

2015-2016 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0379/P1ins
GMM.....

(INSERT 5-8)

1 (d) "Restrictive covenant" means an agreement that restricts or prohibits
2 competition by an employee or agent of a business or professional practice during the
3 term of the employment or agency relationship or after the termination of that
4 relationship. "Restrictive covenant" does not include an agreement that does not
5 restrict or prohibit competition by an employee or agent of a business or professional
6 practice, including any of the following:

7 1. An agreement restricting or prohibiting an employee or agent from
8 disclosing business or professional information that is valuable and confidential to
9 the employer or principal, but that is not valuable and confidential to a competitor
10 of the employer or ^{principal} agent or useful to the employee, the agent, or a competitor in
11 obtaining a competitive advantage over the employer or principal.

12 2. An agreement restricting or prohibiting the solicitation or hiring of an
13 employee or agent who is not privy to valuable and confidential business or
14 professional information of the business or professional practice, who does not have
15 substantial relationships with existing or prospective customers, patients, or clients,
16 and who has not received unique, extraordinary, or specialized training provided by
17 the business or professional practice or otherwise obtained as a result of the
18 employment or agency relationship with the business or professional practice.

(END OF INSERT)

(INSERT 5-11)

19 (b) *Determination of valid consideration.* In any action for the enforcement of
20 a restrictive covenant, a court shall determine that the restrictive covenant is

1 supported by valid consideration if the court finds that any of the following situations
2 exists:

3 1. That the restrictive covenant was executed at, or within a reasonable time
4 after, the commencement of the employment or agency relationship and that the offer
5 of employment or agency, or of continuation of the employment or agency
6 relationship, was contingent on the execution of the restrictive covenant.

7 2. That the restrictive covenant was executed after the time frame specified in
8 subd. 1., but before the time frame specified in subd. 3., and that at or about the time
9 of execution of the restrictive covenant the employee or agent received in connection
10 with the execution of the restrictive covenant any payment or other thing of value,
11 including any of the following:

12 a. Monetary consideration.

13 b. A bonus or incentive payment.

14 c. In the case of an employee, additional paid time off, if the employee
15 acknowledged at the time of execution of the restrictive covenant that the amount
16 of additional paid time off is adequate consideration to support the restrictive
17 covenant.

18 d. Access to a bonus or other incentive program or pool through which the
19 employee or agent receives additional compensation, if the employee or agent would
20 not have had access to the program had he or she not executed the restrictive
21 covenant.

22 e. Continuation of the employment or agency relationship at a rate of pay and
23 benefits that is equal to or greater than the pay and benefits received before the
24 execution of the restrictive covenant, if continuation of the employment or agency
25 relationship is contingent on execution of the restrictive covenant.

1 f. A promise made at the time of execution of the restrictive covenant to provide
 2 any payment or other thing of value during the term of the restrictive covenant as
 3 specified in a written agreement setting forth the circumstances under which that
 4 payment or other thing of value will be provided, if the employer or principal fulfills
 5 that promise when those circumstances occur. This subd. ^{22.} 1 f. includes a promise to
 6 provide paid leave to an employee from the date on which the employer receives
 7 notice of resignation of the employee from the employment relationship or provides
 8 notice to the employee of termination of the employment relationship to the date on
 9 which the employment relationship ends.

10 3. That the restrictive covenant was executed at or about the time of
 11 termination of the employment or agency relationship and that the restrictive
 12 covenant was supported by valid consideration acceptable to the employee or agent
 13 above and beyond any compensation due the employee or agent and any
 14 consideration provided for any other covenants, releases, or promises made by the
 15 employee or agent.

(END OF INSERT)

(INSERT 7-7)

16 (d) *Determination of reasonable necessity of restraint.* In determining whether
 17 a restraint specified in a restrictive covenant is overbroad, overlong, or otherwise not
 18 reasonably necessary to protect the legitimate business interests justifying the
 19 restrictive covenant and, if so, how to modify the restraint so that the restrictive
 20 covenant provides only such restraint as is reasonably necessary to protect those
 21 interests, a court shall consider all of the following:

1 1. The duration, scope, and nature of the relationship between the person
2 seeking enforcement of the restrictive covenant and the person against whom
3 enforcement is sought prior to the commencement of the enforcement action.

4 2. The duration, scope, and nature of the potential harm to those legitimate
5 business interests that might result from a violation of the restrictive covenant.

6 3. Any conduct by the person against whom enforcement of the restrictive
7 covenant is sought, beginning on the date of execution of the restrictive covenant,
8 that is relevant to a determination of the proper duration, scope, and nature of the
9 restraint and to enforcement of the restraint.

