

By: Uresti

S.B. No. 2441

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the enforceability of covenants not to compete and to
3 certain procedures and remedies in actions to enforce those
4 covenants.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Subchapter E, Chapter 15, Business & Commerce
7 Code, is amended to read as follows:

8 SUBCHAPTER E. COVENANTS NOT TO COMPETE

9 Sec. 15.50. SHORT TITLE. This subchapter may be cited as
10 the Texas Covenant Not to Compete Act.

11 Sec. 15.51. POLICY AND PURPOSE. It is the public policy of
12 this state and the purpose of this subchapter to:

13 (1) provide a stable, competitive business
14 environment for the residents of this state;

15 (2) provide certainty and uniformity regarding the
16 enforceability of covenants not to compete; and

17 (3) encourage employers to share confidential,
18 proprietary information and other protectable business interests
19 with employees in furtherance of their common purpose, but to
20 prevent employers from taking unfair advantage of an employee and
21 impairing an employee's personal freedoms and economic mobility.

22 Sec. 15.52. DEFINITIONS. In this subchapter:

23 (1) "Covenant not to compete" or "covenant" means any
24 agreement, regardless of form, that restricts competition. The

1 term does not mean an agreement:

2 (A) not to disclose or use trade secrets or
3 confidential information of the promisee;

4 (B) not to solicit employees of the promisee;

5 (C) to resign or cease using staff or medical
6 privileges acquired with the assistance of the promisee; or

7 (D) not to cause a reduction of staff of the
8 promisee.

9 (2) "Physician" means a person licensed as a physician
10 by the Texas Medical Board.

11 Sec. 15.53. CRITERIA FOR ENFORCEABILITY OF COVENANTS NOT TO
12 COMPETE. (a) Notwithstanding Section 15.05 [~~of this code~~], and
13 subject to any applicable provision of Subsection (b) or (c), a
14 covenant not to compete is enforceable if it is [~~ancillary to or~~
15 part of or supported by an otherwise enforceable agreement only [~~at~~
16 ~~the time the agreement is made~~] to the extent that it contains
17 limitations as to time, geographical area, and scope of activity to
18 be restrained that are reasonable and do not impose a greater
19 restraint than is necessary to protect the goodwill or other
20 business interest of the promisee.

21 (b) In addition to the requirements of Subsection (a), a [A]
22 covenant not to compete or otherwise enforceable agreement is
23 enforceable against a [~~person licensed as a~~] physician [~~by the~~
24 ~~Texas State Board of Medical Examiners~~] if such covenant or
25 agreement complies with the following requirements:

26 (1) the covenant or agreement must provide [+]
27 [~~(A) not deny~~] the physician, on request, access

1 to a list of [~~his~~] patients whom the physician [~~he~~] had seen or
2 treated within the last [~~one~~] year of [~~termination of the contract~~
3 ~~or~~] employment with the promisee;

4 (2) the covenant or agreement must [~~(B)~~] provide, on
5 written authorization of the patient, access to medical records of
6 the physician's patients [~~upon authorization of the patient~~] and
7 any copies of medical records for a reasonable fee as established by
8 the Texas Medical Board [~~State Board of Medical Examiners~~] under
9 Section 159.008, Occupations Code; and

10 [~~(C) provide that any access to a list of~~
11 ~~patients or to patients' medical records after termination of the~~
12 ~~contract or employment shall not require such list or records to be~~
13 ~~provided in a format different than that by which such records are~~
14 ~~maintained except by mutual consent of the parties to the contract;~~

15 [~~(2) the covenant must provide for a buy out of the~~
16 ~~covenant by the physician at a reasonable price or, at the option of~~
17 ~~either party, as determined by a mutually agreed upon arbitrator~~
18 ~~or, in the case of an inability to agree, an arbitrator of the court~~
19 ~~whose decision shall be binding on the parties; and]~~

20 (3) the covenant or agreement must provide that the
21 physician will not be prohibited from providing continuing care and
22 treatment to a specific patient or patients during the course of an
23 acute illness even after the contract or employment has been
24 terminated.

25 (c) A covenant not to compete with a physician must provide
26 for a buyout of the covenant by the physician at a reasonable price
27 in light of the goodwill or other business interests of the promisee

1 that are sought to be protected by the covenant. The buyout price
2 must be provided for in the covenant by stating either an amount, a
3 formula by which the amount may be determined, or a stipulation that
4 the determination of the amount will be submitted to an arbitrator
5 whose decision is conclusive and binding on the parties and the
6 court and not subject to reformation as provided by Section
7 15.54(c).

8 (d) Unless the covenant not to compete or the otherwise
9 enforceable agreement with a physician specifically designates the
10 format in which a patient list or patients' medical records will be
11 provided, the physician's access to a list of patients or to
12 patients' medical records after termination of the contract or
13 employment shall be provided in the format in which the records are
14 maintained.

15 Sec. 15.54 [~~15.51~~]. PROCEDURES AND REMEDIES IN ACTIONS TO
16 ENFORCE COVENANTS NOT TO COMPETE. (a) Except as provided by
17 Subsections [~~in Subsection~~] (c) and (d) [~~of this section~~], a court
18 may award the promisee under a covenant not to compete damages,
19 injunctive relief, or both damages and injunctive relief for a
20 breach by the promisor of the covenant.

21 (b) If the primary purpose of the otherwise enforceable
22 agreement that supports the covenant, or of [~~to~~] which the covenant
23 is a part, [~~ancillary~~] is to obligate the promisor to render
24 personal services, for a term or at will, the promisee has the
25 burden of establishing that the covenant meets the criteria
26 specified by Section 15.53 [~~15.50 of this code~~]. If the agreement
27 has a different primary purpose, the promisor has the burden of

1 establishing that the covenant does not meet those criteria. For
2 the purposes of this subsection, the "burden of establishing" a
3 fact means the burden of persuading the triers of fact that the
4 existence of the fact is more probable than its nonexistence.

