AMENDMENT TO HOUSE BILL 789

AMENDMENT NO. ______. Amend House Bill 789 by replacing everything after the enacting clause with the following:

"Section 5. The Illinois Freedom to Work Act is amended by changing Sections 5 and 10 and by adding Sections 15, 20, 25, and 30 and by adding Section 7 as follows:

(820 ILCS 90/5)

Sec. 5. Definitions. In this Act:

"Adequate consideration" means (1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete or a covenant not to solicit or (2) the employer otherwise provided consideration adequate to support an agreement to not compete or to not solicit, which could consist of the period of employment plus additional consideration or merely other consideration adequate by itself."
"Covenant not to compete" means an agreement:

(1) between an employer and an low-wage employee that restricts the such low-wage employee from performing:

(A) any work for another employer for a specified period of time;

(B) any work in a specified geographical area; or

(C) work for another employer that is similar to the such low-wage employee's work for the employer included as a party to the agreement; and

(2) that is entered into after the effective date of this Act.

"Covenant not to compete" also means an agreement between an employer and an employee, entered into after the effective date of this amendatory Act of the 101st General Assembly, that by its terms imposes adverse financial consequences on a former employee if the employee engages in competitive activities after the termination of the employee's employment with the employer. "Covenant not to compete" does not include (i) a covenant not to solicit, (ii) a confidentiality agreement or covenant, (iii) a covenant or agreement prohibiting use or disclosure of trade secrets or inventions, (iv) invention assignment agreements or covenants, (v) a covenant or agreement entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest, (vi) clauses or an agreement between an employer and an employee requiring advance notice of termination of
employment, during which notice period the employee remains employed by the employer and receives compensation, or (vii) agreements by which the employee agrees not to reapply for employment to the same employer after termination of the employee.

"Covenant not to solicit" means an agreement that is entered into after the effective date of this amendatory Act of the 101st General Assembly between an employer and an employee that (i) restricts an employee from soliciting for employment the employer's employees or (ii) restricts an employee from soliciting for the purpose of selling products or services of any kind to, or from interfering with the employer's relationships with, the employer's clients, prospective clients, vendors, prospective vendors, suppliers, prospective suppliers, or other business relationships.

"Earnings" means the compensation, including earned salary, earned bonuses, earned commissions, or any other form of taxable compensation, reflected or that is expected to be reflected as wages, tips, and other compensation on the employee's IRS Form W-2 plus any elective deferrals not reflected as wages, tips, and other compensation on the employee's IRS Form W-2, such as, without limitation, employee contributions to a 401(k) plan, a 403(b) plan, a flexible spending account, or a health savings account, or commuter benefit-related deductions.

"Employee" has the meaning ascribed to that term in Section
2 of the Illinois Wage Payment and Collection Act and includes individuals currently or formerly employed by an employer. "Employer" has the meaning given to such term in subsection (c) of Section 3 of the Minimum Wage Law. "Employer" does not include governmental or quasi-governmental bodies. "Low-wage employee" means an employee whose earnings do not exceed the greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, State, or local minimum wage law or (2) $13.00 per hour. (Source: P.A. 99-860, eff. 1-1-17; 100-225, eff. 8-18-17.)

(820 ILCS 90/7 new)

Sec. 7. Legitimate business interest of the employer. In determining the legitimate business interest of the employer (consistent with the decision of the Supreme Court of Illinois in Reliable Fire Equipment Company v. Arredondo, 2011 IL 111871), the totality of the facts and circumstances of the individual case shall be considered. Factors that may be considered in this analysis include, but are not limited to, the employee's exposure to the employer's customer relationships or other employees, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, the time restrictions, the place restrictions, and the scope of the activity restrictions. No factor carries any more weight than any other, but rather its importance will
depend on the specific facts and circumstances of the individual case. Such factors are only nonconclusive aids in determining the employer's legitimate business interest, which in turn is but one component in the three-prong rule of reason, grounded in the totality of the circumstances. Each situation must be determined on its own particular facts. Reasonableness is gauged not just by some but by all of the circumstances. The same identical contract and restraint may be reasonable and valid under one set of circumstances and unreasonable and invalid under another set of circumstances.

(820 ILCS 90/10)
Sec. 10. Prohibiting covenants not to compete for low-wage employees.
(a) A covenant not to compete shall not be valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year. This figure shall increase to $80,000 per year beginning on January 1, 2027, $85,000 per year beginning on January 1, 2032, and $90,000 per year beginning on January 1, 2037. No employer shall enter into a covenant not to compete with any low-wage employee of the employer.
(b) A covenant not to solicit shall not be valid or enforceable unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year. This figure shall increase to $47,500 per year beginning on January
1, 2027, $50,000 per year beginning on January 1, 2032, and
$52,500 per year beginning on January 1, 2037. A covenant not
to compete entered into between an employer and a low-wage
employee is illegal and void.

(c) A covenant not to compete is void and illegal for any
employee who an employer terminates or furloughs as the result
of business circumstances or governmental orders related to the
COVID-19 pandemic, or under circumstances that are similar to
the COVID-19 pandemic, unless enforcement of the covenant not
to compete includes compensation equivalent to the employee's
base salary at the time of termination for the period of
enforcement minus compensation earned through subsequent
employment during the period of enforcement.
(Source: P.A. 99-860, eff. 1-1-17.)

(820 ILCS 90/15 new)
Sec. 15. Enforceability of a covenant not to compete or a
covenant not to solicit. A covenant not to compete or a
covenant not to solicit is illegal and void unless (i) the
employee receives adequate consideration, (ii) the covenant is
ancillary to a valid employment relationship, (iii) the
covenant is no greater than is required for the protection of a
legitimate business interest of the employer, (iv) the covenant
does not impose undue hardship on the employee, and (v) the
covenant is not injurious to the public.
Sec. 20. Ensuring employees are informed about their obligations. A covenant not to compete or a covenant not to solicit is illegal and void unless (i) the employer advises the employee in writing to consult with an attorney before entering into the covenant and (ii) the employer provides the employee with a copy of the covenant at least 14 calendar days before the commencement of the employee's employment or the employer provides the employee with at least 14 calendar days to review the covenant.

Sec. 25. Remedies. In addition to any remedies available under any agreement between an employer and an employee or under any other statute, in a civil action filed by an employer (including, but not limited to, a complaint or counterclaim), if an employee prevails on a claim to enforce a covenant not to compete or a covenant not to solicit, the employee shall recover from the employer all costs and all reasonable attorney's fees regarding such claim to enforce a covenant not to compete or a covenant not to solicit.

Sec. 30. Reformation.

(a) Extensive judicial reformation of a covenant not to compete or a covenant not to solicit may be against the public
policy of this State and a court may refrain from wholly rewriting contracts.

(b) In some circumstances, a court may, in its discretion, choose to reform a covenant not to compete or a covenant not to solicit rather than hold such covenant unenforceable. Factors which may be considered when deciding whether such reformation is appropriate include the fairness of the restraints as originally written, whether the original restriction reflects a good-faith effort to protect a legitimate business interest of the employer, the extent of such reformation, and whether the parties included a clause authorizing such modifications in their agreement.

Section 99. Effective date. This Act takes effect June 1, 2021.".