**South Carolina General Assembly**

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**H. 4212**

**STATUS INFORMATION**

General Bill

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Introduced in the House on May 17, 2011

Currently residing in the House Committee on **Judiciary**

Summary: Trade secrets

**HISTORY OF LEGISLATIVE ACTIONS**

Date Body Action Description with journal page number

5/17/2011 House Introduced and read first time ([House Journal‑page 10](file:///h:\hj%20archive\2011\05-17-11.docx))

5/17/2011 House Referred to Committee on **Judiciary** ([House Journal‑page 10](file:///h:\hj%20archive\2011\05-17-11.docx))

**VERSIONS OF THIS BILL**

[5/17/2011](file:///p:\pprever\2011-12\4212_20110517.docx)

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING CHAPTER 10 TO TITLE 39 SO AS TO PROVIDE ENFORCEMENT PROVISIONS, PLEADING REQUIREMENTS, AND PRESUMPTIONS TO BE MADE BY A COURT OF LAW WHEN CONSIDERING RESTRICTIVE COVENANTS; TO AMEND SECTION 39‑8‑20, RELATING TO DEFINITIONS OF THE TRADE SECRET CHAPTER, SO AS TO INCLUDE A DEFINITION FOR CONFIDENTIAL INFORMATION; AND TO AMEND SECTION 39‑8‑30, RELATING TO TRADE SECRETS, SO AS TO INCLUDE CONFIDENTIAL INFORMATION, DISTINGUISH A DUTY NOT TO DIVULGE A TRADE SECRET OR CONFIDENTIAL INFORMATION FROM A COVENANT NOT TO COMPETE, AND PROVIDE PRESUMPTIONS TO BE MADE BY A COURT OF LAW WHEN CONSIDERING A DUTY NOT TO DIVULGE A TRADE SECRET OR CONFIDENTIAL INFORMATION.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Title 39 of the 1976 Code is amended by adding:

“CHAPTER 10

Restrictive Covenants

Section 39‑10‑10. As used in this chapter:

(1) ‘Confidential information’ must be interpreted in accordance with the definition provided in Section 39‑8‑20.

(2) ‘Person’ must be interpreted in accordance with the definition provided in Section 39‑8‑20.

(3) ‘Restrictive covenant’ means any contract or provision of a contract that restricts or prohibits competition or the solicitation of prospective or existing customers, patients, or clients.

(4) ‘Trade secret’ must be interpreted in accordance with the definition provided in Section 39‑8‑20.

Section 39‑10‑20. Notwithstanding Chapter 3, Title 39, enforcement of a restrictive covenant is not prohibited if the restrictive covenant is reasonable in time, area, and line of business. In any action concerning enforcement of a restrictive covenant:

(1) 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 is supported by valuable consideration.

(2) 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. Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable. The term ‘legitimate business interest’ includes, but is not limited to:

(a) trade secrets;

(b) confidential information;

(c) valuable business or professional information that does not otherwise qualify as trade secrets or confidential information;

(d) substantial relationships with specific prospective or existing customers, patients, or clients;

(e) customer, patient, or client goodwill associated with:

(i) an ongoing business or professional practice, by way of trade name, trademark, service mark, or ‘trade dress’;

(ii) a specific geographic location; or

(iii) a specific marketing or trade area; and

(f) extraordinary or specialized training.

(3) 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 evidence 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 the relief reasonably necessary to protect the interest or interests.

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

(a) 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 the assets of a business or professional practice; the shares of a corporation; a partnership interest; a limited liability company membership; or an equity interest, of any other type, in a business or professional practice; a court shall presume reasonable in time any restraint one year or less in duration and shall presume unreasonable in time any restraint more than three years in duration.

(b) 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 the assets of a business or professional practice; the shares of a corporation; a partnership interest; a limited liability company membership; or an equity interest, of any other type, in a business or professional practice; a court shall presume reasonable in time any restraint one year or less in duration and shall presume unreasonable in time any restraint more than three years in duration.

(c) In the case of a restrictive covenant sought to be enforced against the seller of all or a part of the assets of a business or professional practice; the shares of a corporation; a partnership interest; a limited liability company membership; or an equity interest, of any other type, in a business or professional practice; a court shall presume reasonable in time any restraint three years or less in duration and shall presume unreasonable in time any restraint more than seven years in duration.

(5) In determining the reasonableness in time of a restrictive covenant predicated upon the protection of trade secrets, a court shall presume reasonable in time any restraint of five years or less and shall presume unreasonable in time any restraint of more than ten years.

(6) A customer‑based restriction is a sufficient substitute for a geographic restriction in the case of a restrictive covenant that precludes or prohibits a person from soliciting, diverting, attempting to solicit, attempting to divert, or accepting business from any customer of the person seeking enforcement of the restrictive covenant, and the court may not refuse enforcement of such a restrictive covenant due to the absence of a geographic restriction.

