

SECOND REGULAR SESSION

# SENATE BILL NO. 922

100TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR LUETKEMEYER.

Read 1st time January 27, 2020, and ordered printed.

ADRIANE D. CROUSE, Secretary.

4701S.02I

## AN ACT

To repeal section 431.202, RSMo, and to enact in lieu thereof two new sections relating to business covenants.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Section 431.202, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 431.201 and 431.202, to read as follows:

**431.201. As used in section 431.202, unless the context otherwise requires, the following terms mean:**

(1) "Business entity", any natural person, business, corporation, limited liability company, series limited liability company, partnership, sole or other proprietorship, professional practice, or any other business organization or commercial enterprise, whether for profit or not for profit, including, without limitation, any successor in interest to an entity, who conducts business, or who, directly or indirectly, owns any equity interest, ownership, or profit participation in the entity;

(2) "Customers with whom the employee dealt", each customer or prospective customer:

(a) Who was serviced, directly or indirectly, by an employee of a business entity;

(b) Whose business or other dealings with a business entity were supervised, coordinated, or otherwise worked on, directly or indirectly, by an employee;

(c) Who was solicited, produced, induced, persuaded, encouraged, or otherwise dealt with, directly or indirectly, by an

**EXPLANATION**—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

19 employee;

20 (d) About whom an employee, directly or indirectly, obtained,  
21 had knowledge of, had access to, or is in possession of confidential  
22 business or proprietary information or trade secrets in the course of or  
23 as a result of the employee's relationship with the business entity;

24 (e) Who has purchased or otherwise obtained products or  
25 services from a business entity and the sale or provision of which  
26 resulted in compensation, commissions, earnings, or profits to or for  
27 the employee within two years prior to the end of the employee's  
28 employment or business relationship with the business entity; or

29 (f) With whom an employee had contact, directly or indirectly,  
30 of sufficient quality, frequency, and duration during the employee's  
31 employment or other business relationship with the business entity  
32 such that the employee had influence over the customer;

33 (3) "Employee":

34 (a) A natural person currently or formerly employed or retained  
35 by a business entity in any capacity, or has performed work for a  
36 business entity, including, but not limited to, a member of a board of  
37 directors, an officer, a supervisor, an independent contractor, or a  
38 vendor;

39 (b) A natural person who, by reason of having been employed by  
40 or having a business relationship with a business entity:

41 a. Obtained specialized skills, training, learning, or abilities; or

42 b. Obtained, had knowledge of, had access to, or is in possession  
43 of confidential or proprietary business information or trade secrets of  
44 the business entity, including, but not limited to, customer contact  
45 information or information of or belonging to customers of the business  
46 entity;

47 (c) A current or former owner or seller of all or any part of the  
48 assets of a business entity or of any interest in a business entity,  
49 including, but not limited to, all or any part of the shares of a  
50 corporation, a partnership interest, a membership or membership  
51 interest in a limited liability company or a series limited liability  
52 company, or an equity interest, ownership, profit participation, or  
53 other interest of any type in any business entity;

54 (d) The definition of employee set forth in this subdivision shall  
55 be applicable only with respect to section 431.202 and shall have no

56 application in any other context. The definition of employee is not  
57 intended, and shall not be relied upon, to create, change, or affect the  
58 employment status of any natural person or the meaning of the terms  
59 employee, employment or employer that may be applicable in any other  
60 context or pursuant to any other provision of law.

431.202. 1. A reasonable covenant in writing promising not to solicit,  
2 recruit, hire, **induce, persuade, encourage**, or otherwise interfere with,  
3 **directly or indirectly**, the employment **or other business relationship** of  
4 one or more employees **of a business entity** shall be enforceable and not a  
5 restraint of trade pursuant to subsection 1 of section 416.031 if:

6 (1) Between two or more [corporations or other] business entities seeking  
7 to preserve workforce stability (which shall be deemed to be among the  
8 protectable interests of each [corporation or] **such** business entity) during, and  
9 for a reasonable period following, negotiations between such [corporations or]  
10 **business** entities for the acquisition of all or a part of one or more of such  
11 [corporations or] **business** entities;

12 (2) Between two or more [corporations or] business entities engaged in a  
13 joint venture or other legally permissible business arrangement where such  
14 covenant seeks to protect against possible misuse of confidential **business or**  
15 **proprietary information** or trade [secret business information] **secrets** shared  
16 or to be shared between or among such [corporations or] entities;

17 (3) Between [an employer] **a business entity** and one or more employees  
18 **of such business entity** seeking on the part of the [employer] **business entity**  
19 to protect:

20 (a) Confidential **business or proprietary information** or trade [secret  
21 business information] **secrets**; or

22 (b) Customer or supplier relationships, goodwill or loyalty, which shall be  
23 deemed to be among the protectable interests of the [employer] **business entity**;  
24 or

25 (4) Between [an employer] **a business entity** and one or more employees  
26 **of such business entity**, notwithstanding the absence of the protectable  
27 interests described in subdivision (3) of this subsection, so long as such covenant  
28 does not continue for more than [one year] **two years** following the employee's  
29 employment **or business relationship with the business entity**; provided,  
30 however, that this subdivision shall not apply to covenants signed by employees  
31 who provide only secretarial or clerical services **and who own no shares**,

32 **partnership interest, membership or membership interest in a limited**  
33 **liability company or series limited liability company, or equity interest,**  
34 **ownership, profit participation, or other interest of any type in the**  
35 **business entity.**

36         2. Whether a covenant covered by **subsection 1 of** this section is  
37 reasonable shall be determined based upon the facts and circumstances  
38 pertaining to such covenant, but a covenant covered exclusively by subdivision (3)  
39 or (4) of subsection 1 of this section shall be conclusively presumed to be  
40 reasonable if its postemployment **or postbusiness** duration is no more than [one  
41 year] **two years.**

