



State of Wisconsin
2015 - 2016 LEGISLATURE



LRB-0379/P1
GMM:sac:fs

In 11/20
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Comp /
Plu / st

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

- gen act

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:

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

enforceable

during the term of the restrictive covenant

is enforceable if

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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 restrictive covenant

unless that person shows that exceptional personal circumstances exist

X

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.

1)

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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.

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:

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

3 (b) (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 (c) (b) "Posttermination restrictive covenant" means a restrictive covenant that
17 applies after termination of an employment or agency relationship.

18 (d) (e) "Restraint" means a restriction on or prohibition against competition
19 provided in a restrictive covenant.

20 (e) (a) "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~~ a restrictive covenant is ~~not~~
15 ~~prohibited~~ ^{enforceable} 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 during the term of the restrictive covenant

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notice of resignation of the employee from the employment relationship or provides notice to the employee of termination of the employment relationship to the date on which the employment relationship ends.

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~~ 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

if

not

unless

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

that person shows that
unless exceptional personal circumstances exist

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.

5 2. The court may consider as a defense to the enforcement of the restrictive
6 covenant the fact that the person seeking enforcement is no longer in business in the
7 area or line of business that is the subject of the action to enforce the restrictive
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, 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) (e) 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)

Insert 5-2

Garden leave

(a) "Garden leave" means paid leave granted to an employee from the date on which the employer receives notice of resignation of the employee from the employment relationship ~~or the employee~~ or provides notice to the employee of termination of the employment relationship to the ^{date} on which the employment relationship ends.

End
(end of insert)

Malaise, Gordon

From: Finerty, Daniel <dfinerty@lindner-marsack.com>
Sent: Thursday, February 19, 2015 10:00 AM
To: Brabender, Lindsey
Cc: Malaise, Gordon
Subject: RE: Updated Draft
Attachments: Blue Pencil Bill - Restrictive Covenants in Employment 103.465.pdf

Lindsey:

This morning we discussed the question of whether or not to include "trade secrets" in the definition of confidential information in the restrictive covenant bill. While this language is contained in the Florida law on which the draft is based, my initial thought when I eliminated "trade secret" from that definition was that I did not want to interfere with the remedies available to employers under the Wisconsin uniform trade secret act, s. 134.90.

However, after some consideration, if the "trade secret" language is to be placed back in the bill, which I think is a good idea, that will provide Wisconsin employers with another option in cases where they have not only a restrictive covenant but also trade secrets that are at risk. We would need to make relatively minor changes to do this.

First, we would modify the definition of "legitimate business interest" at 103.465(1)(a)1. to be the following: "trade secrets, as defined in S. 134.90(1)(c), or any business or professional information that is valuable and confidential to a business or professional practice but that does not qualify as a trade secret as defined in s. 134.90(1)(c)."

Second, while this may not be completely necessary, I would ask Gordon to provide some perspective on whether to modify 103.465(1)(k)3. to clarify that "The rights and remedies provided under the section are in addition to, and do not displace, any of the rights and remedies that may exist at law or in equity including, but not limited to, the rights set forth in s. 134.90." I think Gordon would likely call that redundant and unnecessary so we probably don't have to do that.

However, I defer to Gordon. The idea would be that we would not want Wisconsin judges believing that an employer has to proceed with either a restrictive covenant or a trade secret claim and that an employer can file only one of the two. In the case where an employee discloses or threatens to disclose confidential information and trade secrets as well, an employer should be able to proceed with enforcement of the restrictive covenant, a trade secret claim and any other civil claim that fits the circumstances.

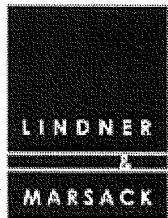
I have attached the latest blue pencil draft of the bill and highlighted the sections that may be affected. Gordon is copied on this e-mail as well. Please let me know if you have any other questions. Thanks!

Dan

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Suite 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Mobile: (414) 232-7992
Fax: (414) 298-9873
E-Mail: DFinerty@lindner-marsack.com
Web: www.lindner-marsack.com

LinkedIn: www.linkedin.com/in/DanielFinerty/

Twitter: [@DanielFinerty](https://twitter.com/DanielFinerty)



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From: Brabender, Lindsey [mailto:Lindsey.Brabender@legis.wisconsin.gov]

Sent: Thursday, February 12, 2015 1:04 PM

To: Finerty, Daniel

Subject: RE: Updated Draft

Sounds good, thank you!

