FLORIDA HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

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BILL #: CS/CS/CS/HB 1219	**COMPANION BILL:** CS/CS/CS/SB 922 (Leek)
TITLE: Employment Agreements	**LINKED BILLS:** None
SPONSOR(S): Koster	**RELATED BILLS:** None

FINAL HOUSE FLOOR ACTION: 91 **Y's** 21 **N's** **GOVERNOR'S ACTION:** Pending

SUMMARY

Effect of the Bill:

The bill creates the Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act to protect confidential information and client relationships by creating two types of agreements: covered garden leave agreements and covered noncompete agreements. The agreements protect the confidentiality of information and client relationships for up to 4 years, either while the covered employee remains employed (covered garden leave agreement) or after the covered employee has left employment (covered noncompete agreement). The bill creates a framework for such agreements and provides that such agreements do not violate public policy or antitrust laws when used under certain narrow conditions.

The bill has an effective date of July 1, 2025.

Fiscal or Economic Impact:

The bill may have a positive economic impact on the state by encouraging businesses to relocate or form in Florida under Florida laws in order to utilize garden leave and noncompete agreements in certain limited situations.

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ANALYSIS

EFFECT OF THE BILL:

The bill creates the "Contracts Honoring Opportunity, Investment, Confidentiality, and Economic Growth (CHOICE) Act" to create narrow protections applicable to certain confidential information and client relationships. Under the bill, a covered employer[1] and covered employee[2] may enter into a covered garden leave agreement or covered noncompete agreement, in which the covered employer agrees to provide no more than 4 years of advance, express notice before terminating the employment or contractual relationship. (Sections 1 and 2).

Covered Garden Leave Agreements

The time between the notice and agreed upon termination date is referred to as the notice period. The covered employer agrees to retain the employee during the notice period and pay the same salary and benefits the covered employee received in the month preceding the beginning of the notice period. In exchange, the covered employee agrees not to resign before the end of the notice period. However, the covered employer is not required to provide discretionary incentive compensation or benefits or have the covered employee continue performing work during the notice period and the covered employer may reduce, during the notice period, the term of the covered garden leave agreement by providing 30 days advance notice. Thus, a covered garden leave agreement allows an employer to effectively bar the employee from the information, assets, facilities, and other employees of the covered employer, while still keeping the employee on the payroll through the duration of the garden leave period. (Section 2).

[1] The bill defines a "covered employer" as an entity or individual who employs or engages a covered employee.
[2] The bill defines a "covered employee" as an employee or an individual who earns or is reasonably expected to earn a salary greater than twice the annual mean wage of the county in Florida in which the covered employer has its principal place of business, or the county in Florida in which the employee resides if the covered employer's principal place of business is not in Florida. The term does not include a health care practitioner.

Pursuant to the provisions of the bill, covered garden leave agreements do not violate public policy as restraint of trade or an attempt to monopolize trade or commerce in this state provided that:

- The covered employee was advised, in writing, of the right to seek counsel and provided the covered agreement at least 7 days before the agreement or offer of employment expired;
- The covered employee acknowledged, in writing, receipt of confidential information or customer relationships; and
- The covered garden leave agreement provides that:
    - After the first 90 days of the notice period, the covered employee does not have to provide services to the covered employer;
    - The covered employee may engage in nonwork activities at any time, including during normal business hours, during the remainder of the notice period;
    - The covered employee may, with the permission of the covered employer, work for another employer while still employed by the covered employer during the notice period; and
    - The garden leave agreement notice period may be reduced during the notice period if the covered employer provides at least 30 days' advance notice in writing to the covered employee. (Section 2).

Once a covered employer seeks enforcement of a covered garden leave agreement, the court must preliminarily enjoin the covered employee from providing services to any business, entity, or individual other than the covered employer during the notice period. The injunction may only be modified or dissolved if the covered employee establishes by clear and convincing evidence, based on nonconfidential information, that:

- The covered employee will not perform, during the notice period, any work similar to the services provided to the covered employer; or
- The covered employer has failed to pay or provide the salary and benefits provided for in the covered garden leave agreement during the notice period and has had a reasonable opportunity to cure the failure. (Section 2).