10 4. Evidence of common practice with respect to the duration, scope, and nature
11 of restraints in the specific industry of the person seeking enforcement of the
12 restrictive covenant.

13 (e) *Rebuttable presumptions.* In determining the reasonableness of a
14 restrictive covenant, a court shall apply the following rebuttable presumptions:

15 1. In the case of a posttermination restrictive covenant, the court shall presume
16 a restraint of 6 months or less from the termination of the employment or agency
17 relationship to be reasonable and a restraint of longer than 2 years from the
18 termination of the employment or agency relationship to be unreasonable. This
19 subdivision does not preclude a court from finding that a restraint of longer than 2
20 years from the termination of the employment or agency relationship is reasonable
21 if the court determines that clear and convincing evidence exists to support that
22 restraint.

Findings

23 2. In the case of a restrictive covenant the consideration for which consists of
24 a promise described in par. (b) 2. f., the court shall presume that restrictive covenant
25 to be reasonable. This subdivision does not preclude a court from finding that a

1 restrictive covenant the consideration for which consists of a promise described in
2 par. (b) 2. f. is unreasonable if the court determines that clear and convincing
3 evidence exists to support that finding.

(END OF INSERT)

(INSERT 8-16)

4 (j) *Dispute resolved by agreement.* If the parties to a pending or threatened
5 action for enforcement of a restrictive covenant reach an agreement resolving that
6 action, the parties may file that agreement with the court and request the court to
7 adopt the agreement as the resolution of the parties' dispute. If the court finds that
8 the agreement is reasonable and consistent with the policy underlying this section,
9 the court may incorporate the terms of the agreement into an order resolving the
10 action. If any party is subsequently in violation of the order, any other party may
11 commence an action for enforcement of the order.

(END OF INSERT)

(INSERT 9-2)

12 2. Notwithstanding s. 813.06, the court may not require a party seeking
13 enforcement of a restrictive covenant to post a bond as a condition to obtaining the
14 injunctive relief specified in subd. 1. The court may, however, as a condition of
15 granting such injunctive relief, order the party seeking that relief to provide to the
16 party enjoined security against any damages that the party enjoined may sustain by
17 reason of the injunctive relief in an amount that is sufficient to protect the interests
18 of the party enjoined.

1 3. The rights and remedies provided under this section are in addition to, and
2 do not displace, any other rights and remedies that may exist at law or in equity.

(END OF INSERT)

(INSERT 9-5)

3 shall award costs and attorneys' fees in accordance with that contractual
4 provision. If a restrictive covenant does not contain such a contractual provision, a
5 court

(END OF INSERT)

relationship, but does not include an agreement that does not restrict or
prohibit competition by an employee or agent of a business or professional practice,
including any of the following:
1. An agreement restricting or prohibiting an employee or agent from
disclosing business or professional information that is valuable and confidential to
the employer or principal, but that is not valuable and confidential to a competitor
of the employer or agent or useful to the employee, the agent, or a competitor in
obtaining a competitive advantage over the employer or principal.
2. An agreement restricting or prohibiting the solicitation or hiring of an
employee or agent who is not privy to valuable and confidential business or
professional information of the business or professional practice, who does not have
substantial relationships with existing or prospective customers, patients, or clients
of the business or professional practice, and who has not received unique,
extraordinary, or specialized training provided by the business or professional
practice or otherwise obtained as a result of the employment or agency relationship
with the business or professional practice.

(END OF INSERT)

(INSERT A-2)

is supported by valid consideration (generally, any payment or other thing of
value given in exchange for entering into the restrictive covenant). The bill requires
a court to determine that a restrictive covenant is supported by valid consideration
if the court finds that any of the following situations exists:

1. In the case of a restrictive covenant that was executed at, or within a
reasonable time after, the commencement of the employment or agency relationship,

that the offer of employment or agency, or of continuation of the employment or agency relationship, was contingent on the execution of the restrictive covenant.

2. In the case of a restrictive covenant that was executed at or about the time of termination of the employment or agency relationship, that the restrictive covenant was supported by valid consideration acceptable to the employee or agent above and beyond any compensation due the employee or agent and any consideration provided for any other covenants, releases, or promises made by the employee or agent.

