542.335 Valid restraints of trade or commerce.

(1) Notwithstanding s. 542.18 and subsection (2), enforcement of contracts that restrict or prohibit competition during or after the term of restrictive covenants, so long as such contracts are reasonable in time, area, and line of business, is not prohibited. In any action concerning enforcement of a restrictive covenant:

(a) A court shall not enforce a restrictive covenant:

1. Unless it is set forth in a writing signed by the person against whom enforcement is sought.

2. Against a current or former employee, agent or independent contractor unless the employee's or agent’s earnings from the party seeking enforcement, when annualized, exceeds $[ ][[1]](#footnote-1) dollars per year. "Earnings" means the compensation reflected on box one of the United States internal revenue service form W-2 that is paid to an employee over the prior year, or portion thereof for which the employee was employed, annualized and calculated as of the earlier of the date enforcement of the noncompetition covenant is sought or the date of separation from employment. "Earnings" also means payments reported on internal revenue service form 1099-MISC for independent contractors.

3. Notwithstanding subparagraph (a)2., a person who engages an employee, agent or independent contractor and who can otherwise meet the requirements of this section shall have the right to seek injunctive relief and recover damages in the event the employee, agent or independent contractor violates (i) a restrictive covenant not to solicit or accept business from or interfere with relationships with clients or customers of the person who engages such employee, agent or independent contractor to the extent that such employee, agent or independent contractor substantively interacted with such client or customer on behalf of the person who engages such employee, agent or independent contractor, or (ii) a restrictive covenant not to solicit employees from the person who engages such employee, agent or independent contractor or not to hire such employees.

4. Notwithstanding this paragraph (a), even in the absence of a written restrictive covenant, an employer shall have the right to seek injunctive relief and recover damages in the event the employee, agent or independent contractor unlawfully reveals any trade secrets, as defined in s. 668.002(4), or valuable confidential business information or professional information that otherwise does not qualify as a trade secret.

(b) The person seeking enforcement of a restrictive covenant shall plead and 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:

1. Trade secrets, as defined in s. 688.002(4).

2. Valuable confidential business or professional information that otherwise does not qualify as trade secrets.

3. Substantial relationships with specific prospective or existing customers, patients, or clients.

4. Customer, patient, or client goodwill associated with:

a. An ongoing business or professional practice, by way of trade name, trademark, service mark, or “trade dress”;

b. A specific geographic location; or

c. A specific marketing or trade area.

5. Extraordinary or specialized training.

6. Referral sources.

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

(c) A person seeking enforcement of a restrictive covenant also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction. If a person seeking enforcement of the restrictive covenant establishes prima facie that the restraint is reasonably necessary, the person opposing enforcement has the burden of establishing that the contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the established legitimate business interest or interests. If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests.

(d) In determining the reasonableness in time of a post-term restrictive covenant not predicated upon the protection of trade secrets, a court shall apply the following rebuttable presumptions:

1. In the case of a restrictive covenant sought to be enforced against a former employee, agent, or independent contractor, and not associated with the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 6 months or less in duration and shall presume unreasonable in time any restraint more than ~~2 years~~ 18 months[[2]](#footnote-5) in duration.

2. 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 the sale of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 1 year or less in duration and shall presume unreasonable in time any restraint more than 3 years in duration.

3. In the case of a restrictive covenant sought to be enforced against the seller of all or a part of:

a. The assets of a business or professional practice, or

b. The shares of a corporation, or

c. A partnership interest, or

d. A limited liability company membership, or

e. An equity interest, of any other type, in a business or professional practice,

a court shall presume reasonable in time any restraint 3 years or less in duration and shall presume unreasonable in time any restraint more than 7 years in duration.

(e) In determining the reasonableness in time of a post-term restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of 5 years or less and shall presume unreasonable in time any restraint of more than 10 years. All such presumptions shall be rebuttable presumptions.

(f) The court shall 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, provided:

1. In the case of a third-party beneficiary, the restrictive covenant expressly identified the person as a third-party beneficiary of the contract and expressly stated that the restrictive covenant was intended for the benefit of such person.

2. In the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party’s assignee or successor.

(g) In determining the enforceability of a restrictive covenant, a court:

~~1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.~~[[3]](#footnote-6)

~~2.~~ 2. [May balance the legitimate business interest of the person seeking enforcement against any individualized economic or other hardship that might be caused to the person against whom enforcement is sought, including without limitation, taking into account any severance payments and continued compensation paid to the person against whom enforcement is sought following the term of such person’s engagement.]

3. May consider as a defense the fact that the person seeking 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 only if such discontinuance of business is not the result of a violation of the restriction.

~~3.~~ 4. Shall consider all other pertinent legal and equitable defenses.

~~4.~~ 5. Shall consider the effect of enforcement upon the public health, safety, and welfare.

(h) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. [Subject to applying subsection (1)(i), a court may employ any rule of contract construction in construing a restrictive covenant but may not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly or against the restraint.] ~~A court shall 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.[[4]](#footnote-7)~~

(i) 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.

(j) A court shall enforce a restrictive covenant by any appropriate and effective remedy, including, but not limited to, temporary and permanent injunctions. The violation of an enforceable restrictive covenant creates a presumption of irreparable injury to the person seeking enforcement of a restrictive covenant. No temporary injunction shall be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court shall not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(k) 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. A court shall not enforce any contractual provision limiting the court’s authority under this section.

(2) Nothing in this section shall be construed or interpreted to legalize or make enforceable any restraint of trade or commerce otherwise illegal or unenforceable under the laws of the United States or of this state.

(3) This act shall apply prospectively, and it shall not apply in actions determining the enforceability of restrictive covenants entered into before July 1, 1996.

(4) The revisions to this section as set forth in [this act] [Laws Chapter \_\_\_\_\_\_] shall not apply in actions determining the enforceability of restrictive covenants entered into before \_\_\_\_\_\_\_, 2020.[[5]](#footnote-8)

1. The idea is to remove lower paid rank and file employees from the effects of a non-compete provision on their ability to work in their field. Washington recently adopted a similar non-compete statute that placed this number at $100,000 per annum. We are recommending that the number be between $40,000 per annum and $50,000 per annum. We are also of the view that even if a non-compete is not permitted for a rank and file employee, the employer can protect trade secrets and valuable confidential business information, and enforce non-solicitation restrictions. [↑](#footnote-ref-1)
2. We are of the view that in the scheme of reasonableness, an 18 month non-complete ought to be reasonable and a two-year non-compete in today’s world appears to be long. [↑](#footnote-ref-5)
3. See Item 4 in the memorandum that accompanies this proposal for a discussion on why this change is proposed. [↑](#footnote-ref-6)
4. See Item 5 in the memorandum that accompanies this proposal for a discussion on why this change is proposed. [↑](#footnote-ref-7)
5. This provision sets a new effective date for disputes involving non-competes that arise under contracts entered into after the amendment of the statute. Under the impairment of contract rule, a statutory change cannot impair the enforceability of contracts that are already in effect at the effective time of the statutory change. [↑](#footnote-ref-8)