Once a covered employer seeks enforcement of a covered garden leave agreement, the court must preliminarily enjoin a business, an entity, or an individual from engaging a covered employee during the notice period. The injunction may only be modified or dissolved if the covered employee establishes by clear and convincing evidence, based on nonconfidential information, that:

- The covered employee will not provide any services covered by the agreement; or
- The business or individual seeking to employ or engage the covered employee is not engaged in, and is not planning to engage in, any business activity similar to those of the covered employer during the notice period. (Section 2).

The provisions of the bill apply to a covered leave agreement with a covered employer whose principal place of business is in Florida, or a covered employee who maintains a primary place of work in this state. (Section 2).

Covered Noncompete Agreements

The bill also creates covered noncompete agreements which are agreements, not to exceed 4 years, within a specified geographic area defined in the agreement. (Section 2).

The covered employee agrees not to assume a role with another business, entity or individual in which it is reasonably likely the covered employee would use confidential information or customer relationships of the covered employer or provide services similar to the services provided to the covered employer during the three years prior to the noncompete period. The noncompete period begins upon termination of employment and continues through the end of the agreed-upon post-employment period provided in the agreement. A covered noncompete agreement must reduce the noncompete period day-for-day by any nonworking portion of the notice period of a covered garden leave agreement. (Section 2).

Under the bill, covered noncompete agreements do not violate public policy as restraint of trade or an attempt to monopolize trade or commerce in this state provided that:

- The covered employee was advised, in writing, of the right to seek counsel and provided the covered agreement at least 7 days before the agreement or offer of employment expired;
- The covered employee acknowledged, in writing, that during the course of their employment they will receive confidential information or customer relationships; and
- The covered noncompete agreement provides that the agreement is reduced day-to-day by any nonworking portion of the notice period, pursuant to a covered garden leave agreement between the covered employee and the covered employer. (Section 2).

Once a covered employer seeks enforcement of a covered noncompete agreement, the court must preliminarily enjoin the covered employee from providing services to any business, entity, or individual other than the covered employer during the noncompete period. The injunction may only be modified or dissolved if the covered employee establishes by clear and convincing evidence, based on nonconfidential information, that:

- The covered employee will not perform, during the noncompete period, any work similar to the services provided to the covered employer or use confidential information or customer relationships of the covered employer;
- The covered employer has failed to pay or provide the compensation provided for in the covered noncompete agreement during the noncompete period and has had a reasonable opportunity to cure the failure; or
- The business, entity, or individual seeking to employ or engage the covered employee is not engaged in, and is not planning or preparing to engage in, any business activity similar to those of the covered employer during the noncompete period and in the geographic area described in the agreement. (Section 2).

Once a covered employer seeks enforcement of a covered noncompete agreement, the court must preliminarily enjoin a business, an entity, or an individual from engaging a covered employee during the noncompete period. The injunction may only be modified or dissolved if the covered employee establishes by clear and convincing evidence, based on nonconfidential information, that:

- The covered employee will not provide any services covered by the agreement or use confidential information or customer relationships of the covered employer; or
- The business, entity, or individual seeking to employ or engage the covered employee is not engaged in, and is not planning or preparing to engage in, any business activity similar to those of the covered employer during the noncompete period and in the geographic area described in the agreement. (Section 2).

Any information filed with the court which the covered employer deems confidential, must be filed under seal to protect confidentiality or avoid substantial injury. In addition, the court must presume that an employee or individual contractor has access to confidential information or customer relationships if the employee or individual contractor acknowledges the access or receipt of such access in writing. (Section 2).