Lindsey Brabender

Policy Advisor

Office of State Senator Paul Farrow

33rd Senate District

(608) 266-9174

From: Finerty, Daniel [mailto:dfinerty@lindner-marsack.com]

Sent: Thursday, February 12, 2015 11:35 AM

To: Brabender, Lindsey

Subject: Re: Updated Draft

I will call you this afternoon to discuss. I'm in Rice Lake doing training will be on my way back this afternoon.

Daniel Finerty

Lindner & Marsack, S.C.

411 E. Wisconsin Ave., Ste. 1800

Milwaukee, WI 53202-4498

Direct: (414) 226-4807

Main: (414) 273-3910

Fax: (414) 298-9873

Mobile: (414) 232-7992

E-mail: dfinerty@lindner-marsack.com

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On Feb 12, 2015, at 10:21 AM, Brabender, Lindsey <Lindsey.Brabender@legis.wisconsin.gov> wrote:

Atty. Finerty,

I spoke with Chris Reader yesterday and we are moving along in the legislative process and plan on securing an assembly co-sponsor and releasing the bill for co-sponsorship in the next couple of weeks. I just had one thing that I wanted to clarify with you first.

In reviewing the bill yesterday I noticed that we have explicitly stated that trade secrets do not fall under the definition of a legitimate business interest for the purposes of this bill. What is the reason for that? Reader and I thought that it was because we have other statutes that address the treatment of trade secrets already in Wisconsin law that we do not want to affect with this legislation, but I just wanted to double-check with you. If you want a specific cite to the bill you can find what I am talking about on pg. 5, Section 1., line 10 of sub. (1)(b). "Legitimate business interest" includes all of the following... (1) Any business or professional information that is valuable and confidential to a business or professional practice but that does not qualify as a trade secret, as defined in s. 134.90(1)(c)."

Lastly, and forgive me if this is a "stupid question" but could you give me an example of when a third-party beneficiary/assignee/successor would seek to enforce a restrictive covenant. Who would typically be a third-beneficiary of these types of restrictive covenants?

-Lindsey

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

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]
Sent: Thursday, December 04, 2014 4:43 PM
To: Brabender, Lindsey
Subject: Re: Updated Draft

I'm totally fine with that. Thanks for checking.

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Ste. 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Main: (414) 273-3910
Fax: (414) 298-9873
Mobile: (414) 232-7992
E-mail: dfinerty@lindner-marsack.com

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On Dec 4, 2014, at 3:58 PM, Brabender, Lindsey <Lindsey.Brabender@legis.wisconsin.gov> wrote:

Dan,

As far as the "garden leave" issue, Gordon did define it at the beginning of the draft in 103.465(1)(a). Did you mean that we need a different definition or am I missing something?

The only other change that we didn't make, as far as I know, was the "including, but not limited to" language. Gordon said that the LRB does not draft that phrase because it is redundant and, if something is included, then it already is nonexclusive or not limited to.

Let me know what you think.

Lindsey Brabender

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

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]
Sent: Wednesday, December 03, 2014 3:01 PM
To: Brabender, Lindsey; Chris Reader (creader@wmc.org)
Subject: RE: Updated Draft

Lindsey:

A few changes were not made from my prior draft. If there is a good reason for not making them, it is understandable. If not, I would suggest they be made. In addition, I inserted "garden leave" at one point in an attempt to define the term. We should make sure that judges don't get stuck trying to interpret the statute based on conflicting definitions when we can easily provide one. Any questions, please let me know. Thanks.

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Suite 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Mobile: (414) 232-7992
Fax: (414) 298-9873
E-Mail: DFinerty@lindner-marsack.com
Web: www.lindner-marsack.com
LinkedIn: www.linkedin.com/in/DanielFinerty/
Twitter: [@DanielFinerty](https://twitter.com/DanielFinerty)

<image001.jpg>

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From: Brabender, Lindsey [<mailto:Lindsey.Brabender@legis.wisconsin.gov>]
Sent: Wednesday, November 26, 2014 9:41 AM
To: Chris Reader (creader@wmc.org); Finerty, Daniel
Subject: Updated Draft

Attached is the updated Blue Pencil draft. Take a look and let me know what you think, hopefully we'll be good to go.

