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 842
INTRODUCER:	Senator Brodeur
SUBJECT:	Invalid Restrictive Covenants in Health Care
DATE:	January 7, 2022
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McMillan	McKay	CM	**Favorable**
2.			HP	
3.			RC	

I. Summary:

SB 842 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 provides that a restrictive covenant in an employment agreement between a physician and a hospital is not supported by a legitimate business interest if it does not include an option for the physician to buy out of the restrictive covenant at a reasonable price. If such an option is not provided, the restrictive covenant is void and unenforceable. This provision applies to restrictive covenants entered into on or after July 1, 2022. The bill also provides that any party to an employment agreement which believes that the price to buy out of the restrictive covenant in the agreement is unreasonable may elect to have a mutually agreed upon arbitrator determine a reasonable price.

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 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]

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[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. 7, 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. 7, 2022).
[4] *Id.*
[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. 7, 2022).

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]
- Valuable confidential business or professional information that otherwise does not qualify as trade secrets;

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[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 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.

- 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. 542.336, F.S., to provide that a restrictive covenant in an employment agreement between a physician and a hospital is not supported by a legitimate business interest if it does not include an option for the physician to buy out of the restrictive covenant at a reasonable price.[21] If such an option is not provided, the restrictive covenant is void and unenforceable. This provision applies to restrictive covenants entered into on or after July 1, 2022. The bill also provides that any party to an employment agreement which believes that the price to buy out of the restrictive covenant in the agreement is unreasonable may elect to have a mutually agreed upon arbitrator determine a reasonable price.

The bill establishes the following definitions:

- "Hospital" means a hospital as defined in s. 395.002(13), F.S.,[22] which is licensed under Chapter 395 of the Florida Statutes and part II of Chapter 408 of the Florida Statutes; and

[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*.
[21] The bill does not define the term "reasonable price," which may lead to differing interpretations of the meaning of the term.
[22] Section 395.002(13), F.S. defines "hospital" as any establishment that offers services more intensive than those required for room, board, personal services, and general nursing care, and offers facilities and beds for use beyond 24 hours by individuals requiring diagnosis, treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy, and regularly makes available at least clinical laboratory services, diagnostic X-ray services, and treatment facilities for surgery or obstetrical care, or other definitive medical treatment of similar extent, except that a critical access hospital, as defined in s. 408.07, F.S., must not be required to make available treatment facilities for surgery, obstetrical care, or similar

- "Physician" means a person licensed to practice medicine under Chapter 458 of the Florida Statutes or osteopathic medicine under Chapter 459 of the Florida Statutes.

The bill takes effect July 1, 2022.

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:

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The ability for physicians to buy out of a restrictive covenant in an employment agreement with a hospital may provide patients with more access to physicians and decrease healthcare costs.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

services as long as it maintains its critical access hospital designation and must be required to make such facilities available only if it ceases to be designated as a critical access hospital.

VII. Related Issues:

If parties to an employment agreement mutually agree that arbitration is necessary, the Florida Arbitration Code applies.[23]

VIII. Statutes Affected:

This bill substantially amends section 542.336 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.

[23] *See* s. 682.013, F.S.