Prior to entering covered garden leave agreements and covered noncompete agreements, a covered employer must provide the proposed covered agreement to a prospective covered employee at least 7 days before the offer of employment expires or 7 days before the covered agreement expires if the covered employee is a current employee. (Section 2).

When enforcing either type of agreement, a reduction in salary or benefits or other appropriate action during the noncompete or notice period due to gross misconduct by the covered employee may not be considered a breach of the noncompete or garden leave agreement. In addition to injunctive relief, a prevailing covered employer is entitled to recover all available monetary damages for all available claims. (Section 2).

The prevailing party is entitled to reasonable attorney fees and costs. (Section 2).

The provisions of the bill apply to a covered leave agreement with a covered employer whose principal place of business is in Florida, or a covered employee who maintains a primary place of work in this state. (Section 2).

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2025. (Section 22).

FISCAL OR ECONOMIC IMPACT:

STATE GOVERNMENT:

The bill may have a positive economic impact on the state by encouraging businesses to relocate or establish under Florida law in order to utilize into garden leave and noncompete agreements.

RELEVANT INFORMATION

SUBJECT OVERVIEW:

Noncompete Agreements (Florida)

Generally, a contract in restraint of trade or commerce in Florida is unlawful.[3] However, non-competition restrictive covenants[4] contained in employment agreements that are reasonable in time, area, and line of business, are not prohibited.[5] 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.[6] The term "legitimate business interest" includes, but is not limited to:

- Trade secrets;[7]
- Valuable confidential business or professional information that does not otherwise 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.[8]

Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.[9] 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.[10]

[3] S. 542.18, F.S.
[4] S. 542.335, F.S. employs the term "restrictive covenants" and includes all contractual restrictions such as noncompetition/non-solicitation 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).
[5] S. 542.335(1), F.S.
[6] *Id*.
[7] S. 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.
[8] S. 542.335(1)(b), F.S.
[9] *Id*.
[10] S. 542.335(1)(c), F.S.

Garden Leave Agreements

The term "garden leave" generally refers to agreements in which the worker remains employed and receives the same total annual compensation and benefits, but their access to co-workers and company facilities is restricted.[11] Such agreements are not considered to be "post-employment restrictions."[12] As such, when an employee subject to a Garden Leave Agreement resigns or is terminated from his or her employment, the employer must continue to pay the employee during the garden leave period. However, the employer is not obligated to assign work, and the employee is prohibited from working for competitors. Garden Leave Agreements may be particularly useful in industries which rely on proprietary information and data, or in which an employee's departure will expose the business to substantial risk.

Florida Antitrust Laws

Florida law provides protections against anticompetitive practices. Chapter 542, F.S., the Florida Antitrust Act of 1980, intended to complement the body of federal law prohibiting restraints of trade or commerce in order to foster effective competition.[13] The Florida Antitrust Act outlaws every contract, combination, or conspiracy in restraint of trade or commerce in Florida[14] and any person from monopolizing or attempting or conspiring to monopolize any part of trade.[15]

Trade Secrets

Section 812.081, F.S., defines a "trade secret" as the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof, whether tangible or intangible, and regardless of whether or how it is stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

- Secret;
- Of value;
- For use or in use by the business; and
- Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it.[16]

Penalties Associated with Trade Secrets

Florida law criminalizes the disclosure or theft of trade secrets. For example:

- S. 815.04, F.S., makes it a third-degree felony[17] for a person to willfully, knowingly, and without authorization disclose or take data, programs, or supporting documentation that are trade secrets that reside or exist internal or external to a computer, computer system, computer network, or electronic device.[18]
- S. 812.081(2), F.S., makes it a third-degree felony for a person to willfully and without authorization, obtain or use, or endeavor to obtain or use, a trade secret with the intent to either temporarily or permanently:

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[11] 16 C.F.R. §910 and §912 (2024).

[12] *Id.*

[13] S. 542.16, F.S.

[14] S. 542.18, F.S.

[15] S. 542.19, F.S.