-Lindsey

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



2015 BILL

- 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:

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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 a restrictive covenant is enforceable 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:

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 during the term of the restrictive covenant 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”).

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Legitimate business interest and reasonable necessity. The bill also provides that a restrictive covenant is enforceable if 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) 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 during the term of the restrictive covenant, 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

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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 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, unless that person shows that exceptional personal circumstances exist, 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: 1) 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

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authorizing the award of costs and attorney fees, a court may award costs and attorney fees to the prevailing party.

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:

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

4 (a) “Garden leave” means paid leave granted to an employee from the date on
5 which the employer receives notice of resignation of the employee from the
6 employment relationship or provides notice to the employee of termination of the
7 employment relationship to the date on which the employment relationship ends.

8 (b) “Legitimate business interest” includes all of the following:

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

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

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

18 4. Unique, extraordinary, or specialized training provided by a business or
19 professional practice or obtained as a result of an employment or agency relationship
20 with a business or professional practice.

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1 (c) "Posttermination restrictive covenant" means a restrictive covenant that
2 applies after termination of an employment or agency relationship.

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

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

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

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

23 (2) ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) *Reasonableness and valid*
24 *consideration.* Subject to sub. (3), a restrictive covenant is enforceable if the

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1 restrictive covenant is reasonable as to time, area, and line of business and is
2 supported by valid consideration, as determined under par. (b).

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

7 1. That the restrictive covenant was executed at, or within a reasonable time
8 after, the commencement of the employment or agency relationship and that the offer
9 of employment or agency, or of continuation of the employment or agency
10 relationship, was contingent on the execution of the restrictive covenant.

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

16 a. Monetary consideration.

17 b. A bonus or incentive payment.

18 c. In the case of an employee, additional paid time off, if the employee
19 acknowledged at the time of execution of the restrictive covenant that the amount
20 of additional paid time off is adequate consideration to support the restrictive
21 covenant.

22 d. Access to a bonus or other incentive program or pool through which the
23 employee or agent receives additional compensation, if the employee or agent would
24 not have had access to the program had he or she not executed the restrictive
25 covenant.

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1 e. Continuation of the employment or agency relationship at a rate of pay and
2 benefits that is equal to or greater than the pay and benefits received before the
3 execution of the restrictive covenant, if continuation of the employment or agency
4 relationship is contingent on execution of the restrictive covenant.

5 f. A promise made at the time of execution of the restrictive covenant to provide
6 any payment or other thing of value during the term of the restrictive covenant as
7 specified in a written agreement setting forth the circumstances under which that
8 payment or other thing of value will be provided, if the employer or principal fulfills
9 that promise when those circumstances occur. This subd. 2. f. includes a promise to
10 provide garden leave during the term of the restrictive covenant.

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

17 (c) *Legitimate business interest.* In any action for the enforcement of a
18 restrictive covenant, a court may enforce the restrictive covenant if the restrictive
19 covenant is in writing and signed by the person against whom enforcement is sought
20 and the person seeking enforcement proves all of the following:

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

24 2. That the restraint specified in the restrictive covenant is reasonably
25 necessary to protect the legitimate business interest justifying the restrictive

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1 covenant. If the person seeking enforcement of the restrictive covenant establishes
2 a prima facie case that the restraint is reasonably necessary, the person against
3 whom enforcement is sought has the burden of establishing that the restraint is
4 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate
5 business interest established by the person seeking enforcement. If the restraint is
6 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate
7 business interest, the court shall modify the restraint and grant only such relief as
8 is reasonably necessary to protect that legitimate business interest.

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

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

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

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

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

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

6 1. In the case of a posttermination restrictive covenant, the court shall presume
7 a restraint of 6 months or less from the termination of the employment or agency
8 relationship to be reasonable and a restraint of longer than 2 years from the
9 termination of the employment or agency relationship to be unreasonable. This
10 subdivision does not preclude a court from finding that a restraint of longer than 2
11 years from the termination of the employment or agency relationship is reasonable
12 if the court determines that clear and convincing evidence exists to support that
13 finding.

