



## 102ND GENERAL ASSEMBLY

### State of Illinois

2021 and 2022

HB3066

Introduced 2/19/2021, by Rep. Kelly M. Burke

#### SYNOPSIS AS INTRODUCED:

820 ILCS 90/5  
820 ILCS 90/7 new  
820 ILCS 90/10  
820 ILCS 90/15 new  
820 ILCS 90/20 new  
820 ILCS 90/25 new  
820 ILCS 90/30 new

Amends the Illinois Freedom to Work Act. Provides that 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 on the effective date of the amendatory Act, \$80,000 per year beginning on January 1, 2027, \$85,000 per year beginning on January 1, 2032, or \$90,000 per year beginning on January 1, 2037 (rather than no employer shall enter into a covenant not to compete with any low-wage employee of the employer). Provides that 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. Provides that 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. Contains provisions concerning the enforceability of a covenant not to compete or a covenant not to solicit; notice requirements for employers under a covenant not to compete or a covenant not to solicit; remedies for employees who prevail against an employer's civil action to enforce a covenant not to compete or a covenant not to solicit; and certain factors a court may consider when determining whether to reform a covenant not to compete or a covenant not to solicit. Defines "adequate consideration"; "covenant not to compete"; "covenant not to solicit"; "earnings"; and "employee". Removes the definition for the term "low-wage employee".

LRB102 10768 JLS 16098 b

A BILL FOR

1 AN ACT concerning employment.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

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

7 (820 ILCS 90/5)

8 Sec. 5. Definitions. In this Act:

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

17 "Covenant not to compete" means an agreement:

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

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

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

23 (C) work for another employer that is similar to

1           ~~the such low wage~~ employee's work for the employer  
2           included as a party to the agreement; and

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

5           "Covenant not to compete" also means an agreement between  
6           an employer and an employee, entered into after the effective  
7           date of this amendatory Act of the 102nd General Assembly,  
8           that by its terms imposes adverse financial consequences on a  
9           former employee if the employee engages in competitive  
10           activities after the termination of the employee's employment  
11           with the employer. "Covenant not to compete" does not include  
12           (i) a covenant not to solicit, (ii) a confidentiality  
13           agreement or covenant, (iii) a covenant or agreement  
14           prohibiting use or disclosure of trade secrets or inventions,  
15           (iv) invention assignment agreements or covenants, (v) a  
16           covenant or agreement entered into by a person purchasing or  
17           selling the goodwill of a business or otherwise acquiring or  
18           disposing of an ownership interest, (vi) clauses or an  
19           agreement between an employer and an employee requiring  
20           advance notice of termination of employment, during which  
21           notice period the employee remains employed by the employer  
22           and receives compensation, or (vii) agreements by which the  
23           employee agrees not to reapply for employment to the same  
24           employer after termination of the employee.

25           "Covenant not to solicit" means an agreement that is  
26           entered into after the effective date of this amendatory Act

1 of the 102nd General Assembly between an employer and an  
2 employee that (i) restricts an employee from soliciting for  
3 employment the employer's employees or (ii) restricts an  
4 employee from soliciting for the purpose of selling products  
5 or services of any kind to, or from interfering with the  
6 employer's relationships with, the employer's clients,  
7 prospective clients, vendors, prospective vendors, suppliers,  
8 prospective suppliers, or other business relationships.

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

19 "Employee" has the meaning ascribed to that term in  
20 Section 2 of the Illinois Wage Payment and Collection Act and  
21 includes individuals currently or formerly employed by an  
22 employer.

23 "Employer" has the meaning given to such term in  
24 subsection (c) of Section 3 of the Minimum Wage Law.  
25 "Employer" does not include governmental or quasi-governmental  
26 bodies.

1       ~~"Low wage employee" means an employee whose earnings do~~  
2 ~~not exceed the greater of (1) the hourly rate equal to the~~  
3 ~~minimum wage required by the applicable federal, State, or~~  
4 ~~local minimum wage law or (2) \$13.00 per hour.~~

5       (Source: P.A. 99-860, eff. 1-1-17; 100-225, eff. 8-18-17.)