[16] S. 812.081(1)(f), F.S.

[17] A third-degree felony is punishable by up to 5 years in prison and up to a $5,000 fine. *See* ss. 775.082, F.S., and 775.083, F.S.

[18] The offense is a second-degree felony if committed for the purpose of devising or executing any scheme or artifice to defraud or to obtain property.

- Deprive or withhold from the trade secret's owner the control or benefit of a trade secret; or
- Appropriate a trade secret to his or her own use or to the use of another person not entitled to the trade secret.

- S. 812.081(3), F.S., makes it a second-degree felony[19] for a person who traffics in, or endeavors to traffic in, a trade secret that he or she knows or should know was obtained or used without authorization.

Restrictive Covenants in Florida Healthcare

Under s. 542.336, F.S., 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.[20] The restrictive covenant remains void and unenforceable until three 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.[21]

In *21st Century Oncology, Inc.*, the plaintiff 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. While s. 542.336, F.S., was found to impair the plaintiff's employment contracts within the meaning of the Contracts Clause, the court held that the degree of impairment did not outweigh the statute's significant, legitimate public purpose.[22]

Federal Treatment of Noncompete Agreements

History of 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. Under current Federal Law, the Sherman Act, the FTC Act,[23] and the Clayton Act[24] govern federal antitrust matters.[25]

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 harmful to competition. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids.[26]

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.

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[19] A second-degree felony is punishable by up to 15 years in prison and up to a $10,000 fine. *See* ss. 775.082 and 775.083, F.S.
[20] S. 542.336, F.S.
[21] *Id*.
[22] The ostensible public purpose of s. 542.336, F.S., is to reduce healthcare costs and improve patients' access to physicians. *See* s. 542.336, F.S.; ECF No. 64 at 8 (Attorney General's post-hearing brief, stating "s 542.336, F.S., explicitly sets forth its own rational basis in declaring that the restrictive covenants addressed by it are not supported by a legitimate business interest, restrict patient access to physicians, and increase costs"). It is well settled that access to affordable healthcare is a legitimate state interest." *See also 21st Century Oncology, Inc. v. Moody*, 402 F. Supp. 3d 1351, 1359 (N.D. Fla. 2019). .
[23] 15 U.S.C. §§ 41-58.
[24] *Id.*
[25] The U.S. Supreme Court has also ruled that all violations of the Sherman Act also violate the FTC Act. *The Antitrust Laws*, Federal Trade Commission, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 18, 2025).
[26] *Id.*

Department of Justice. Criminal prosecutions are typically limited to intentional and clear violations. The Sherman Act imposes criminal penalties of up to $10 million for a corporation and $350,000 for an individual, along with up to 3 years in prison.[27] Under some circumstances, the maximum fines can be higher.[28]

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates, and also bans mergers and acquisitions where the effect may substantially lessen competition or create a monopoly.[29]

2024 Federal Trade Commission Rule

In April of 2024, the FTC adopted a rule[30] banning noncompete agreements, which was set to take effect in September 2024.[31] Under the rule, existing noncompete agreements for most workers would no longer be enforceable.[32] Existing noncompete agreements for senior executives would remain in force, however, new noncompete agreements, even if they involve senior executives would be banned.[33]

The FTC rule determined that it is an unfair method of competition for employers to enter into noncompete agreements with workers, and therefore noncompete agreements are a violation of Section 5 of the FTC Act.

Constitutional Challenges to the 2024 FTC Rule

On July 23, 2024, the U.S. District Court for the Eastern District of Pennsylvania issued a decision, which held that the FTC had the authority to issue its rule banning most employment based noncompete agreements.[34]

On August 14, 2024, the U.S. District Court for the Middle District of Florida entered a limited injunction prohibiting the FTC from enforcing the FTC's noncompete rule. The court used the "major questions doctrine" to argue that the FTC did not have a valid grant of congressional authority to enact the rule.[35] Under the limited injunction, the FTC was enjoined from enforcing the noncompete rule only with respect to the Plaintiffs, Properties of the Villages, Inc. As such, the 2024 FTC Rule may still be applied to business operating in Florida.