3. In the case of a restrictive covenant that was executed at any other time, that at or about the time of execution of the restrictive covenant the employee or agent received in connection with the execution of the restrictive covenant valid consideration, including a) monetary consideration; b) a bonus or incentive payment; c) additional paid time off; d) access to a bonus or other incentive program or pool through which the employee or agent receives additional compensation; e) continuation of the employment or agency relationship at a rate of pay and benefits that is equal to or greater than the pay and benefits received before the execution of the restrictive covenant, if continuation of the employment or agency relationship is contingent on execution of the restrictive covenant; or f) a promise to provide any payment or other thing of value as specified in a written agreement setting forth the circumstances under which that payment or other thing of value will be provided, including a promise to provide paid leave at the end of the employment relationship (commonly referred to in the business community as "garden leave").

Legitimate business interest and reasonable necessity. The bill also provides

(END OF INSERT)

In

(INSERT A-3)

or otherwise obtained as a result of an employment or agency relationship with a business or professional practice.

The bill requires a court, in determining whether a restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interests justifying the restrictive covenant and, if so, how to modify the restraint so that the restrictive covenant provides only such restraint as is reasonably necessary to protect those interests, to consider all of the following:

1. The duration, scope, and nature of the relationship between the person seeking enforcement of the restrictive covenant and the person against whom enforcement is sought prior to the commencement of the enforcement action.
2. The duration, scope, and nature of the potential harm to those legitimate business interests that might result from a violation of the restrictive covenant.
3. Any conduct by the person against whom enforcement of the restrictive covenant is sought, beginning on the date of execution of the restrictive covenant, that is relevant to a determination of the proper duration, scope, and nature of the restraint and to enforcement of the restraint.

NO 97

The bill requires a court

4. Evidence of common practice with respect to the duration, scope, and nature of restraints in the specific industry of the person seeking enforcement of the restrictive covenant.

(END OF INSERT)

(INSERT A-4)

2. In the case of a restrictive covenant the consideration for which consists of a promise of garden leave, that the restrictive covenant is presumed to be reasonable.

(END OF INSERT)

(INSERT A-5)

that reach an agreement resolving

Disputes resolved by agreement. Additionally, the bill permits parties to a pending or threatened action for enforcement of a restrictive covenant ~~that reach an agreement resolving that action~~ to file that agreement with the court and request the court to adopt the agreement as the resolution of the parties' dispute. If the court finds that the agreement is reasonable and consistent with the policy underlying the bill, the court may incorporate the terms of the agreement into an order resolving the action.

(END OF INSERT)

(INSERT A-6)

no II

(injunctive relief); 2) that the court may not require a party seeking enforcement of a restrictive covenant to post a bond as a condition to obtaining injunctive relief, but may order that party to provide to the party enjoined security against any damages that he or she may sustain by reason of the injunctive relief in an amount that is sufficient to protect his or her interests; 3) that if a restrictive covenant contains a contractual provision authorizing the award of costs and attorneys fees, a court must award costs and attorneys fees in accordance with that contractual provision; and 4)

(END OF INSERT)

*

Malaise, Gordon

From: Brabender, Lindsey
Sent: Thursday, November 20, 2014 12:45 PM
To: Malaise, Gordon
Subject: LRB 0379/P1
Attachments: 4192_001.pdf

Gordon,

We received and have reviewed the Blue Pencil draft, LRB 0379/P1 and have a few changes to make. I have attached a PDF with notes on the changes that we would like to see to the draft. Please let me know if you have any questions or concerns with the changes.

Thanks!
Lindsey

Lindsey Brabender
Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174



State of Wisconsin
2015 - 2016 LEGISLATURE



LRB-0379/P1
GMM:sac:rs

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

1 **AN ACT to repeal and recreate** 103.465 of the statutes; **relating to:** restrictive
2 covenants in employment and agency relationships.

Analysis by the Legislative Reference Bureau

Current law

Covenants not to compete. Under current law, a covenant by an employee or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time (covenant not to compete) is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Currently, any covenant not to compete that imposes an unreasonable restraint on an employee or agent is illegal, void, and unenforceable even as to any part of the covenant that would be a reasonable restraint.

The bill

Restrictive covenants. This bill repeals current law relating to covenants not to compete and instead creates a new provision relating to restrictive covenants in employment and agency relationships. Under the bill, "restrictive covenant" means an agreement that restricts or prohibits competition by an employee or agent of a business or professional practice during the term, or after the termination, of the employment or agency relationship, but does not include an agreement that does not restrict or prohibit competition by an employee or agent of a business or professional practice, including any of the following:

1. An agreement restricting or prohibiting an employee or agent from disclosing business or professional information that is valuable and confidential to

the employer or principal, but that is not valuable and confidential to a competitor of the employer or principal or useful to the employee, the agent, or a competitor in obtaining a competitive advantage over the employer or principal.