14 2. In the case of a restrictive covenant the consideration for which consists of
15 a promise described in par. (b) 2. f., the court shall presume that restrictive covenant
16 to be reasonable. This subdivision does not preclude a court from finding that a
17 restrictive covenant the consideration for which consists of a promise described in
18 par. (b) 2. f. is unreasonable if the court determines that clear and convincing
19 evidence exists to support that finding.

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

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

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

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

12 1. The court may not consider any individualized economic or other hardship
13 that might be caused to the person against whom enforcement is sought unless that
14 person shows that exceptional personal circumstances exist.

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

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

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

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

15 (k) *Remedies.* 1. If a court determines that a restrictive covenant is
16 enforceable, the court shall enforce the restrictive covenant by any appropriate and
17 effective remedy, including a temporary or permanent injunction. Violation of an
18 enforceable restrictive covenant creates a presumption of irreparable injury to the
19 person seeking enforcement of the restrictive covenant.

20 2. Notwithstanding s. 813.06, the court may not require a party seeking
21 enforcement of a restrictive covenant to post a bond as a condition to obtaining the
22 injunctive relief specified in subd. 1. The court may, however, as a condition of
23 granting such injunctive relief, order the party seeking that relief to provide to the
24 party enjoined security against any damages that the party enjoined may sustain by

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1 reason of the injunctive relief in an amount that is sufficient to protect the interests
2 of the party enjoined.

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

5 (L) *Costs and attorney fees.* If a restrictive covenant contains a contractual
6 provision authorizing the award of costs and attorney fees to the prevailing party in
7 an action seeking enforcement of, or challenging the enforceability of, a restrictive
8 covenant, a court shall award costs and attorney fees in accordance with that
9 contractual provision. If a restrictive covenant does not contain such a contractual
10 provision, a court may award costs and attorney fees to the prevailing party. A court
11 may not enforce any contractual provision limiting the court's authority under this
12 paragraph.

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

16 **SECTION 2. Initial applicability.**

17 (1) **RESTRICTIVE COVENANTS IN EMPLOYMENT AND AGENCY RELATIONSHIPS.** This act
18 first applies to a restrictive covenant, as defined in section 103.465 (1) (e) of the
19 statutes, as repealed and recreated by this act, entered into or extended, modified, or
20 renewed on the effective date of this subsection.

21 (END)

misappropriation begins at the time that the act of misappropriation occurs).

This Act rejects a continuing wrong approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. If objectively reasonable notice of misappropriation exists, three years is sufficient time to vindicate one's legal rights.

SECTION 7. EFFECT ON OTHER LAW.

(a) ~~This~~ Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State ~~pertaining to~~ providing civil liability remedies for misappropriation of a trade secret. = N/A provide civil remedy for breach of covenant

(b) This [Act] does not affect:

May proceed under 103.415

(1) ~~contractual or other civil liability or relief that is~~ remedies, whether or not based upon misappropriation of a trade secret; ~~or~~

(2) ~~criminal liability for~~ other civil remedies that are not based upon misappropriation of a trade secret; or

(3) criminal remedies, whether or not based upon misappropriation of a trade secret.

COMMENT

137.90

This Act ~~is not a comprehensive remedy~~ does not deal with criminal remedies for trade secret misappropriation and is not a comprehensive statement of civil remedies. It applies to ~~duties imposed by law in order~~ a duty to protect competitively significant secret information that is imposed by law. It does not apply to ~~duties~~ a duty voluntarily assumed through an express or an implied-in-fact contract. The enforceability of covenants not to disclose trade secrets and covenants not to compete that are intended to protect trade secrets, for example, ~~are~~ is governed by other law. The Act also does not apply to ~~duties~~ a duty imposed by law that ~~are~~ is not dependent upon the existence of competitively significant secret information, like an agent's duty of loyalty to his or her principal.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION. This

[Act] shall be applied and construed to effectuate its general purpose to make uniform the law

Malaise, Gordon

From: Malaise, Gordon
Sent: Thursday, February 19, 2015 3:06 PM
To: Brabender, Lindsey
Cc: dfinerty@lindner-marsack.com
Subject: RE: Updated Draft

Correct.

From: Brabender, Lindsey
Sent: Thursday, February 19, 2015 2:26 PM
To: Malaise, Gordon
Subject: RE: Updated Draft

Dan and Gordon,

Alright, so to sum up, we will insert trade secrets as a "legitimate business interest" and leave 103.465(1)(k)3 alone?

