

FIRST REGULAR SESSION

SENATE BILL NO. 181

101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR LUETKEMEYER.

0427S.01H

ADRIANE D. CROUSE, Secretary

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Section A. Section 431.202, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 431.201 and 431.202, to read as follows: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

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

19 (c) Who was solicited, produced, induced, persuaded,
20 encouraged, or otherwise dealt with, directly or indirectly,
21 by an employee;

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

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

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

38 (3) "Employee":

39 (a) A natural person currently or formerly employed or
40 retained by a business entity in any capacity, or has
41 performed work for a business entity, including, but not
42 limited to, a member of a board of directors, an officer, a
43 supervisor, an independent contractor, or a vendor;

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

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

49 b. Obtained, had knowledge of, had access to, or is in
50 possession of confidential or proprietary business

51 information or trade secrets of the business entity,
52 including, but not limited to, customer contact information
53 or information of or belonging to customers of the business
54 entity;

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

63 (d) The definition of employee set forth in this
64 subdivision shall be applicable only with respect to section
65 431.202 and shall have no application in any other context.
66 The definition of employee is not intended, and shall not be
67 relied upon, to create, change, or affect the employment
68 status of any natural person or the meaning of the terms
69 employee, employment or employer that may be applicable in
70 any other context or pursuant to any other provision of law.

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

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

13 [corporations or] **business** entities for the acquisition of
14 all or a part of one or more of such [corporations or]
15 **business** entities;

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

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

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

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

31 (4) Between [an employer] **a business entity** and one or
32 more employees **of such business entity**, notwithstanding the
33 absence of the protectable interests described in
34 subdivision (3) of this subsection, so long as such covenant
35 does not continue for more than [one year] **two years**
36 following the employee's employment **or business relationship**
37 **with the business entity**; provided, however, that this
38 subdivision shall not apply to covenants signed by employees
39 who provide only secretarial or clerical services **and who**
40 **own no shares, partnership interest, membership or**
41 **membership interest in a limited liability company or series**
42 **limited liability company, or equity interest, ownership,**
43 **profit participation, or other interest of any type in the**
44 **business entity.**

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

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

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

69 (a) **The assets of a business entity; or**

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

77 so long as the covenant does not continue for more than two
78 years following the end of the employee's employment or
79 business relationship with the business entity.

80 Notwithstanding the foregoing, this subdivision shall not
81 apply to covenants with current or former distributors,
82 dealers, franchisees, lessees of real or personal property,
83 or licensees of a trademark, trade dress, or service mark;

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

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

102 (a) A breach or threatened breach of a covenant
103 described in this subdivision shall create a conclusive
104 presumption of irreparable harm in the absence of an
105 issuance of injunctive relief in connection with the
106 enforcement of the covenant, without the necessity of
107 establishing by prima facie evidence any actual or
108 threatened damages or harm. Nothing in this paragraph shall

109 be construed to change any other applicable evidentiary
110 standard or other standards necessary for obtaining
111 temporary, preliminary, or permanent injunctive relief
112 relating to the enforcement of covenants.

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

126 4. Whether a covenant covered by subsection 3 of this
127 section is reasonable shall be determined based upon the
128 facts and circumstances pertaining to the covenant, but a
129 covenant covered by subdivision (1) to (3) of subsection 3
130 of this section shall be conclusively presumed to be
131 reasonable if its postemployment, posttermination,
132 postbusiness relationship, postsale, or postdisposition
133 duration is consistent with the applicable duration set
134 forth in subdivision (1) to (3) of subsection 3 of this
135 section.

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

139 6. If a covenant is overbroad, overlong, or otherwise
140 not reasonably necessary to protect the legitimate business

141 interests of the person seeking enforcement of the covenant,
142 a court shall modify the covenant, enforce the covenant as
143 modified, and grant only the relief reasonably necessary to
144 protect such interests.

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

152 [4.] 8. Nothing in this section shall preclude a
153 covenant described in subsection 1 of this section from
154 being enforceable in circumstances other than those
155 described in subdivisions (1) to (4) of subsection 1 of this
156 section, or a covenant described in subsection 3 of this
157 section from being enforceable in circumstances other than
158 those described in subdivisions (1) to (3) of subsection 3
159 of this section, where such covenant is reasonably necessary
160 to protect a party's legally permissible business interests.

161 [5.] 9. Except as otherwise expressly provided in this
162 section, nothing [is] in this section shall be construed to
163 limit an employee's ability to seek or accept employment
164 with another employer immediately upon, or at any time
165 subsequent to, termination of employment, whether said
166 termination was voluntary or nonvoluntary.

167 [6.] 10. This section shall have retrospective as well
168 as prospective effect.

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