2. An agreement restricting or prohibiting the solicitation or hiring of an employee or agent who is not privy to valuable and confidential business or professional information of the business or professional practice, who does not have substantial relationships with existing or prospective customers, patients, or clients of the business or professional practice, and who has not received unique, extraordinary, or specialized training provided by the business or professional practice or otherwise obtained as a result of the employment or agency relationship with the business or professional practice.

Reasonableness and valid consideration. Specifically, the bill provides ~~that enforcement of a restrictive covenant is not prohibited if the restrictive covenant~~ is reasonable as to time, area, and line of business and is supported by valid consideration (generally, any payment or other thing of value given in exchange for entering into the restrictive covenant). The bill requires a court to determine that a restrictive covenant is supported by valid consideration if the court finds that any of the following situations exists:

is enforceable

1. In the case of a restrictive covenant that was executed at, or within a reasonable time after, the commencement of the employment or agency relationship, that the offer of employment or agency, or of continuation of the employment or agency relationship, was contingent on the execution of the restrictive covenant.

2. In the case of a restrictive covenant that was executed at or about the time of termination of the employment or agency relationship, that the restrictive covenant was supported by valid consideration acceptable to the employee or agent above and beyond any compensation due the employee or agent and any consideration provided for any other covenants, releases, or promises made by the employee or agent.

3. In the case of a restrictive covenant that was executed at any other time, that at or about the time of execution of the restrictive covenant the employee or agent received in connection with the execution of the restrictive covenant valid consideration, including a) monetary consideration; b) a bonus or incentive payment; c) additional paid time off; d) access to a bonus or other incentive program or pool through which the employee or agent receives additional compensation; e) continuation of the employment or agency relationship at a rate of pay and benefits that is equal to or greater than the pay and benefits received before the execution of the restrictive covenant, if continuation of the employment or agency relationship is contingent on execution of the restrictive covenant; or f) a promise to provide any payment or other thing of value as specified in a written agreement setting forth the circumstances under which that payment or other thing of value will be provided, including a promise to provide paid leave at the end of the employment relationship (commonly referred to in the business community as "garden leave").

Legitimate business interest and reasonable necessity. The bill also provides that a ~~court may not enforce~~ a restrictive covenant unless the person seeking enforcement of the restrictive covenant proves the existence of a legitimate

is enforceable if

business interest justifying the restrictive covenant and that the restriction or prohibition on competition specified in the restrictive covenant (restraint) is reasonably necessary to protect that legitimate business interest.

The bill defines "legitimate business interest" to include: 1) any business or professional information that is valuable and confidential but that does not qualify as a trade secret; 2) substantial relationships with specific existing or prospective customers, patients, or clients; 3) customer, patient, or client goodwill associated with a specific geographic location, a specific marketing or trade area, or an ongoing business or professional practice; or 4) unique, extraordinary, or specialized training provided by a business or professional practice or otherwise obtained as a result of an employment or agency relationship with a business or professional practice.

In determining whether a restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interests justifying the restrictive covenant and, if so, how to modify the restraint so that the restrictive covenant provides only such restraint as is reasonably necessary to protect those interests, the bill requires a court to consider all of the following:

1. The duration, scope, and nature of the relationship between the person seeking enforcement of the restrictive covenant and the person against whom enforcement is sought prior to the commencement of the enforcement action.

2. The duration, scope, and nature of the potential harm to those legitimate business interests that might result from a violation of the restrictive covenant.

3. Any conduct by the person against whom enforcement of the restrictive covenant is sought, beginning on the date of execution of the restrictive covenant, that is relevant to a determination of the proper duration, scope, and nature of the restraint and to enforcement of the restraint.

4. Evidence of common practice with respect to the duration, scope, and nature of restraints in the specific industry of the person seeking enforcement of the restrictive covenant.

Rebuttable presumptions. In addition, the bill requires a court, in determining the reasonableness of a restrictive covenant, to apply the following rebuttable presumptions:

1. In the case of a restrictive covenant that applies after the termination of an employment or agency relationship, that a restraint of six months or less is presumed to be reasonable and a restraint of longer than two years is presumed to be unreasonable.

2. In the case of a restrictive covenant the consideration for which consists of a promise of garden leave, that the restrictive covenant is presumed to be reasonable.

Third-party beneficiaries, assignees, and successors. Under the bill, subject to certain conditions, a court may not refuse to enforce a restrictive covenant on the ground that the person seeking enforcement of the restrictive covenant is a third-party beneficiary of the restrictive covenant or is an assignee of or a successor to a party to the restrictive covenant.

