

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Commerce and Tourism

BILL: SB 882

INTRODUCER: Senator Gruters

SUBJECT: Restraints of Trade or Commerce

DATE: April 5, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McKay	CM	Pre-meeting
2.			JU	
3.			RC	

I. Summary:

SB 882 amends Florida’s non-compete statute, which allows for the enforcement of contracts that restrict or prohibit competition as long as such contracts are reasonable in time, area, and line of business. Under current law, a person seeking enforcement of a non-compete agreement must prove the existence of one or more “legitimate business interests,” which include trade secrets; valuable confidential business or professional information; substantial relationships with specific prospective or existing customers, patients, or clients; customer goodwill associated with an ongoing business by way of trade name, specific geographic location, or specific marketing or trade area; or extraordinary or specialized training.

The bill removes the requirement that a non-compete agreement must be reasonable as to area. The bill also narrows the list of what constitutes a “legitimate business interest” to trade secrets; valuable confidential business or professional information; or customer, patient, or client goodwill associated with an ongoing business by way of trade name, trademark, service mark, or trade dress.

The bill takes effect July 1, 2019.

II. Present Situation:

Contracts in Restraint of Trade or Commerce

Generally, a contract in restraint of trade or commerce in Florida is unlawful.¹ However, non-competition restrictive covenants contained in employment agreements that are reasonable in time, area, and line of business are not prohibited, pursuant to s. 542.335, F.S. In any action

¹ Section 542.18, F.S.

concerning enforcement of a restrictive covenant, a court may not enforce a restrictive covenant unless it is set forth in a writing signed by the person against whom enforcement is sought, and the person seeking enforcement of a restrictive covenant must prove the existence of one or more legitimate business interests justifying the restrictive covenant. The term “legitimate business interest” includes, but is not limited to:

- Trade secrets;²
- Valuable confidential business or professional information that otherwise does not qualify as trade secrets;
- Substantial relationships with specific prospective or existing customers, patients, or clients;
- Customer, patient, or client goodwill associated with:
 - An ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”;
 - A specific geographic location; or
 - A specific marketing or trade area; or
- Extraordinary or specialized training.³

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable. A person seeking enforcement of a restrictive covenant must prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction.

In determining the reasonableness in time of a post-term restrictive covenant not predicated upon the protection of trade secrets, a court must apply specified rebuttable presumptions, and must presume as reasonable in time any restraint 6 months or less in duration, and presume as unreasonable in time any restraint more than 2 years in duration. In the case of a restrictive covenant sought to be enforced against a former distributor, dealer, franchisee, or licensee of a trademark or service mark and not associated with certain sales, a court must presume as reasonable in time any restraint 1 year or less in duration, and presume as unreasonable in time any restraint more than 3 years in duration. In the case of a restrictive covenant sought to be enforced against the seller of certain assets, a court must presume as reasonable in time any restraint 3 years or less in duration and must presume as unreasonable in time any restraint more than 7 years in duration. In determining the reasonableness in time of a postterm restrictive covenant predicated upon the protection of trade secrets, a court must presume as reasonable in time any restraint of 5 years or less, and presume as unreasonable in time any restraint of more than 10 years.

A court must not refuse enforcement of a restrictive covenant on the ground that the person seeking enforcement is a third-party beneficiary of such contract or is an assignee or successor to a party to such contract. In determining the enforceability of a restrictive covenant, a court must not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought, may consider as a defense the fact that the person seeking

² Section 688.002, F.S., defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

³ Section 542.335(1)(b), F.S.

enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant, and must consider all other pertinent legal and equitable defenses, and the effect of enforcement upon the public health, safety, and welfare.

A court must construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement, and must not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract. No court may refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless such public policy is articulated specifically by the court and the court finds that the specified public policy requirements substantially outweigh the need to protect the legitimate business interest or interests established by the person seeking enforcement of the restraint.

A court must enforce a restrictive covenant by any appropriate and effective remedy. In the absence of a contractual provision authorizing an award of attorney's fees and costs to the prevailing party, a court may award attorney's fees and costs to the prevailing party in any action seeking enforcement of, or challenging the enforceability of, a restrictive covenant.

III. Effect of Proposed Changes:

The bill removes the requirement that non-compete contracts must be reasonable as to area in order to be enforceable.

The bill also changes the types of "legitimate business interests" that a person seeking enforcement of a restrictive covenant must prove. The bill removes from the list of types of legitimate business interests that justify a restrictive covenant: (1) substantial relationships with specific prospective or existing customers, patients, or clients, and (2) extraordinary or specialized training.

Current law provides that customer, patient, or client goodwill associated with an ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress"; a specific geographic location; or a specific marketing or trade area are types of legitimate business interests. The bill removes specific geographic location, and specific marketing or trade area from the list of ways with which customer, patient, or client goodwill is associated.

The bill provides that the amendments to s. 542.335, F.S., made by the bill apply in actions determining the enforceability of restrictive covenants entered into on or after the effective date of the bill, July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

Indeterminate.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 542.335 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