You two are really taking me back to my days in contract law.

Lindsey Brabender

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

From: Malaise, Gordon
Sent: Thursday, February 19, 2015 1:04 PM
To: Finerty, Daniel; Brabender, Lindsey
Subject: RE: Updated Draft

Dan and Lindsey:

It is no problem to insert trade secrets back in to the definition of "legitimate business interest."

As for the rights and remedies, Dan raises an interesting legal question in this case. I agree that a specific reference to the remedies under s. 134.90 would be redundant because those remedies are remedies that exist at law, which are already mentioned in s. 103.465 (2) (k), as created by the current draft, so no further language is necessary. Moreover, s. 134.90 (6) (b) 1. already provides that the uniform trade secrets act does not affect "any contractual remedy, whether or not based upon misappropriation of a trade secret." A restrictive covenant is a contract, the remedies under s. 103.465 (2) (k) are remedies for a breach of such a contract, therefore, those remedies are contractual remedies, which under s. 134.90 (6) (b) 1. are unaffected by s. 134.90, whether or not they are based on misappropriation of a trade secret. Therefore, under ss. 103.465 (2) (k), as created by the draft, and 134.90 (6) (b) 1. under current law, a person could proceed under both provisions.

Because Dan and I enjoy talking statutory interpretation and legislative history (I know, how pathetic ☺), I will go into the weeds just a little bit further to explain the distinction between the remedy *at law* under s. 134.90 and the *contractual* remedy under s. 103.465 (2) (k). The Comment following this provision of the Uniform Trade Secrets Act prepared by the National Conference of Commissioners on Uniform State Laws provides as follows:

"This Act ... applies to a duty to protect competitively significant secret information *that is imposed by law*. It does *not* apply to a duty voluntarily assumed through an express or an implied-in-fact contract. *The enforceability of covenants not to disclose trade secrets and covenants not to compete that are intended to protect trade secrets, for example, is governed by other law.*"

So, even though a violation of s. 134.90 and a breach of a restrictive covenant might arise out of the same conduct, the employer has both the remedy at law provided under s. 134.90 and the contractual remedy under s.103.465 (2) (k) and both ss. 134.90 (6) (b) 1. under current law and s. 103.465 (2) (k) 3., as created by the draft, provide for that.

Gordon

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]
Sent: Thursday, February 19, 2015 10:00 AM
To: Brabender, Lindsey
Cc: Malaise, Gordon
Subject: RE: Updated Draft

Lindsey:

This morning we discussed the question of whether or not to include "trade secrets" in the definition of confidential information in the restrictive covenant bill. While this language is contained in the Florida law on which the draft is based, my initial thought when I eliminated "trade secret" from that definition was that I did not want to interfere with the remedies available to employers under the Wisconsin uniform trade secret act, s. 134.90.

However, after some consideration, if the "trade secret" language is to be placed back in the bill, which I think is a good idea, that will provide Wisconsin employers with another option in cases where they have not only a restrictive covenant but also trade secrets that are at risk. We would need to make relatively minor changes to do this.

First, we would modify the definition of "legitimate business interest" at 103.465(1)(a)1. to be the following: "trade secrets, as defined in S. 134.90(1)(c), or any business or professional information that is valuable and confidential to a business or professional practice but that does not qualify as a trade secret as defined in s. 134.90(1)(c)."

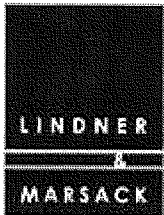
Second, while this may not be completely necessary, I would ask Gordon to provide some perspective on whether to modify 103.465(1)(k)3. to clarify that "The rights and remedies provided under the section are in addition to, and do not displace, any of the rights and remedies that may exist at law or in equity including, but not limited to, the rights set forth in s. 134.90." I think Gordon would likely call that redundant and unnecessary so we probably don't have to do that.

However, I defer to Gordon. The idea would be that we would not want Wisconsin judges believing that an employer has to proceed with either a restrictive covenant or a trade secret claim and that an employer can file only one of the two. In the case where an employee discloses or threatens to disclose confidential information and trade secrets as well, an employer should be able to proceed with enforcement of the restrictive covenant, a trade secret claim and any other civil claim that fits the circumstances.