On August 20, 2024, the U.S. District Court for the Northern District of Texas granted summary judgement to the plaintiffs and plaintiff intervenors' corresponding claims in *Ryan, LLC v. FTC*, which sets aside the FTC's noncompete clause rule.[36] The court found that the FTC has no authority to promulgate substantive rules regarding unfair competition, and that the rule is invalid because it is arbitrary and capricious.[37]

Preliminary Injunction

[27] *Antitrust Enforcement and the Consumer*, U.S. Department of Justice, https://www.govinfo.gov/content/pkg/GOVPUB-J-PURL-LPS16084/pdf/GOVPUB-J-PURL-LPS16084.pdf (last visited Mar. 18, 2025). *See also* 15 U.S.C.A. § 2.
[28] *Id*.
[29] *The Antitrust Laws*, Federal Trade Commission *supra* note 25.
[30] 16 C.F.R. § 910.1-6.
[31] The Federal Trade Commission, *FTC Announces Rule Banning Noncompetes*, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes (last visited March 28, 2025).
[32] *Id.*
[33] *Id.* The final rule defines "senior executives" as workers earning more than $151,164 annually and who are in policy-making positions. *See also* 16 C.F.R. § 910.1-6.
[34] *ATS Tree Services, LLC. v. Federal Trade Commission*, WL 3511630 (E.D. Pa. 2024). The court found that the FTC has broad authority to regulate "unfair methods of competition" under the FTC Act. *See also* 15 U.S.C. §§ 41-58.
[35] *Properties of the Villages, Inc. v. Federal Trade Commission*, WL 3870380 (M.D. Fla. 2024). The "major questions doctrine" requires administrative agencies issuing rules of extraordinary economic and political significance to point to clear and unambiguous congressional intent to confer such power on the agency.
[36] *Ryan, LLC v. Federal Trade Commission*, 746 F.Supp.3d 369 (N.D. Tex. 2024).
[37] *Id.*

A preliminary injunction is a legal tool that may be granted before or during trial, with the goal of preserving the status quo prior to the entry of a Final Judgment.[38] If a preliminary injunction is entered, the party that is subject to the injunction is "enjoined" or barred from taking certain specified actions. In order to obtain a preliminary injunction in a civil matter, a party must show that it will suffer irreparable harm unless the injunction is issued.

Temporary Injunction

Under Rule 1.610, Florida Rules of Civil Procedure, a temporary injunction may be granted without written or oral notice to the adverse party only if:

- It appears from the specific facts shown by the affidavit or verified pleading that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
- The movant's attorney certifies in writing any efforts that have been made to give notice and the reasons why notice should not be required.

The temporary injunction remains in effect until further order of the court.[39]

Attorney Fees

In Florida, fee-shifting statutes entitle the prevailing party or, more specifically, a particular prevailing claimant or plaintiff, to have his or her fees paid by the other party.[40]

[38] Cornell Law School, Legal Information Institute, *Preliminary Injunction*, https://www.law.cornell.edu/wex/preliminary_injunction (last visited March 28, 2025).
[39] Rule 1.160, Fla. R. Civ. P., 182.
[40] *See, e.g.,* s. 400.023, F.S. (nursing home resident); s. 440.34, F.S. (claimant in a workers' compensation case in certain situations); s. 501.2105, F.S. (plaintiff in specified FDUTPA actions); ss. 626.9373 and 627.428, F.S. (prevailing insured party in a case brought against an insurer); s. 790.33, F.S. (plaintiff in a suit to enforce his or her firearm rights); *see also* 42 U.S.C. s. 1988(b) (federal fee-shifting statute for prevailing parties in actions to enforce certain civil rights statutes).