Enforcement considerations. The bill also requires a court, in determining the enforceability of a restrictive covenant, to consider the effect of enforcement of the restrictive covenant on the public health, safety, and welfare and to consider all

during the term of the restrictive covenant

unless exceptional personal circumstances exist

pertinent legal and equitable defenses, except that the court may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought and the court may consider as a defense to the enforcement of the restrictive covenant the fact that the person seeking enforcement is no longer in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if the discontinuance of business is not the result of a violation of the restrictive covenant.

Construction of restrictive covenants. Moreover, the bill requires a court to construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement of the restrictive covenant and not to employ any rule of contractual interpretation that requires a restrictive covenant to be construed narrowly, against the restraint, or against the drafter of the restrictive covenant.

Public policy. Further, the bill prohibits a court from refusing to enforce an otherwise enforceable restrictive covenant on the ground that the restrictive covenant violates public policy unless the court specifically articulates the public policy and finds that the public policy substantially outweighs the policy underlying the bill and the need to protect the legitimate business interests established by the person seeking enforcement of the restraint.

Disputes resolved by agreement. Additionally, the bill permits parties that reach an agreement resolving a pending or threatened action for enforcement of a restrictive covenant to file that agreement with the court and request the court to adopt the agreement as the resolution of the parties' dispute. If the court finds that the agreement is reasonable and consistent with the policy underlying the bill, the court may incorporate the terms of the agreement into an order resolving the action.

Remedies; costs and attorney fees. Finally, the bill provides that if a court determines that a restrictive covenant is enforceable, the court must enforce the restrictive covenant by any appropriate and effective remedy, including a temporary or permanent injunction (injunctive relief); 2) that the court may not require a party seeking enforcement of a restrictive covenant to post a bond as a condition to obtaining injunctive relief, but may order that party to provide to the party enjoined security against any damages that he or she may sustain by reason of the injunctive relief in an amount that is sufficient to protect his or her interests; 3) that if a restrictive covenant contains a contractual provision authorizing the award of costs and attorney fees, a court must award costs and attorney fees in accordance with that contractual provision; and 4) that, in the absence of a contractual provision authorizing the award of costs and attorney fees, a court may award costs and attorney fees to the prevailing party.

but not limited to,

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1

SECTION 1. 103.465 of the statutes is repealed and recreated to read:

1 **103.465 Restrictive covenants in employment and agency**
2 **relationships.** (1) DEFINITIONS. In this section:

3 (a) “Legitimate business interest” includes all of the following:

4 1. Any business or professional information that is valuable and confidential
5 to a business or professional practice but that does not qualify as a trade secret, as
6 defined in s. 134.90 (1) (c).

7 2. Substantial relationships with specific existing or prospective customers,
8 patients, or clients of a business or professional practice.

9 3. Customer, patient, or client goodwill associated with a specific geographic
10 location; a specific marketing or trade area; or an ongoing business or professional
11 practice by way of a trade name, trademark, service mark, or trade dress that
12 identifies a good or service with the business or professional practice.

13 4. Unique, extraordinary, or specialized training provided by a business or
14 professional practice or obtained as a result of an employment or agency relationship
15 with a business or professional practice.

16 (b) “Posttermination restrictive covenant” means a restrictive covenant that
17 applies after termination of an employment or agency relationship.

18 (c) “Restraint” means a restriction on or prohibition against competition
19 provided in a restrictive covenant.

20 (d) “Restrictive covenant” means an agreement that restricts or prohibits
21 competition by an employee or agent of a business or professional practice during the
22 term of the employment or agency relationship or after the termination of that
23 relationship. “Restrictive covenant” does not include an agreement that does not
24 restrict or prohibit competition by an employee or agent of a business or professional
25 practice, including any of the following:

1 1. An agreement restricting or prohibiting an employee or agent from
2 disclosing business or professional information that is valuable and confidential to
3 the employer or principal, but that is not valuable and confidential to a competitor
4 of the employer or principal or useful to the employee, the agent, or a competitor in
5 obtaining a competitive advantage over the employer or principal.

6 2. An agreement restricting or prohibiting the solicitation or hiring of an
7 employee or agent who is not privy to valuable and confidential business or
8 professional information of the business or professional practice, who does not have
9 substantial relationships with existing or prospective customers, patients, or clients,
10 and who has not received unique, extraordinary, or specialized training provided by
11 the business or professional practice or otherwise obtained as a result of the
12 employment or agency relationship with the business or professional practice.