6               (820 ILCS 90/7 new)

7       Sec. 7. Legitimate business interest of the employer. In  
8 determining the legitimate business interest of the employer  
9 (consistent with the decision of the Supreme Court of Illinois  
10 in Reliable Fire Equipment Company v. Arredondo, 2011 IL  
11 111871), the totality of the facts and circumstances of the  
12 individual case shall be considered. Factors that may be  
13 considered in this analysis include, but are not limited to,  
14 the employee's exposure to the employer's customer  
15 relationships or other employees, the near-permanence of  
16 customer relationships, the employee's acquisition, use, or  
17 knowledge of confidential information through the employee's  
18 employment, the time restrictions, the place restrictions, and  
19 the scope of the activity restrictions. No factor carries any  
20 more weight than any other, but rather its importance will  
21 depend on the specific facts and circumstances of the  
22 individual case. Such factors are only nonconclusive aids in  
23 determining the employer's legitimate business interest, which  
24 in turn is but one component in the three-prong rule of reason,  
25 grounded in the totality of the circumstances. Each situation

1 must be determined on its own particular facts. Reasonableness  
2 is gauged not just by some but by all of the circumstances. The  
3 same identical contract and restraint may be reasonable and  
4 valid under one set of circumstances and unreasonable and  
5 invalid under another set of circumstances.

6 (820 ILCS 90/10)

7 Sec. 10. Prohibiting covenants not to compete for ~~low wage~~  
8 employees.

9 (a) A covenant not to compete shall not be valid or  
10 enforceable unless the employee's actual or expected  
11 annualized rate of earnings exceeds \$75,000 per year. This  
12 figure shall increase to \$80,000 per year beginning on January  
13 1, 2027, \$85,000 per year beginning on January 1, 2032, and  
14 \$90,000 per year beginning on January 1, 2037. ~~No employer~~  
15 ~~shall enter into a covenant not to compete with any low wage~~  
16 ~~employee of the employer.~~

17 (b) A covenant not to solicit shall not be valid or  
18 enforceable unless the employee's actual or expected  
19 annualized rate of earnings exceeds \$45,000 per year. This  
20 figure shall increase to \$47,500 per year beginning on January  
21 1, 2027, \$50,000 per year beginning on January 1, 2032, and  
22 \$52,500 per year beginning on January 1, 2037. ~~A covenant not~~  
23 ~~to compete entered into between an employer and a low wage~~  
24 ~~employee is illegal and void.~~

25 (c) A covenant not to compete is void and illegal for any

1 employee who an employer terminates or furloughs as the result  
2 of business circumstances or governmental orders related to  
3 the COVID-19 pandemic, or under circumstances that are similar  
4 to the COVID-19 pandemic, unless enforcement of the covenant  
5 not to compete includes compensation equivalent to the  
6 employee's base salary at the time of termination for the  
7 period of enforcement minus compensation earned through  
8 subsequent employment during the period of enforcement.

9 (Source: P.A. 99-860, eff. 1-1-17.)

10 (820 ILCS 90/15 new)

11 Sec. 15. Enforceability of a covenant not to compete or a  
12 covenant not to solicit. A covenant not to compete or a  
13 covenant not to solicit is illegal and void unless (i) the  
14 employee receives adequate consideration, (ii) the covenant is  
15 ancillary to a valid employment relationship, (iii) the  
16 covenant is no greater than is required for the protection of a  
17 legitimate business interest of the employer, (iv) the  
18 covenant does not impose undue hardship on the employee, and  
19 (v) the covenant is not injurious to the public.

20 (820 ILCS 90/20 new)

21 Sec. 20. Ensuring employees are informed about their  
22 obligations. A covenant not to compete or a covenant not to  
23 solicit is illegal and void unless (i) the employer advises  
24 the employee in writing to consult with an attorney before

1 entering into the covenant and (ii) the employer provides the  
2 employee with a copy of the covenant at least 14 calendar days  
3 before the commencement of the employee's employment or the  
4 employer provides the employee with at least 14 calendar days  
5 to review the covenant.

6 (820 ILCS 90/25 new)

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

16 (820 ILCS 90/30 new)

17 Sec. 30. Reformation.

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

22 (b) In some circumstances, a court may, in its discretion,  
23 choose to reform a covenant not to compete or a covenant not to  
24 solicit rather than hold such covenant unenforceable. Factors



1 which may be considered when deciding whether such reformation  
2 is appropriate include the fairness of the restraints as  
3 originally written, whether the original restriction reflects  
4 a good-faith effort to protect a legitimate business interest  
5 of the employer, the extent of such reformation, and whether  
6 the parties included a clause authorizing such modifications  
7 in their agreement.