5 (c) If the covenant is found to be ~~[ancillary to or part of~~
6 ~~an otherwise]~~ enforceable under Section 15.53 [agreement] but, as
7 written, contains limitations as to time, geographical area, or
8 scope of activity ~~[to be restrained]~~ that are not reasonable or
9 ~~[and]~~ impose a greater restraint than is necessary to protect the
10 goodwill or other business interest of the promisee, the promisee
11 of the covenant may, in writing, unilaterally expressly modify or
12 amend the limitations as to time, geographical area, or scope of
13 activity to make them reasonable and not impose a greater restraint
14 than is necessary to protect the goodwill or other business
15 interest of the promisee and may seek to have the covenant enforced
16 as modified or amended. An election to modify or amend
17 automatically reduces the scope of the covenant to the limitations
18 sought to be enforced by the promisee and must be made at or before
19 the time any claim is made in a suit to enforce the covenant. If a
20 court enforces the covenant as modified or amended and to the extent
21 sought to be enforced by the promisee as to time, geographical area,
22 or scope of activity, the court may award the promisee damages and
23 injunctive relief. If the covenant is found to be enforceable under
24 Section 15.53 but the promisee of the covenant seeks to enforce
25 limitations as to time, geographical area, or scope of activity
26 that are not reasonable and impose a greater restraint than is
27 necessary to protect the goodwill or other business interest of the

1 promisee, the court shall reform the covenant to the extent
2 necessary to cause the limitations contained in the covenant as to
3 time, geographical area, and scope of activity to be restrained so
4 as to be reasonable and to impose a restraint that is not greater
5 than necessary to protect the goodwill or other business interest
6 of the promisee and shall enforce the covenant as reformed. If the
7 court reforms the covenant, [except that] the court may award the
8 promisee injunctive relief and damages for breach of the covenant
9 after it was reformed by the court or arbitrator but may not award
10 ~~[the promisee] damages for a breach of the covenant before its~~
11 ~~reformation [and the relief granted to the promisee shall be~~
12 ~~limited to injunctive relief].~~

13 (d) The final trial in any case involving the enforceability
14 of a covenant not to compete shall be held expeditiously and shall
15 take precedence over other matters, except criminal and family law
16 matters. A promisee of a covenant not to compete that is
17 enforceable under Section 15.53 is entitled to temporary injunctive
18 relief without the necessity of showing irreparable harm or an
19 inadequate remedy at law. A promisee of a covenant not to compete
20 is entitled to temporary injunctive relief during the pendency of
21 any suit if the final hearing is set later than six months after the
22 date the original suit is filed.

23 (e) A promisee of a covenant not to compete that is
24 enforceable under Section 15.53 is entitled to have the period of
25 the restrictions extended by the court for a period equivalent to
26 the period of any breach of the covenant by the promisor.

27 (f) A court shall award a party that prevails in a suit under

1 this chapter [~~If the primary purpose of the agreement to which the~~
2 ~~covenant is ancillary is to obligate the promisor to render~~
3 ~~personal services, the promisor establishes that the promisee knew~~
4 ~~at the time of the execution of the agreement that the covenant did~~
5 ~~not contain limitations as to time, geographical area, and scope of~~
6 ~~activity to be restrained that were reasonable and the limitations~~
7 ~~imposed a greater restraint than necessary to protect the goodwill~~
8 ~~or other business interest of the promisee, and the promisee sought~~
9 ~~to enforce the covenant to a greater extent than was necessary to~~
10 ~~protect the goodwill or other business interest of the promisee,~~
11 ~~the] court [~~may award the promisor the] costs and [~~, including~~
12 reasonable and necessary attorney's fees, except that a promisee is~~
13 not entitled to court costs and attorney's fees if [~~actually and~~
14 ~~reasonably incurred by the promisor in defending the action to~~
15 ~~enforce] the covenant is reformed by a court under Subsection (c).~~~~

16 Sec. 15.55 [~~15.52~~]. PREEMPTION OF OTHER LAW. (a) The
17 criteria for enforceability of a covenant not to compete provided
18 by Section 15.53 [~~15.50 of this code~~] and the procedures and
19 remedies in an action to enforce a covenant not to compete provided
20 by Section 15.54 [~~15.51 of this code~~] are exclusive and preempt any
21 other criteria for enforceability of a covenant not to compete or
22 procedures and remedies in an action, regardless of form, to
23 determine the enforceability or to enforce a covenant not to
24 compete under common law or otherwise.

25 (b) If the primary purpose of the otherwise enforceable
26 agreement that supports the covenant or of which the covenant is a
27 part is to obligate the promisor to render personal services, for a

1 term or at will, and the covenant seeks to restrict the promisee
2 from competing in this state, any agreement that purports to select
3 or elect the laws of another jurisdiction to apply or govern in any
4 action to determine the enforceability of or to enforce a covenant
5 not to compete is void.

6 SECTION 2. The change in law made by this Act to Subchapter
7 E, Chapter 15, Business & Commerce Code, applies only to an action
8 to enforce a covenant not to compete filed on or after the effective
9 date of this Act. An action filed before the effective date of this
10 Act, including an action filed in which a party is joined or
11 designated after that date, is governed by the law in effect
12 immediately before the effective date of this Act, and the former
13 law is continued in effect for that purpose.

14 SECTION 3. This Act takes effect September 1, 2009.