

# SENATE BILL NO. 833

## 101ST GENERAL ASSEMBLY

INTRODUCED BY SENATOR LUETKEMEYER.

3413S.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Section A. Section 431.202, RSMo, is repealed and two new sections enacted in lieu thereof, to be known as sections 431.201 and 431.202, to read as follows: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 who 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; or

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 term "employee" set forth in this subdivision  
64 shall be applicable only with respect to section 431.202 and  
65 shall have no application in any other context. The term  
66 "employee" is not intended, and shall not be relied upon, to  
67 create, change, or affect the employment status of any  
68 natural person or the meaning of the terms "employee",  
69 "employment", or "employer" that may be applicable in any  
70 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 this  
90 subsection, so long as such covenant does not continue for  
91 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 this  
96 subsection, so long as the covenant does not continue for  
97 more than the longer of five years in duration or the period  
98 of time during which payments are being made to the owner or  
99 seller as a result of any sale measured from the date of  
100 termination, closing, or disposition of such items.

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

109 standard or other standards necessary for obtaining  
110 temporary, preliminary, or permanent injunctive relief  
111 relating to the enforcement of covenants.

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

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

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

138 6. If a covenant is overbroad, overlong, or otherwise  
139 not reasonably necessary to protect the legitimate business  
140 interests of the person seeking enforcement of the covenant,

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

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

151 [4.] 8. Nothing in this section shall preclude a  
152 covenant described in subsection 1 of this section from  
153 being enforceable in circumstances other than those  
154 described in subdivisions (1) to (4) of subsection 1 of this  
155 section, or a covenant described in subsection 3 of this  
156 section from being enforceable in circumstances other than  
157 those described in subdivisions (1) to (3) of subsection 3  
158 of this section, where such covenant is reasonably necessary  
159 to protect a party's legally permissible business interests.

160 [5.] 9. Except as otherwise expressly provided in this  
161 section, nothing [is] in this section shall be construed to  
162 limit an employee's ability to seek or accept employment  
163 with another employer immediately upon, or at any time  
164 subsequent to, termination of employment, whether said  
165 termination was voluntary or nonvoluntary.

166 [6.] 10. This section shall have retrospective as well  
167 as prospective effect.

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