



2015 ASSEMBLY BILL 91

March 12, 2015 – Introduced by Representatives ROHRKASTE, KNODL, GANNON and MURPHY, cosponsored by Senator FARROW. Referred to Committee on Labor.

- 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) a trade secret or any other business or professional information that is valuable and confidential but that does not qualify as a trade secret; 2) substantial relationships with specific existing or prospective customers, patients, or clients; 3) customer, patient, or client goodwill associated with a specific geographic location, a specific marketing or trade area, or an ongoing business or professional practice; or 4) 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. A trade secret, as defined in s. 134.90 (1) (c), or any other business or
10 professional information that is valuable and confidential to a business or
11 professional practice but that does not qualify as a trade secret.

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)