

**HB4040**



**96TH GENERAL ASSEMBLY**

**State of Illinois**

**2009 and 2010**

**HB4040**

Introduced 2/27/2009, by Rep. Rosemary Mulligan

**SYNOPSIS AS INTRODUCED:**

New Act

Creates the Illinois Covenants Not to Compete Act. Establishes criteria for enforceability of covenants not to compete. Creates certain rebuttable presumptions as to the enforceability of covenants not to compete. Establishes remedies and procedures for enforcing covenants not to compete. Effective January 1, 2010.

LRB096 09150 RLC 19299 b

A BILL FOR

1 AN ACT concerning business.

2 **Be it enacted by the People of the State of Illinois,**  
3 **represented in the General Assembly:**

4 Section 1. Short title. This Act may be cited as the  
5 Illinois Covenants Not to Compete Act.

6 Section 5. Definitions. As used in this Act, the following  
7 definitions apply:

8 (a) "Promisor" means a party against whom a covenant not to  
9 compete is sought to be enforced.

10 (b) "Promisee" means a party seeking to enforce a covenant  
11 not to compete.

12 (c) "Covenant not to compete" means a restriction which  
13 prevents a promisor from working for or providing personal  
14 services to a person or entity in competition with the  
15 promisee.

16 (d) "Key employee" or "key independent contractor" means  
17 any employee or independent contractor who has (i) substantial  
18 involvement in the executive management of the promisee's  
19 business, (ii) direct and substantial contact with customers of  
20 the promisee, (iii) knowledge of bona fide trade secrets or  
21 other proprietary information of the promisee, (iv) such unique  
22 skills that the person has achieved a high degree of public or  
23 industry notoriety, fame, or reputation as a representative of

1 the promisee, or (v) is among the highest paid 5% of the  
2 promisee's employees or independent contractors in the year  
3 preceding a separation from service by the key employee or key  
4 independent contractor.

5 (e) "Legitimate business interest" means (i) customer  
6 relationships developed and maintained by the promisee, (ii)  
7 trade secrets or other proprietary information of the promisee  
8 to which a promisor was granted meaningful or regular access,  
9 or (iii) business goodwill of the promisee.

10 (f) "Trade secrets" means any trade secrets as defined in  
11 the Illinois Trade Secrets Act and the common law under such  
12 Act.

13 Section 10. Criteria for enforceability of covenants not to  
14 compete. A covenant not to compete is void as an illegal  
15 restraint of trade and may not be enforced by a court in this  
16 State, unless:

17 (a) the promisee is a key employee or key independent  
18 contractor;

19 (b) the promisor either (i) informs the key employee or key  
20 independent contractor in a written offer at least 2 weeks  
21 prior to the first day of the employment or contractor  
22 relationship that a covenant not to compete is required as a  
23 condition of employment or services, or (ii) enters into the  
24 covenant not to compete with the promisee upon (A) a material  
25 advancement or promotion of the key employee or key independent

1 contractor, or (B) payment of a material bonus or material  
2 increase in rate of regular compensation; and

3 (c) the covenant not to compete is narrowly tailored to  
4 support the protection of a legitimate business interest of the  
5 promisee against actual or threatened infringement by the  
6 promisor.

7 Section 15. Rebuttable presumptions.

8 (a) A covenant not to compete will be presumed not to meet  
9 the criteria under subsection (c) of Section 10 if (i) the  
10 duration of the covenant not to compete exceeds one year, (ii)  
11 the geographic area of the covenant not compete extends beyond  
12 any region in which the key employee or key independent  
13 contractor provided employment or contractor services for the  
14 promisee during the one year preceding termination of the  
15 employment or independent contractor relationship, or (iii)  
16 the type of personal services activity subject to the covenant  
17 not to compete extends beyond the nature of work the key  
18 employee or key independent contractor provided to the promisee  
19 during the one year preceding termination of the employment or  
20 independent contractor relationship.

21 (b) A promisee may introduce evidence to rebut the  
22 presumptions in subsection (a) of this Section upon a showing  
23 that more extensive restrictions are necessary to protect a  
24 legitimate business interest.

1 Section 20. Remedies and procedures in actions to enforce  
2 covenants not to compete.

3 (a) Modification. For any action brought to enforce a  
4 covenant not to compete in which the covenant is found not to  
5 meet the criteria in subsection (c) of Section 10, the court  
6 retains discretion to modify the covenant not to compete to the  
7 extent necessary to make the restraint reasonable under the  
8 circumstances. If the court so modifies the covenant, the court  
9 may not award the promisee any damages for a breach of the  
10 covenant not to compete occurring before an order of  
11 modification.

12 (b) Attorney's Fees and Costs of Litigation. For any action  
13 brought to enforce a covenant not to compete in which the  
14 subject agreement contains a provision granting the promisee a  
15 right to recover attorney's fees or other costs of litigation  
16 from the promisor, such provision shall be construed to provide  
17 the promisor with a mutual entitlement to attorney's fees or  
18 other costs of litigation should it be the prevailing party  
19 against the promisee.

20 (c) Declaratory Judgment. Any promisor has the right to  
21 file an action under Section 2-701 of the Code of Civil  
22 Procedure for a declaration of his or her rights under a  
23 covenant not to compete, and in the event the promisor is the  
24 prevailing party in such a proceeding, the court may award him  
25 or her reasonable attorneys' fees and court costs.

1 Section 25. Exceptions. This Act does not apply to and  
2 shall not modify the common law with respect to:

3 (a) any agreement relating to the solicitation, hiring, or  
4 contact with employees, vendors, or customers;

5 (b) any confidentiality agreement;

6 (c) any agreement between (i) a corporation, partnership,  
7 limited liability partnership, limited liability company, and  
8 (ii) its shareholders, partners, or members; and

9 (d) an agreement between an employer and employee under  
10 which an employee receives incentive compensation of any kind,  
11 and where the employer is entitled to forfeiture of such  
12 compensation for competition.

13 Section 99. Effective date. This Act takes effect January  
14 1, 2010.