

**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.)

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

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BILL: CS/SB 882

INTRODUCER: Commerce and Tourism Committee and Senator Gruters

SUBJECT: Restrictive Covenants

DATE: April 8, 2019

REVISED: \_\_\_\_\_

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

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/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 provides that 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.

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.

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.<sup>1</sup> 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 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;<sup>2</sup>
- 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.<sup>3</sup>

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

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<sup>1</sup> Section 542.18, F.S.

<sup>2</sup> 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.

<sup>3</sup> Section 542.335(1)(b), F.S.

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 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 provides that a restrictive covenant entered into with a physician licensed under Chapter 458 (Medical Practice) or Chapter 459 (Osteopathic Medicine) of the Florida Statutes, 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.

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.

The bill takes effect 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:

*Retroactive vs Prospective Application*

The bill provides an effective date of July 1, 2019, but does not specifically address whether the new provision deeming certain restrictive covenants void and unenforceable is to be applied retroactively to contracts already in effect on July 1, 2019, or prospectively to contracts entered into on or after July 1, 2019.

Florida courts use a two-prong test for determining whether statutes should be applied retroactively.<sup>4</sup> The first is whether there is clear legislative intent to apply the statute retrospectively. The general rule is that in the absence of clear legislative intent to the contrary, a law affecting substantive rights, liabilities and duties is presumed to apply prospectively. If the legislation clearly expresses an intent that it apply retroactively, then the second inquiry is whether retroactive application is constitutionally permissible.<sup>5</sup> The presumption against retroactivity is only a default rule of statutory construction; the essential purpose of statutory construction is to determine legislative intent.<sup>6</sup>

*Impairment of Contract*

The United States Constitution and the Florida Constitution prohibit the state from passing any law impairing the obligation of contracts.<sup>7</sup> “[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear.”<sup>8</sup> If a law does impair contracts, the courts will assess whether the law is deemed reasonable and necessary to serve an important public purpose.<sup>9</sup> The factors that a court will consider when balancing the impairment of contracts with the public purpose include:

<sup>4</sup> *Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So. 2d 494, 499 (Fla. 1999).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*, at 500.

<sup>7</sup> U.S. Const. Article I, s. 10; Art. I, s. 10, Fla. Const.

<sup>8</sup> *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). See also *General Motors Corp. v. Romein*, 503 U.S. 181 (1992).

<sup>9</sup> *Park Benziger & Co. v. Southern Wine & Spirits, Inc.*, 391 So. 2d 681, 683 (Fla. 1980); *Yellow Cab Co. of Dade County v. Dade County*, 412 So. 2d 395, 397 (Fla. 3rd DCA 1982) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)).

- Whether the law was enacted to deal with a broad, generalized economic or social problem;
- Whether the law operates in an area that was already subject to state regulation at the time the parties undertook their contractual obligations, or whether it invades an area never before subject to regulation; and
- Whether the law results in a temporary alteration of the contractual relationships of those within its scope, or whether it permanently and immediately changes those contractual relationships, irrevocably and retroactively.<sup>10</sup>

**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:**

The bill deems certain restrictive covenants, which might otherwise be enforceable under s. 542.335, F.S., as “void and unenforceable” until 3 years after a date determined by the actions of private actors and entities. In effect, the enforceability of specific restrictive covenants for medical specialties would be determined not by the law as defined by the Legislature, but would be determined by, and would require knowledge of, the actions of private actors and entities, on particular dates, on a county by county basis. The bill therefore appears to create potential issues of notice, in determining when or if certain restrictive covenants are enforceable.

**VIII. Statutes Affected:**

This bill creates section 542.336 of the Florida Statutes.

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<sup>10</sup> See *supra* note 8.

**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 April 8, 2019:**

The CS provides that 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, and 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.

- B. **Amendments:**

None.