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:	CS/SB 1618
INTRODUCER:	Senator Broxson
SUBJECT:	Restrictions on Employment
DATE:	January 25, 2022
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McMillan	McKay	CM	**Fav/CS**
2.			JU	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1618 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.

The bill establishes in s. 542.335(3), F.S., that a restrictive covenant is only enforceable against a former employee, agent, or independent contractor who voluntarily resigns, is terminated because of misconduct, or does not satisfy reasonable performance standards or goals which were set in advance. The bill clarifies that the termination or resignation of an employee following a substantial unanticipated change in market conditions is not a termination for the failure to satisfy reasonable performance standards or goals. Additionally, the bill provides that a resignation resulting from a constructive termination is not voluntary.

The bill provides that s. 542.335(3), F.S., does not apply to a restrictive covenant that prohibits disclosing a trade secret of the employer to third parties. Additionally, s. 542.335(3), F.S., does not apply to a restrictive covenant sought to be enforced against a former employer, agent, or independent contractor who is associated with the sale of all or part of the following:

- The assets of a business or professional practice;
- The shares of a corporation;
- A partnership interest;
- A limited liability company membership; or
- An equity interest, of any other type, in a business or professional practice.

The bill establishes that ss. 542.335(1) and 542.335(2), F.S., apply to restrictive covenants entered into on or after July 1, 1996, and before June 30, 2022, and s. 542.335(3), F.S., applies to restrictive covenants entered into on or after July 1, 2022.

The bill takes effect July 1, 2022.

II. Present Situation:

Federal Antitrust Laws

In 1890, Congress passed the first antitrust law, the Sherman Act, as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. Congress subsequently passed two additional antitrust laws in 1914: the Federal Trade Commission Act, which created the Federal Trade Commission (FTC), and the Clayton Act. Currently, these are the three core federal antitrust laws.[1]

The Sherman Act

The Sherman Act outlaws every contract, combination, or conspiracy in restraint of trade, and any monopolization, attempted monopolization, or conspiracy or combination to monopolize. The Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For example, an agreement between two individuals to form a partnership may restrain trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. In contrast, certain acts are considered "per se" violations of the Sherman Act because they are so harmful to competition. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids.[2]

The penalties for violating the Sherman Act can be severe. Although most enforcement actions are civil, the Sherman Act is also a criminal law, and individuals and businesses that violate it may be prosecuted by the U.S. Department of Justice (DOJ). Criminal prosecutions are typically limited to intentional and clear violations, such as when competitors fix prices or rig bids. The Sherman Act imposes criminal penalties of up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison.[3] Under some circumstances, the maximum fines can reach twice the gain or loss involved.[4]

The Federal Trade Commission Act

The Federal Trade Commission Act prohibits unfair methods of competition and unfair or deceptive acts or practices. The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Therefore, the FTC can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices

[1] *See The Antitrust Laws*, Federal Trade Commission, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Jan. 25, 2022).
[2] *Id.*
[3] *See Antitrust Enforcement and the Consumer*, U.S. Department of Justice, *available at* https://www.justice.gov/atr/file/800691/download (last visited Jan. 25, 2022).
[4] *Id.*

that harm competition but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.[5]

The Clayton Act

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates.[6] It also bans mergers and acquisitions where the effect may substantially lessen competition or create a monopoly. As amended by the Robinson-Patman Act of 1936, the Clayton Act also prohibits certain discriminatory prices, services, and allowances in dealings between merchants. The Clayton Act was amended again in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act to require companies planning large mergers or acquisitions to notify the government of their plans in advance. Additionally, private parties are authorized to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.[7]

Florida Antitrust Laws

Florida law also provides protections against anticompetitive practices. Chapter 542, F.S., the Florida Antitrust Act of 1980, has a stated purpose to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.[8] It outlaws every contract, combination, or conspiracy in restraint of trade or commerce in Florida[9] and any person from monopolizing or attempting or conspiring to monopolize any part of trade.[10]

Contracts in Restraint of Trade or Commerce

Generally, a contract in restraint of trade or commerce in Florida is unlawful.[11] However, non-competition restrictive covenants[12] contained in employment agreements that are reasonable in time, area, and line of business are not prohibited.[13] In any action 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.[14] The term "legitimate business interest" includes, but is not limited to:

- Trade secrets;[15]