I have attached the latest blue pencil draft of the bill and highlighted the sections that may be affected. Gordon is copied on this e-mail as well. Please let me know if you have any other questions. Thanks!

Dan

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Suite 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Mobile: (414) 232-7992
Fax: (414) 298-9873
E-Mail: DFinerty@lindner-marsack.com
Web: www.lindner-marsack.com
LinkedIn: www.linkedin.com/in/DanielFinerty/
Twitter: [@DanielFinerty](https://twitter.com/DanielFinerty)



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From: Brabender, Lindsey [<mailto:Lindsey.Brabender@legis.wisconsin.gov>]
Sent: Thursday, February 12, 2015 1:04 PM
To: Finerty, Daniel
Subject: RE: Updated Draft

Sounds good, thank you!

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

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]
Sent: Thursday, February 12, 2015 11:35 AM
To: Brabender, Lindsey
Subject: Re: Updated Draft

I will call you this afternoon to discuss. I'm in Rice Lake doing training will be on my way back this afternoon.

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Ste. 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Main: (414) 273-3910
Fax: (414) 298-9873
Mobile: (414) 232-7992
E-mail: dfinerty@lindner-marsack.com

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On Feb 12, 2015, at 10:21 AM, Brabender, Lindsey <Lindsey.Brabender@legis.wisconsin.gov> wrote:

Atty. Finerty,

I spoke with Chris Reader yesterday and we are moving along in the legislative process and plan on securing an assembly co-sponsor and releasing the bill for co-sponsorship in the next couple of weeks. I just had one thing that I wanted to clarify with you first.

In reviewing the bill yesterday I noticed that we have explicitly stated that trade secrets do not fall under the definition of a legitimate business interest for the purposes of this bill. What is the reason for that? Reader and I thought that it was because we have other statutes that address the treatment of trade secrets already in Wisconsin law that we do not want to affect with this legislation, but I just wanted to double-check with you. If you want a specific cite to the bill you can find what I am talking about on pg. 5, Section 1., line 10 of sub. (1)(b). "Legitimate business interest" includes all of the following...(1) Any business or professional information that is valuable and confidential to a business or professional practice but that does not qualify as a trade secret, as defined in s. 134.90(1)(c)."

Lastly, and forgive me if this is a "stupid question" but could you give me an example of when a third-party beneficiary/assignee/successor would seek to enforce a restrictive covenant. Who would typically be a third-beneficiary of these types of restrictive covenants?

-Lindsey

Lindsey Brabender

Policy Advisor

Office of State Senator Paul Farrow

33rd Senate District

(608) 266-9174

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]

Sent: Thursday, December 04, 2014 4:43 PM

To: Brabender, Lindsey

Subject: Re: Updated Draft

I'm totally fine with that. Thanks for checking.

Daniel Finerty

Lindner & Marsack, S.C.

411 E. Wisconsin Ave., Ste. 1800

Milwaukee, WI 53202-4498

Direct: (414) 226-4807

Main: (414) 273-3910

Fax: (414) 298-9873

Mobile: (414) 232-7992

E-mail: dfinerty@lindner-marsack.com

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On Dec 4, 2014, at 3:58 PM, Brabender, Lindsey <Lindsey.Brabender@legis.wisconsin.gov> wrote:

Dan,

As far as the "garden leave" issue, Gordon did define it at the beginning of the draft in 103.465(1)(a). Did you mean that we need a different definition or am I missing something?

The only other change that we didn't make, as far as I know, was the "including, but not limited to" language. Gordon said that the LRB does not draft that phrase because it is redundant and, if something is included, then it already is nonexclusive or not limited to.

Let me know what you think.

Lindsey Brabender

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

From: Finerty, Daniel [<mailto:dfinerty@lindner-marsack.com>]
Sent: Wednesday, December 03, 2014 3:01 PM
To: Brabender, Lindsey; Chris Reader (creader@wmc.org)
Subject: RE: Updated Draft

Lindsey:

A few changes were not made from my prior draft. If there is a good reason for not making them, it is understandable. If not, I would suggest they be made. In addition, I inserted "garden leave" at one point in an attempt to define the term. We should make sure that judges don't get stuck trying to interpret the statute based on conflicting definitions when we can easily provide one. Any questions, please let me know. Thanks.

