



**House
Legislative
Analysis
Section**

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House Bill 4072 as enrolled
Second Analysis (12-18-87)

FEB 04 1988

Sponsor: Rep. Claude Trim
House Committee: Judiciary
Senate Committee: Judiciary

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THE APPARENT PROBLEM:

Among the statutes repealed by the Michigan Antitrust Reform Act (Public Act 274 of 1984) was Public Act 329 of 1905, which among other things generally prohibited the enforcement of employment covenants whereby an employee agrees not to compete with the employer after leaving the firm; such covenants generally were permitted if necessary to prevent the "theft" of customers and if they did not extend beyond 90 days after employment terminated. According to at least one antitrust expert, Michigan courts tended to uphold post-employment restraints that appeared to conflict with the statute, if necessary to protect an employer's legitimate interest, and the judicial reluctance to apply the old law was a factor in its repeal. However, the repeal of the old law left a gap in statute: were post-employment covenants legal or not and under what conditions? Legislation has been proposed to clarify in statute the permissible uses of restrictive covenants for employees who leave employment.

THE CONTENT OF THE BILL:

The bill would amend the Michigan Antitrust Reform Act to allow certain agreements not to compete. An employer could obtain from an employee an agreement that protected the employer's reasonable competitive business interests and prohibited an employee from working in a line of business after employment terminated. However, the agreement would have to be reasonable as to its duration, geographical area, and the type of employment or line of business prohibited. To the extent that such an agreement was found to be unreasonable in any respect, a court could limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

The bill would apply to covenants and agreements made after March 29, 1985.

MCL 445.774a

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have no fiscal impact on state or local government. (12-8-87)

ARGUMENTS:

For:

The bill would enact reasonable restrictions on the use of employee post-termination covenants, and would fill a statutory void created when the Michigan Antitrust Reform Act repealed earlier restrictions. The covenants would be permitted to the degree necessary to protect an employer's legitimate interests in trade secrets, client lists, and corporate planning or confidential employment materials. It not only would recognize employer's legitimate needs, but would protect employees against arbitrary terms: terms such as the period of time for which a covenant applied

would have to be reasonable. In effect, the bill would enable employers and employees to negotiate the details of covenants.

Response: Arguing that employers and employees could negotiate covenant terms assumes that employers and employees could negotiate from equal positions of power; that is rarely the case.

Against:

The bill is not necessary. The public interest and rights of employees and employers would be sufficiently well served, as they are in many other states, by the common law test of reasonableness, which courts would employ in the absence of a specific statute on post-employment covenants. This test would weigh the various interests of employer, employee, and the public on a case-by-case basis. As articulated in a dissenting opinion filed with a 1976 Michigan Supreme Court decision, "a non-competition forfeiture clause is a reasonable restraint of trade only if it 1) is no greater than necessary for the protection of the legitimate interests of the employer; 2) does not impose undue hardship on the employee; and 3) is not injurious to the interests of the public." Indeed, the bill's vagueness and reliance on a general test of reasonableness ensure that disputes will continue to arise and be resolved by the courts.

Response: The bill would offer the courts statutory guidance in resolving disputes over post-employment restrictive covenants.

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