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[5] *See The Antitrust Laws*, Federal Trade Commission, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Jan. 25, 2022).
[6] "Interlocking directorates" means the same person making business decisions for competing companies. *See also Id*.
[7] *Id*.
[8] Section 542.16, F.S.
[9] Section 542.18, F.S.
[10] Section 542.19, F.S.
[11] Section 542.18, F.S.
[12] Section 542.335, F.S. employs the term "restrictive covenants" and includes all contractual restrictions such as noncompetition/nonsolicitation agreements, confidentiality agreements, exclusive dealing agreements, and all other contractual restraints of trade. *See Henao v. Prof'l Shoe Repair, Inc.*, 929 So.2d 723, 726 (Fla. 5th DCA 2006).
[13] Section 542.335(1), F.S.
[14] *Id*.
[15] Section 688.002(4), 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

- 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.[16]

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.[17] 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.[18]

Restrictive Covenants in Healthcare

Currently in Florida, a restrictive covenant entered into with a physician who practices a medical specialty in a county where one entity employs or contracts with all physicians who practice that specialty in that county is not supported by a legitimate business interest, and is void and unenforceable.[19] The restrictive covenant remains void and unenforceable until 3 years after the date on which a second entity that employs or contracts with one or more physicians who practice that specialty begins serving patients in that county.[20]

III. Effect of Proposed Changes:

The bill amends s. 542.335, F.S., to provide that a restrictive covenant is only enforceable against a former employee, agent, or independent contractor who voluntarily resigns, is terminated for misconduct, or does not satisfy reasonable performance standards or goals which were set in advance. The bill clarifies that the termination or resignation of an employee following a substantial unanticipated change in market conditions is not a termination for the failure to satisfy reasonable performance standards or goals. Additionally, the bill provides that a resignation resulting from a constructive termination[21] is not voluntary.

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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.

[16] Section 542.335(1)(b), F.S.

[17] *Id*.

[18] Section 542.335(1)(c), F.S.

[19] Section 542.336, F.S.

[20] *Id*. 21st Century Oncology, Inc., sought a preliminary injunction to enjoin the application and enforcement of s. 542.336, F.S. In August of 2019, the U.S. District Court for the Northern District of Florida denied the injunction. Although it was determined that s. 542.336, F.S., did impair the plaintiff's employment contracts within the meaning of the Contracts Clause, the court held that the degree of impairment does not outweigh the statute's significant, legitimate public purpose.

[21] A "constructive discharge" occurs when an employee involuntarily resigns in order to escape intolerable and illegal employment requirements. In order to prevail on a constructive discharge claim, an employee must show, under an objective standard that the employer made working conditions so difficult that a reasonable person would feel compelled to resign. *See Vazquez v. City Of Hialeah Gardens*, 874 So. 2d 626 (Fla. 3d DCA 2004). *See also Webb v. Florida Health Care Mgmt. Corp.*, 804 So.2d 422, 424 (Fla. 4th DCA 2001).

The bill establishes that for the purpose of s. 542.335(3), F.S., the term "misconduct" means all misconduct warranting involuntary termination, regardless of whether the misconduct occurs at the workplace or during working hours, and includes, but is not limited to, the following, which may not be construed in pari materia with each other:

- Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee, agent, or independent contractor;[22]
- Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent or shows an intentional and substantial disregard of the employer's interests or of the employee's, agent's or independent contractor's duties and obligations to his or her employer;
- Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence;
- A willful and deliberate violation of a standard or regulation of the state by an employee, agent, or independent contractor of an employer licensed or certified by the state, which violation would cause the employer to be sanctioned or have its license or certification suspended by the state;
- A violation of an employer's rule, unless the employee, agent, or independent contractor can demonstrate the following:
  - He or she did not know, and could not reasonably know, of the rules requirements;
  - The rule is not lawful or not reasonably related to the job environment and performance; or
  - The rule is not fairly or consistently enforced; and
- Committing criminal assault or battery on another employee, or on a customer or invitee of the employer, or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The bill provides that s. 542.335(3), F.S., does not apply to a restrictive covenant that prohibits disclosing a trade secret of the employer to third parties. Additionally, s. 542.335(3), F.S., does not apply to a restrictive covenant sought to be enforced against a former employer, agent, or independent contractor who is associated with the sale of all or part of the following:

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[22] Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $500, or theft of employer property or property of a customer or invitee of the employer.

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 Identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill provides that a restrictive covenant is only enforceable against a former employee, agent, or independent contractor who voluntarily resigns or is terminated because of misconduct. This may provide more competition within the labor market.

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

CS by Commerce and Tourism on January 24, 2022:
The committee substitute adds that a restrictive covenant is enforceable against a former employee, agent, or independent contractor who does not satisfy reasonable performance standards or goals which were set in advance. The amendment clarifies that the termination or resignation of an employee following a substantial unanticipated change in market conditions is not a termination for the failure to satisfy reasonable performance standards or goals.

B. Amendments:

None.