

Stricken language would be deleted from and underlined language would be added to present law.

State of Arkansas
93rd General Assembly
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A Bill

SENATE BILL 665

By: Senators B. Ballinger, Hill
By: Representative Gonzales

For An Act To Be Entitled

AN ACT TO MODIFY THE STATUTES CONCERNING COVENANT NOT
TO COMPETE AGREEMENTS; AND FOR OTHER PURPOSES.

Subtitle

TO MODIFY THE STATUTES CONCERNING
COVENANT NOT TO COMPETE AGREEMENTS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 4-75-101 is amended to read as follows:

4-75-101. Covenant not to compete agreements.

(a) A covenant not to compete agreement is enforceable if the agreement is ancillary to an employment relationship or part of an otherwise enforceable employment agreement or contract to the extent that:

(1) The employer has a protectable business interest; ~~and~~

(2) The covenant not to compete agreement is limited with respect to time, geographic scope, and ~~scope~~ type of commercial activity in a manner that is not greater than necessary to defend the protectable business interest of the employer; and

(3) The covenant not to compete agreement does not unduly burden:

(A) An employee's:

(i) Ability to obtain gainful employment; and

(ii) Freedom of movement; and

(B) The public, such as by unreasonably limiting competition in the employer's industry.



(b)(1) For the purposes of subsection (a) of this section, the protectable business interest of the employer includes the employer's:

- ~~(1)~~(A) Trade secrets;
- ~~(2)~~(B) Intellectual property;
- ~~(3)~~(C) Customer lists that are not compiled as a result of action by an employee;
- ~~(4)~~(D) Goodwill with customers that is not based on the action of an employee;
- ~~(5)~~(E) Knowledge of ~~his or her~~ the employer's business practices that are unique or peculiar to the employer;
- ~~(6)~~(F) Methods that are specialized and unique to the employer;
- ~~(7)~~(G) Profit margins;
- ~~(8)~~(H) Costs;
- ~~(9)~~(I) Other confidential business information that is confidential, proprietary, and increases in value from not being known by a competitor unless that information is available in the public domain;
- ~~(10)~~(J) Training and education of the employer's employees that is not provided in the regular course of employment; and
- ~~(11)~~(K) Other valuable employer data that the employer has provided to an employee ~~that an employer would reasonably seek~~ and has sought to protect or safeguard from a competitor in the interest of fairness.

(2) As used in subdivision (b)(1) of this section, "protectable business interest" does not include information available in the public domain.

~~(c)(1) The lack of a specific or defined geographic descriptive restriction in a covenant not to compete agreement does not make the covenant not to compete agreement overly broad under subdivision (a)(2) of this section if the covenant not to compete agreement is limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer~~ Whether or not a covenant not to compete agreement satisfies the requirements of subsection (a) of this section-

~~(2) The reasonableness of a covenant not to compete agreement shall be determined after considering, among other things:~~

- ~~(A)~~(1) The nature of the employer's protectable business

interest;

~~(B)(2)~~ The geographic scope of the employer’s business and whether or not a the covenant not to compete agreement’s geographic limitation is ~~feasible~~ appropriate under the circumstances;

~~(C)(3)~~ Whether or not the restriction placed on the employee is limited to a specific group of customers or other individuals or entities associated with the employer’s business; ~~and~~

~~(D)(4)~~ The nature of the employer’s business;

(5) The extent of the burden the covenant not to compete agreement places on the employee’s:

(A) Ability to obtain gainful employment; and

(B) Freedom of movement; and

(6) The extent of the burden the covenant not to compete agreement places on the public, such as limiting competition in the employer’s industry or by inhibiting the free movement of employees to markets and regions in need of the employee’s labor and skills.

(d) A post-termination restriction of ~~two (2) years~~ one (1) year is presumptively reasonable as to length of time under subdivision (a)(2) of this section unless the facts and circumstances of a particular case ~~clearly~~ demonstrate that ~~two (2) years~~ one (1) year is unreasonable compared to the employer’s protectable business interest.

(e)(1) A covenant not to compete agreement shall be separately signed from any standard employment agreement and any other ancillary agreements with clear notice from the employer to the employee of the nature and scope of the covenant not to compete agreement.

(2) An employer shall provide a copy of the employee’s job description to the employee at the time of execution of a covenant not to compete agreement.

(3) If an employer fails to comply with subdivision (e)(1) or subdivision (e)(2) of this section, then the covenant not to compete agreement is unenforceable.

~~(e)(1)(f)(1)~~ In a private court action, a court may award the employer damages for a breach of a covenant not to compete agreement, appropriate injunctive relief, or both, if appropriate.

(2) The immediate harm associated with the breach of a covenant not to compete agreement shall be considered irreparable to establish the

appropriateness of a preliminary injunction.

(3) This subsection does not limit:

(A) Any other defense available to a party against a claim for preliminary injunctive relief; or

(B) An employer's right to monetary damages for breach of a covenant not to compete agreement.