13 (2) ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) *Reasonableness and valid*
14 *consideration.* Subject to sub. (3), ~~enforcement of~~ *enforced* a restrictive covenant is not
15 ~~prohibited~~ if the restrictive covenant is reasonable as to time, area, and line of
16 business and is supported by valid consideration, as determined under par. (b).

17 (b) *Determination of valid consideration.* In any action for the enforcement of
18 a restrictive covenant, a court shall determine that the restrictive covenant is
19 supported by valid consideration if the court finds that any of the following situations
20 exists:

21 1. That the restrictive covenant was executed at, or within a reasonable time
22 after, the commencement of the employment or agency relationship and that the offer
23 of employment or agency, or of continuation of the employment or agency
24 relationship, was contingent on the execution of the restrictive covenant.

1 2. That the restrictive covenant was executed after the time frame specified in
2 subd. 1., but before the time frame specified in subd. 3., and that at or about the time
3 of execution of the restrictive covenant the employee or agent received in connection
4 with the execution of the restrictive covenant any payment or other thing of value,
5 including any of the following:

6 a. Monetary consideration.

7 b. A bonus or incentive payment.

8 c. In the case of an employee, additional paid time off, if the employee
9 acknowledged at the time of execution of the restrictive covenant that the amount
10 of additional paid time off is adequate consideration to support the restrictive
11 covenant.

12 d. Access to a bonus or other incentive program or pool through which the
13 employee or agent receives additional compensation, if the employee or agent would
14 not have had access to the program had he or she not executed the restrictive
15 covenant.

16 e. Continuation of the employment or agency relationship at a rate of pay and
17 benefits that is equal to or greater than the pay and benefits received before the
18 execution of the restrictive covenant, if continuation of the employment or agency
19 relationship is contingent on execution of the restrictive covenant.

20 f. A promise made at the time of execution of the restrictive covenant to provide
21 any payment or other thing of value during the term of the restrictive covenant as
22 specified in a written agreement setting forth the circumstances under which that
23 payment or other thing of value will be provided, if the employer or principal fulfills
24 that promise when those circumstances occur. This subd. 2. f. includes a promise to
25 provide paid ~~leave~~ to an employee from the date on which the employer receives

"garden leave"

1 notice of resignation of the employee from the employment relationship or provides
2 notice to the employee of termination of the employment relationship to the date on
3 which the employment relationship ends, *during the term of the restrictive*
covenant.

4 3. That the restrictive covenant was executed at or about the time of
5 termination of the employment or agency relationship and that the restrictive
6 covenant was supported by valid consideration acceptable to the employee or agent
7 above and beyond any compensation due the employee or agent and any
8 consideration provided for any other covenants, releases, or promises made by the
9 employee or agent.

10 (c) *Legitimate business interest.* In any action for the enforcement of a
11 restrictive covenant, a court may ~~not~~ ^{if} enforce the restrictive covenant ~~unless~~ the
12 restrictive covenant is in writing and signed by the person against whom
13 enforcement is sought and the person seeking enforcement proves all of the
14 following:

15 1. The existence of one or more legitimate business interests justifying the
16 restrictive covenant. Any restrictive covenant not supported by a legitimate
17 business interest is illegal, void, and unenforceable.

18 2. That the restraint specified in the restrictive covenant is reasonably
19 necessary to protect the legitimate business interest justifying the restrictive
20 covenant. If the person seeking enforcement of the restrictive covenant establishes
21 a prima facie case that the restraint is reasonably necessary, the person against
22 whom enforcement is sought has the burden of establishing that the restraint is
23 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate
24 business interest established by the person seeking enforcement. If the restraint is
25 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate

1 business interest, the court shall modify the restraint and grant only such relief as
2 is reasonably necessary to protect that legitimate business interest.

3 (d) *Determination of reasonable necessity of restraint.* In determining whether
4 a restraint specified in a restrictive covenant is overbroad, overlong, or otherwise not
5 reasonably necessary to protect the legitimate business interests justifying the
6 restrictive covenant and, if so, how to modify the restraint so that the restrictive
7 covenant provides only such restraint as is reasonably necessary to protect those
8 interests, a court shall consider all of the following:

9 1. The duration, scope, and nature of the relationship between the person
10 seeking enforcement of the restrictive covenant and the person against whom
11 enforcement is sought prior to the commencement of the enforcement action.

12 2. The duration, scope, and nature of the potential harm to those legitimate
13 business interests that might result from a violation of the restrictive covenant.