(7) The court may 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:

(a) 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; or

(b) in the case of an assignee or successor, the restrictive covenant expressly authorized enforcement by a party’s assignee or successor.

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

(a) may not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought;

(b) may consider as a defense the fact that one or more of the parties to the restrictive covenant 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 the discontinuance of business is not the result of a violation of the restriction;

(c) shall consider all other pertinent legal and equitable defenses;

(d) shall consider the effect of enforcement upon the public health, safety, and welfare.

(9) A court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement. A court may not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, strictly, against the restraint, or against the drafter of the contract.

(10) A court may not refuse enforcement of an otherwise enforceable restrictive covenant on the ground that the contract violates public policy unless the 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.

(11) 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. A temporary injunction may not be entered unless the person seeking enforcement of a restrictive covenant gives a proper bond, and the court may not enforce any contractual provision waiving the requirement of an injunction bond or limiting the amount of such bond.

(12) All presumptions provided in this section are rebuttable.

Section 39‑10‑30. Nothing in this chapter may 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.”

SECTION 2. Section 39‑8‑20 of the 1976 Code is amended to read:

“Section 39‑8‑20. As used in this chapter, unless the context requires otherwise:

(1) ‘confidential information’ means any confidential and proprietary information that, while not rising to the level of a ‘trade secret’, as defined in this section, is not know or otherwise available by proper means through sources other than the owner of the confidential information, and that therefore has value to the owner and provides the owner an actual or potential advantage over competitors. Confidential information may include, but is not limited to, processes, designs, licenses, pricing statistics, future plans, projects, financial information, marketing and sales information, purchasing information, customer information, including the identity of current and prospective customers, supplier information, including the identity of current and prospective suppliers, vendor information, including the identity of current and prospective vendors, and any information of any third party that has been provided to the owner or to any person as part of his or her relationship with the owner in confidence.

(2) ‘Improper means’ include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, duties imposed by the common law, statute, contract, license, protective order, or other court or administrative order, or espionage through electronic or other means.

~~(2)~~(3) ‘Misappropriation’ means:

(a) acquisition of a trade secret of another by a person by improper means;

(b) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(c) disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) used improper means to acquire knowledge of the trade secret; or

(ii) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

(A) derived from or through a person who had utilized improper means to acquire it;

(B) acquired by mistake or under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

~~(3)~~(4) ‘Owner’ means the person or entity in whom or in which rightful legal or equitable title to the trade secret or confidential information is reposed.

~~(4)~~(5) ‘Person’ means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

~~(5)~~(6) ‘Trade secret’ means:

(a) information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by the public or any other person who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(b) A trade secret may consist of a simple fact, item, or procedure, or a series or sequence of items or procedures which, although individually could be perceived as relatively minor or simple, collectively can make a substantial difference in the efficiency of a process or the production of a product, or may be the basis of a marketing or commercial strategy. The collective effect of the items and procedures must be considered in any analysis of whether a trade secret exists and not the general knowledge of each individual item or procedure.”

SECTION 3. Section 39‑8‑30 of the 1976 Code is amended to read:

“Section 39‑8‑30. (A) A trade secret endures and is protectable and enforceable until it is disclosed or discovered by proper means.

(B) Every employee who is informed of or should reasonably have known from the circumstances of the existence of any employer’s trade secret has a duty to refrain from using or disclosing the trade secret without the employer’s permission independently of and in addition to any written contract of employment, secrecy agreement, noncompete agreement, nondisclosure agreement, or other agreement between the employer and the employee.

(C) A person aggrieved by a misappropriation, wrongful disclosure, or wrongful use of his trade secrets may bring a civil action to recover damages incurred as a result of the wrongful acts and to enjoin its appropriation, disclosure, use, or wrongful acts pertaining to the trade secrets.

(D) Notwithstanding any similarity to a covenant not to compete, a contractual duty not to disclose or divulge a trade secret or confidential information, to maintain the secrecy of a trade secret, or to limit the use of a trade secret or confidential information is distinct and independent from a covenant not to compete and:

(1) must be presumptively valid and enforceable, with the presumption being overcome by a showing that none of the information protected by the contractual duty qualifies as a trade secret or confidential information;

(2) may not be subject to the heightened level of scrutiny applied to covenants not to compete at the common law;

(3) may not be considered void or unenforceable for lack of consideration where the consideration provided for executing the agreement consists of initial employment, initial access or exposure to the trade secret or confidential information in question, continued employment, continued access or exposure to the trade secret or confidential information in question, or any combination thereof; and

(4) ~~must~~ may not be considered void or unenforceable or against public policy for lack of a durational or geographical limitation.

(E) This chapter applies to ~~any and~~ all civil remedies which are based upon misappropriation of a trade secret or confidential information or upon protection of a trade secret except as provided in Section 39‑8‑110(B) and (C).”

SECTION 4. This act takes effect upon approval by the Governor and applies to any action commenced after the effective date of this act.

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