SENATE SUBSTITUTE

FOR

SENATE BILL NO. 94

AN ACT

To repeal section 431.202, RSMo, and to enact in lieu thereof three new sections relating to the employer-employee relationship.

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

Section A. Section 431.202, RSMo, is repealed and three new sections enacted in lieu thereof, to be known as sections 285.075, 431.201, and 431.202, to read as follows:

285.075. 1. Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisee or a franchisor, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose, unless the franchisor exercises direct and immediate control over the hiring, termination, discipline, and direction of the franchisee's employees.

2. For purposes of this section, the terms "franchisee" and "franchisor" shall have the same meaning as in 16 C.F.R. 436.1.

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 employee;

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

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

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

(3) "Employee":

(a) A natural person currently or formerly employed or retained by a business entity in any capacity, or has performed work for a business entity, including, but not

limited to, a member of a board of directors, an officer, a supervisor, an independent contractor, or a vendor;

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

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

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

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

(d) The definition of employee set forth in this subdivision shall be applicable only with respect to section 431.202 and shall have no application in any other context. The definition of employee is not intended, and shall not be relied upon, to create, change, or affect the employment status of any natural person or the meaning of the terms employee, employment or employer that may be applicable in any other context or pursuant to any other provision of law.

431.202. 1. A reasonable covenant in writing promising not to solicit, recruit, hire, induce, persuade, encourage, or otherwise interfere with, directly or indirectly, the employment or other business relationship of

one or more employees of a business entity shall be enforceable and not a restraint of trade pursuant to subsection 1 of section 416.031 if:

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

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

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

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

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

(4) Between [an employer] a business entity and one or more employees of such business entity, notwithstanding the absence of the protectable interests described in subdivision (3) of this subsection, so long as such covenant does not continue for more than [one year] two years following the employee's employment or business relationship with the business entity; provided, however, that this

subdivision shall not apply to covenants signed by employees who provide only secretarial or clerical services and who own no shares, partnership interest, membership or membership interest in a limited liability company or series limited liability company, or equity interest, ownership, profit participation, or other interest of any type in the business entity.

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

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

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

(a) The assets of a business entity; or

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

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

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

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

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

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

4. Whether a covenant covered by subsection 3 of this section is reasonable shall be determined based upon the facts and circumstances pertaining to the covenant, but a covenant covered by subdivision (1) to (3) of subsection 3 of this section shall be conclusively presumed to be reasonable if its postemployment, posttermination, postbusiness relationship, postsale, or postdisposition duration is consistent with the applicable duration set

forth in subdivision (1) to (3) of subsection 3 of this section.

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

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

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

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

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

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