14 3. Any conduct by the person against whom enforcement of the restrictive
15 covenant is sought, beginning on the date of execution of the restrictive covenant,
16 that is relevant to a determination of the proper duration, scope, and nature of the
17 restraint and to enforcement of the restraint.

18 4. Evidence of common practice with respect to the duration, scope, and nature
19 of restraints in the specific industry of the person seeking enforcement of the
20 restrictive covenant.

21 (e) *Rebuttable presumptions.* In determining the reasonableness of a
22 restrictive covenant, a court shall apply the following rebuttable presumptions:

23 1. In the case of a posttermination restrictive covenant, the court shall presume
24 a restraint of 6 months or less from the termination of the employment or agency
25 relationship to be reasonable and a restraint of longer than 2 years from the

1 termination of the employment or agency relationship to be unreasonable. This
2 subdivision does not preclude a court from finding that a restraint of longer than 2
3 years from the termination of the employment or agency relationship is reasonable
4 if the court determines that clear and convincing evidence exists to support that
5 finding.

6 2. In the case of a restrictive covenant the consideration for which consists of
7 a promise described in par. (b) 2. f., the court shall presume that restrictive covenant
8 to be reasonable. This subdivision does not preclude a court from finding that a
9 restrictive covenant the consideration for which consists of a promise described in
10 par. (b) 2. f. is unreasonable if the court determines that clear and convincing
11 evidence exists to support that finding.

12 (f) *Third-party beneficiaries, assignees, and successors.* A court may not refuse
13 to enforce a restrictive covenant on the ground that the person seeking enforcement
14 of the restrictive covenant is a 3rd-party beneficiary of the restrictive covenant or
15 is an assignee of or a successor to a party to the restrictive covenant if any of the
16 following apply:

17 1. In the case of a 3rd-party beneficiary of the restrictive covenant, the
18 restrictive covenant expressly identifies the person as a 3rd-party beneficiary of the
19 restrictive covenant and expressly states that the restrictive covenant is intended for
20 the benefit of that person.

21 2. In the case of an assignee of or a successor to a party to the restrictive
22 covenant, the restrictive covenant expressly authorizes an assignee of or successor
23 to the party to enforce the restrictive covenant.

24 (g) *Considerations in enforcing restrictive covenants.* In determining the
25 enforceability of a restrictive covenant, a court shall consider the effect of

1 enforcement of the restrictive covenant on the public health, safety, and welfare and
2 shall consider all pertinent legal and equitable defenses, except as follows;

3 1. The court may not consider any individualized economic or other hardship
4 that might be caused to the person against whom enforcement is sought ^{unless} ~~exceptional~~
5 2. The court may consider as a defense to the enforcement of the restrictive ^{Personal}
6 covenant the fact that the person seeking enforcement is no longer in business in the ^{circum}
7 area or line of business that is the subject of the action to enforce the restrictive ^{list.}
8 covenant only if the discontinuance of business is not the result of a violation of the
9 restrictive covenant.

10 (h) *Construction of restrictive covenants.* A court shall construe a restrictive
11 covenant in favor of providing reasonable protection to all legitimate business
12 interests established by the person seeking enforcement of the restrictive covenant.
13 A court may not employ any rule of contractual interpretation that requires a
14 restrictive covenant to be construed narrowly, against the restraint, or against the
15 drafter of the restrictive covenant.

16 (i) *Public policy.* No court may refuse to enforce an otherwise enforceable
17 restrictive covenant on the ground that the restrictive covenant violates public policy
18 unless the court specifically articulates the public policy and finds that the public
19 policy substantially outweighs the policy underlying this section and the need to
20 protect the legitimate business interests established by the person seeking
21 enforcement of the restraint.

22 (j) *Dispute resolved by agreement.* If the parties to a pending or threatened
23 action for enforcement of a restrictive covenant reach an agreement resolving that
24 action, the parties may file that agreement with the court and request the court to
25 adopt the agreement as the resolution of the parties' dispute. If the court finds that

1 the agreement is reasonable and consistent with the policy underlying this section,
2 the court may incorporate the terms of the agreement into an order resolving the
3 action. If any party is subsequently in violation of the order, any other party may
4 commence an action for enforcement of the order.

5 (k) *Remedies.* 1. If a court determines that a restrictive covenant is
6 enforceable, the court shall enforce the restrictive covenant by any appropriate and
7 effective remedy, ^{but not limited to,} including a temporary or permanent injunction. Violation of an
8 enforceable restrictive covenant creates a presumption of irreparable injury to the
9 person seeking enforcement of the restrictive covenant.