Daniel Finerty
Lindner & Marsack, S.C.
411 E. Wisconsin Ave., Suite 1800
Milwaukee, WI 53202-4498
Direct: (414) 226-4807
Mobile: (414) 232-7992
Fax: (414) 298-9873
E-Mail: DFinerty@lindner-marsack.com
Web: www.lindner-marsack.com
LinkedIn: www.linkedin.com/in/DanielFinerty/
Twitter: [@DanielFinerty](https://twitter.com/DanielFinerty)

<image001.jpg>

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From: Brabender, Lindsey [<mailto:Lindsey.Brabender@legis.wisconsin.gov>]

Sent: Wednesday, November 26, 2014 9:41 AM

To: Chris Reader (creader@wmc.org); Finerty, Daniel

Subject: Updated Draft

Attached is the updated Blue Pencil draft. Take a look and let me know what you think, hopefully we'll be good to go.

-Lindsey

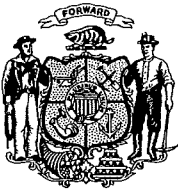
Lindsey Brabender

Policy Advisor

Office of State Senator Paul Farrow

33rd Senate District

(608) 266-9174



State of Wisconsin
2015 - 2016 LEGISLATURE

IN 2/19
wanted 2/20

2015 BILL

(178305)



LRB-0379/1 (2)
GMM:sac:jf RMR
stays
E. E. J.

Regen

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:

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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 a restrictive covenant is enforceable 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:

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 during the term of the restrictive covenant 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”).

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a trade secret or any other

Legitimate business interest and reasonable necessity. The bill also provides that a restrictive covenant is enforceable if 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) ~~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 during the term of the restrictive covenant, 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

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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 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, unless that person shows that exceptional personal circumstances exist, 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: 1) 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

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authorizing the award of costs and attorney fees, a court may award costs and attorney fees to the prevailing party.

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

A trade secret, as defined in s. 134.90 (1)(c), or any other

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

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

(a) "Garden leave" means paid leave granted to an employee from the date on which the employer receives notice of resignation of the employee from the employment relationship or provides notice to the employee of termination of the employment relationship to the date on which the employment relationship ends.

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

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

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

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

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1 (c) “Posttermination restrictive covenant” means a restrictive covenant that
2 applies after termination of an employment or agency relationship.

3 (d) “Restraint” means a restriction on or prohibition against competition
4 provided in a restrictive covenant.

5 (e) “Restrictive covenant” means an agreement that restricts or prohibits
6 competition by an employee or agent of a business or professional practice during the
7 term of the employment or agency relationship or after the termination of that
8 relationship. “Restrictive covenant” does not include an agreement that does not
9 restrict or prohibit competition by an employee or agent of a business or professional
10 practice, including any of the following:

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

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

23 (2) ENFORCEMENT OF RESTRICTIVE COVENANTS. (a) *Reasonableness and valid*
24 *consideration.* Subject to sub. (3), a restrictive covenant is enforceable if the

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1 restrictive covenant is reasonable as to time, area, and line of business and is
2 supported by valid consideration, as determined under par. (b).

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

7 1. That the restrictive covenant was executed at, or within a reasonable time
8 after, the commencement of the employment or agency relationship and that the offer
9 of employment or agency, or of continuation of the employment or agency
10 relationship, was contingent on the execution of the restrictive covenant.

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

16 a. Monetary consideration.

17 b. A bonus or incentive payment.

18 c. In the case of an employee, additional paid time off, if the employee
19 acknowledged at the time of execution of the restrictive covenant that the amount
20 of additional paid time off is adequate consideration to support the restrictive
21 covenant.

22 d. Access to a bonus or other incentive program or pool through which the
23 employee or agent receives additional compensation, if the employee or agent would
24 not have had access to the program had he or she not executed the restrictive
25 covenant.

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1 e. Continuation of the employment or agency relationship at a rate of pay and
2 benefits that is equal to or greater than the pay and benefits received before the
3 execution of the restrictive covenant, if continuation of the employment or agency
4 relationship is contingent on execution of the restrictive covenant.