42         3. A reasonable covenant in writing promising not to solicit,  
43 induce, persuade, encourage, service, accept business from, or  
44 otherwise interfere with, directly or indirectly, a business entity's  
45 customers, including, without limitation, any reduction, termination,  
46 or transfer of any customer's business, in whole or in part, for purposes  
47 of providing any product or any service that is competitive with those  
48 provided by the business entity, shall be enforceable, and not a  
49 restraint of trade pursuant to subsection 1 of section 416.031, if the  
50 covenant is limited to customers with whom the employee dealt during  
51 the employee's employment or other business relationship with the  
52 business entity, and if:

53         (1) The covenant is between a business entity and one or more  
54 current or former employees of the business entity and is not  
55 associated with the sale or ownership of all or any part of:

56             (a) The assets of a business entity; or

57             (b) Any interest in a business entity, including, but not limited  
58 to, all or any part of the shares of a corporation, a partnership interest,  
59 a membership or membership interest in a limited liability company or  
60 series limited liability company, or an equity interest, ownership, profit  
61 participation, or other interest of any type in any business entity;

62 so long as the covenant does not continue for more than two years  
63 following the end of the employee's employment or business  
64 relationship with the business entity. Notwithstanding the foregoing,  
65 this subdivision shall not apply to covenants with current or former  
66 distributors, dealers, franchisees, lessees of real or personal property,  
67 or licensees of a trademark, trade dress, or service mark;

68         (2) The covenant is between a business entity and a current or

69 former distributor, dealer, franchisee, lessee of real or personal  
70 property, or licensee of a trademark, trade dress, or service mark, and  
71 is not associated with the sale or ownership of all or any part of any of  
72 the items provided in paragraphs (a) or (b) of subdivision (1) of  
73 subsection 3 of this section, so long as such covenant does not continue  
74 for more than three years following the end of the business  
75 relationship; or

76 (3) The covenant is between a business entity and the owner or  
77 seller of all or any part of any of the items provided in paragraphs (a)  
78 or (b) of subdivision (1) of subsection 3 of this section, so long as the  
79 covenant does not continue for more than the longer of five years in  
80 duration or the period of time during which payments are being made  
81 to the owner or seller as a result of any sale measured from the date of  
82 termination, closing, or disposition of such items.

83 (a) A breach or threatened breach of a covenant described in this  
84 subdivision shall create a conclusive presumption of irreparable harm  
85 in the absence of an issuance of injunctive relief in connection with the  
86 enforcement of the covenant, without the necessity of establishing by  
87 prima facie evidence any actual or threatened damages or  
88 harm. Nothing in this paragraph shall be construed to change any  
89 other applicable evidentiary standard or other standards necessary for  
90 obtaining temporary, preliminary, or permanent injunctive relief  
91 relating to the enforcement of covenants.

92 (b) A provision in writing by which an employee promises to  
93 provide prior notice to a business entity of the employee's intent to  
94 terminate, sell, or otherwise dispose of all or any part of any of the  
95 items covered by this subdivision shall be conclusively presumed to be  
96 enforceable, and not a restraint of trade pursuant to subsection 1 of  
97 section 416.031, if the specified notice period is no longer than thirty  
98 days in duration and the business entity agrees in writing to pay the  
99 employee at the employee's regular rate of pay and to provide the  
100 employee with the employee's regular benefits during the applicable  
101 notice period even if the business entity does not require the employee  
102 to provide services during the notice period.

103 4. Whether a covenant covered by subsection 3 of this section is  
104 reasonable shall be determined based upon the facts and circumstances  
105 pertaining to the covenant, but a covenant covered by subdivision (1)

106 to (3) of subsection 3 of this section shall be conclusively presumed to  
107 be reasonable if its postemployment, posttermination, postbusiness  
108 relationship, postsale, or postdisposition duration is consistent with the  
109 applicable duration set forth in subdivision (1) to (3) of subsection 3 of  
110 this section.

111 5. No express reference to geographic area shall be required for  
112 a covenant described in this section to be enforceable.

113 6. If a covenant is overbroad, overlong, or otherwise not  
114 reasonably necessary to protect the legitimate business interests of the  
115 person seeking enforcement of the covenant, a court shall modify the  
116 covenant, enforce the covenant as modified, and grant only the relief  
117 reasonably necessary to protect such interests.

118 7. Nothing in subdivision (3) or (4) of subsection 1 or subdivisions (1)  
119 to (3) of subsection 3 of this section is intended to create, or to affect the  
120 validity or enforceability of, [employer-employee] covenants not to compete, other  
121 types of covenants, or nondisclosure or confidentiality agreements,  
122 except as expressly provided in this section.

123 [4.] 8. Nothing in this section shall preclude a covenant described in  
124 subsection 1 of this section from being enforceable in circumstances other than  
125 those described in subdivisions (1) to (4) of subsection 1 of this section, or a  
126 covenant described in subsection 3 of this section from being  
127 enforceable in circumstances other than those described in  
128 subdivisions (1) to (3) of subsection 3 of this section, where such covenant  
129 is reasonably necessary to protect a party's legally permissible business interests.

130 [5.] 9. Except as otherwise expressly provided in this section,  
131 nothing in this section shall be construed to limit an employee's ability to seek or  
132 accept employment with another employer immediately upon, or at any time  
133 subsequent to, termination of employment, whether said termination was  
134 voluntary or nonvoluntary.

135 [6.] 10. This section shall have retrospective as well as prospective effect.

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