10 2. Notwithstanding s. 813.06, the court may not require a party seeking
11 enforcement of a restrictive covenant to post a bond as a condition to obtaining the
12 injunctive relief specified in subd. 1. The court may, however, as a condition of
13 granting such injunctive relief, order the party seeking that relief to provide to the
14 party enjoined security against any damages that the party enjoined may sustain by
15 reason of the injunctive relief in an amount that is sufficient to protect the interests
16 of the party enjoined.

17 3. The rights and remedies provided under this section are in addition to, and
18 do not displace, any other rights and remedies that may exist at law or in equity.

19 (L) *Costs and attorney fees.* If a restrictive covenant contains a contractual
20 provision authorizing the award of costs and attorney fees to the prevailing party in
21 an action seeking enforcement of, or challenging the enforceability of, a restrictive
22 covenant, a court shall award costs and attorney fees in accordance with that
23 contractual provision. If a restrictive covenant does not contain such a contractual
24 provision, a court may award costs and attorney fees to the prevailing party. A court

1 may not enforce any contractual provision limiting the court's authority under this
2 paragraph.

3 (3) ILLEGAL RESTRAINTS OF TRADE. Nothing in this section shall be construed or
4 interpreted to legalize or make enforceable any restraint of trade or commerce that
5 is otherwise illegal or unenforceable under s. 133.03 or any similar federal law.

6 **SECTION 2. Initial applicability.**

7 (1) RESTRICTIVE COVENANTS IN EMPLOYMENT AND AGENCY RELATIONSHIPS. This act
8 first applies to a restrictive covenant, as defined in section 103.465 (1) (d) of the
9 statutes, as repealed and recreated by this act, entered into or extended, modified, or
10 renewed on the effective date of this subsection.

11

(END)

Malaise, Gordon

From: Brabender, Lindsey
Sent: Thursday, November 20, 2014 2:42 PM
To: Malaise, Gordon
Subject: RE: LRB 0379/P1

Sounds good to me.

Lindsey Brabender
Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

From: Malaise, Gordon
Sent: Thursday, November 20, 2014 2:42 PM
To: Brabender, Lindsey
Subject: RE: LRB 0379/P1

Since it will be business people who will be using this statute they know what they are talking about when someone uses the term "garden leave." So I think that I can define and then use the term.

From: Brabender, Lindsey
Sent: Thursday, November 20, 2014 2:17 PM
To: Malaise, Gordon
Subject: RE: LRB 0379/P1

Do whichever way you think will be less confusing.

Lindsey Brabender
Policy Advisor
Office of State Senator Paul Farrow
33rd Senate District
(608) 266-9174

From: Malaise, Gordon
Sent: Thursday, November 20, 2014 1:20 PM
To: Brabender, Lindsey
Subject: RE: LRB 0379/P1

Another slight tweak. I can use the term "garden leave" in the statute if they want but because it is a colloquial term whose meaning is not familiar outside the business world I would have to create a definition for the term so that everybody will know what it means. That's why I described what garden leave is generically without using the actual term.

From: Brabender, Lindsey
Sent: Thursday, November 20, 2014 1:04 PM
To: Malaise, Gordon
Subject: RE: LRB 0379/P1

Great, I think that makes sense ("including, but not limited to"). Everything else sounds good to me as well. We are ready to convert to a /1.

Thanks!

Lindsey Brabender

Policy Advisor

Office of State Senator Paul Farrow

33rd Senate District

(608) 266-9174

From: Malaise, Gordon

Sent: Thursday, November 20, 2014 12:58 PM

To: Brabender, Lindsey

Subject: RE: LRB 0379/P1

Lindsey:

Judging by the dearth of red ink, it looks like they liked my draft. ☺ I liked their markups too, especially phrasing things in the positive rather than the negative, e.g., "is enforceable" rather "enforcement is not prohibited."

One drafting change that I do not go along with is "including, but not limited to." The LRB does not draft that phrase because it is redundant. If something is included, then it already is nonexclusive or not limited to.

So I can get these few changes turned around for you soon. Convert it to a /1?

Gordon

From: Brabender, Lindsey

Sent: Thursday, November 20, 2014 12:45 PM

To: Malaise, Gordon

Subject: LRB 0379/P1

Gordon,

We received and have reviewed the Blue Pencil draft, LRB 0379/P1 and have a few changes to make. I have attached a PDF with notes on the changes that we would like to see to the draft. Please let me know if you have any questions or concerns with the changes.

Thanks!

Lindsey

Lindsey Brabender

Policy Advisor

Office of State Senator Paul Farrow

33rd Senate District

(608) 266-9174