~~(f)(1)(g)~~ If restrictions in a covenant not to compete agreement are found to be unreasonable and impose a greater restraint than is necessary to protect the protectable business interest of the employer allowed under subdivision ~~(a)(1)~~ subsection (a) of this section, the court shall reform the covenant not to compete agreement to the extent necessary to: covenant not to compete agreement is unenforceable.

~~(A) Cause the limitations contained in the covenant not to compete agreement to be reasonable; and~~

~~(B) Impose a restraint that is not greater than necessary to protect the protectable business interest.~~

~~(2) The court shall enforce the covenant not to compete agreement under the reformed terms and conditions.~~

~~(g)(h)~~ An employee's continued employment is sufficient consideration for a covenant not to compete agreement.

~~(h)(1)(i)(1)~~ This ~~subsection~~ section does not apply to a covenant not to compete agreement that is ancillary to other contractual relationships, including any type of agreement for the sale and purchase of a business, franchise agreement, and any other agreement not ancillary to an employment relationship or employment contract.

(2) Existing common law standards governing a covenant not to compete agreement outside the employment background shall remain in effect.

~~(i)(1)(j)(1)~~ This section ~~shall~~ does not apply to other types of agreements between employers and employees that do not concern competition or competitive work, including:

- (A) Agreements not to solicit, recruit, or hire employees;
- (B) Confidentiality agreements;
- (C) Nondisclosure agreements; and
- (D) The terms and conditions of an employment or

employment agreement.

(2) Existing common law standards governing ~~these types of~~

~~agreements~~ the agreements described in subdivision (j)(1) of this section shall remain in effect.

(k)(1) The burden of proof shall be on an employer attempting to enforce a covenant not to compete agreement.

(2) An employer that does not prevail in the employer's attempt to enforce a covenant not to compete agreement against an employee is responsible for the attorney's fees incurred by the employee.

~~(j)(1)~~ This section shall does not:

(1) Be read to impair Impair, limit, or change a party's protections and rights under the Arkansas Trade Secrets Act, § 4-75-601 et seq.; or

(2) Apply to a person who:

(A) holding Holds a professional license under Arkansas Code Title 17, Subtitle 3; or

(B)(i) Is a nonmanagement employee.

(ii)(a) As used in this section, "nonmanagement employee" means an employee who is not employed in a supervisory role as described in the employee's job description under the employer's written policy.

(b) "Nonmanagement employee" does not include an employee who is employed in a position that requires significant skill or training.

(m) A covenant not to compete agreement between an employer and a nonmanagement employee is unenforceable.

SECTION 2. DO NOT CODIFY. Legislative findings and intent.

(a) The General Assembly finds that:

(1) Many employers in Arkansas require a prospective or current employee to sign a covenant not to compete agreement to gain employment or remain employed;

(2) An employee in need of employment and a steady paycheck will often sign a covenant not to compete agreement without reading and understanding the terms and conditions outlined in the covenant not to compete agreement;

(3) Often, an employer can prevent an employee from finding new employment with a potentially higher salary or better benefits due to the

covenant not to compete agreement;

(4) In fact, an employee may not be able to find any job in their chosen field regardless of salary or benefits due to a covenant not to compete agreement;

(5) An employer is able to use a covenant not to compete agreement to keep an employee's salary static while at the same time preventing that employee from exploring any employment opportunities in the employee's chosen field;

(6) A covenant not to compete agreement is often the product of unequal bargaining power and an employee generally does not grant sufficient attention to the hardship that a covenant not to compete agreement imposes on the employee after the employee leaves the job;

(7) An employee is seldom able to dispute how unreasonable a covenant not to compete agreement is on the employee because the legal expenses incurred are too great;

(8) Many employers are not treating employees in a fair and equitable manner when requiring an employee to sign a covenant not to compete agreement to remain employed;

(9) Employers regularly require employees to sign a covenant not to compete agreement solely to restrain competition in the employment market rather than to protect a legitimate business interest such as trade secrets or genuinely confidential information;

(10) Many other states enforce covenant not to compete agreements less frequently than Arkansas;

(11) Some states prohibit the enforcement of covenant not to compete agreements in employment situations and yet those states have vibrant and flourishing economies;

(12) This demonstrates that existing law governing covenant not to compete agreements in Arkansas is not necessary for this state to have a well-functioning and dynamic economy;

(13) A better balance is needed between the legitimate interests of employers seeking to protect genuinely proprietary information on the one hand, and on the other hand, the rights of employees to economic freedom, the freedom of movement, and the values of free market competition; and

(14) It should be the choice of an employee as to where the employee is employed as it should be the choice of a consumer as to where the

consumer does business in Arkansas because consumer choice is a priority in business transactions and employees should have the same rights as consumers.

(b) This act does not affect the ability of an employer to protect the employer's trade secrets under the Arkansas Trade Secrets Act, § 4-75-601 et seq.