5 f. A promise made at the time of execution of the restrictive covenant to provide
6 any payment or other thing of value during the term of the restrictive covenant as
7 specified in a written agreement setting forth the circumstances under which that
8 payment or other thing of value will be provided, if the employer or principal fulfills
9 that promise when those circumstances occur. This subd. 2. f. includes a promise to
10 provide garden leave during the term of the restrictive covenant.

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

17 (c) *Legitimate business interest.* In any action for the enforcement of a
18 restrictive covenant, a court may enforce the restrictive covenant if the restrictive
19 covenant is in writing and signed by the person against whom enforcement is sought
20 and the person seeking enforcement proves all of the following:

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

24 2. That the restraint specified in the restrictive covenant is reasonably
25 necessary to protect the legitimate business interest justifying the restrictive

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1 covenant. If the person seeking enforcement of the restrictive covenant establishes
2 a prima facie case that the restraint is reasonably necessary, the person against
3 whom enforcement is sought has the burden of establishing that the restraint is
4 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate
5 business interest established by the person seeking enforcement. If the restraint is
6 overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate
7 business interest, the court shall modify the restraint and grant only such relief as
8 is reasonably necessary to protect that legitimate business interest.

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

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

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

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

BILL**SECTION 1**

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

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

6 1. In the case of a posttermination restrictive covenant, the court shall presume
7 a restraint of 6 months or less from the termination of the employment or agency
8 relationship to be reasonable and a restraint of longer than 2 years from the
9 termination of the employment or agency relationship to be unreasonable. This
10 subdivision does not preclude a court from finding that a restraint of longer than 2
11 years from the termination of the employment or agency relationship is reasonable
12 if the court determines that clear and convincing evidence exists to support that
13 finding.

14 2. In the case of a restrictive covenant the consideration for which consists of
15 a promise described in par. (b) 2. f., the court shall presume that restrictive covenant
16 to be reasonable. This subdivision does not preclude a court from finding that a
17 restrictive covenant the consideration for which consists of a promise described in
18 par. (b) 2. f. is unreasonable if the court determines that clear and convincing
19 evidence exists to support that finding.

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

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

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

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

12 1. The court may not consider any individualized economic or other hardship
13 that might be caused to the person against whom enforcement is sought unless that
14 person shows that exceptional personal circumstances exist.

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

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

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

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

15 (k) *Remedies.* 1. If a court determines that a restrictive covenant is
16 enforceable, the court shall enforce the restrictive covenant by any appropriate and
17 effective remedy, including a temporary or permanent injunction. Violation of an
18 enforceable restrictive covenant creates a presumption of irreparable injury to the
19 person seeking enforcement of the restrictive covenant.

20 2. Notwithstanding s. 813.06, the court may not require a party seeking
21 enforcement of a restrictive covenant to post a bond as a condition to obtaining the
22 injunctive relief specified in subd. 1. The court may, however, as a condition of
23 granting such injunctive relief, order the party seeking that relief to provide to the
24 party enjoined security against any damages that the party enjoined may sustain by

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1 reason of the injunctive relief in an amount that is sufficient to protect the interests
2 of the party enjoined.

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

5 (L) *Costs and attorney fees.* If a restrictive covenant contains a contractual
6 provision authorizing the award of costs and attorney fees to the prevailing party in
7 an action seeking enforcement of, or challenging the enforceability of, a restrictive
8 covenant, a court shall award costs and attorney fees in accordance with that
9 contractual provision. If a restrictive covenant does not contain such a contractual
10 provision, a court may award costs and attorney fees to the prevailing party. A court
11 may not enforce any contractual provision limiting the court's authority under this
12 paragraph.

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

16 **SECTION 2. Initial applicability.**

17 (1) **RESTRICTIVE COVENANTS IN EMPLOYMENT AND AGENCY RELATIONSHIPS.** This act
18 first applies to a restrictive covenant, as defined in section 103.465 (1) (e) of the
19 statutes, as repealed and recreated by this act, entered into or extended, modified, or
20 renewed on the effective date of this subsection.

21 (END)

Parisi, Lori

From: Brabender, Lindsey
Sent: Monday, February 23, 2015 10:24 AM
To: LRB.Legal
Subject: Draft Review: LRB -0379/2 Topic: Restrictive covenants in employment contracts

Please Jacket LRB -0379/2 for the SENATE.