

D R A F T
FOR DISCUSSION ONLY

Uniform Covenants Not to Compete Act
[Tentative new name: Uniform Restrictive Employment
Agreement Act or Uniform Employee Noncompete
Agreement Act]

Uniform Law Commission

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Clean Draft



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Uniform Covenants Not to Compete Act

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Uniform Covenants Not to Compete Act

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Uniform Covenants Not to Compete Act

Section 1. Title

This [act] may be cited as the Uniform Restrictive Employment Agreement Act.

Section 2. Definitions

In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) “Employer” means a person that hires or contracts with a worker.

(3) “Person” means an individual, estate, business or nonprofit entity, or other legal entity. The term does not include a public corporation or government or governmental subdivision, agency, or instrumentality.

(4) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(5) “Restrictive employment agreement” means an agreement or part of an agreement between an employer and worker that prohibits, limits, or deters the worker from working after the work relationship ends or a sale of business is consummated and is a noncompete agreement as defined in Section 6, a confidentiality agreement as defined in Section 7, a no-business agreement as defined in Section 8, a nonsolicitation agreement as defined in Section 9, no-recruit agreement as defined in Section 10, a payment-for-competition agreement as defined in Section 11, or a training-repayment agreement as defined in Section 12.

(6) “Sale of a business” means sale or merger of all or part of a business,

1 nonprofit, or other legal entity or of substantially all the operating assets or controlling
2 ownership interest of the entity.

3 (7) “Sign” means, with present intent to authenticate or adopt a record:

4 (A) execute or adopt a tangible symbol; or

5 (B) attach to or logically associate with the record an electronic symbol,
6 sound, or process.

7 (8) “Special training” means instruction or other education a worker receives from
8 a source other than the employer that is:

9 (A) designed to enhance the ability of the worker to perform the worker’s
10 work;

11 (B) not normally received by other workers; and

12 (C) a significant and identifiable cost to the employer distinct from
13 ordinary on-the-job training.

14 (9) “Stated rate of pay” means the annual compensation an employer agrees to
15 pay a worker. The term includes a wage, salary, professional fee, other amount paid as
16 compensation for personal service, and the fair market value of all remuneration paid in a
17 medium other than cash. The term does not include a healthcare benefit, severance pay,
18 retirement benefit, expense reimbursement, amount paid as a distribution of earnings and profit
19 unless paid as compensation for personal service, or anticipated but indeterminable
20 compensation including a tip, bonus, or commission.

21 (10) “Trade secret” has the meaning in [cite to Uniform Trade Secrets Act Section
22 1(4)].

23 (11) "Work" means providing service; "works" means provides service.

(12) “Worker” means an individual who works for an employer. The term includes an employee, independent contractor, partner, extern, intern, volunteer, apprentice, and sole proprietor who provides service to a customer. The term does not include an individual whose sole relationship with the employer is as a member of a board of directors or other governing board, investor, or vendor of goods.

Legislative Note: *In paragraph (20), a state should cite to the state’s Uniform Trade Secrets Act Section 1(4) or the equivalent definition of trade secret.*

Section 3. Scope

(a) This [act] applies to a restrictive employment agreement. If a restrictive employment agreement is part of an agreement, other parts of the agreement are not affected by this [act].

(b) This [act] supersedes common law that applies only to a restrictive employment contract but does not otherwise affect:

(1) the common law of contract; or

(2) the common law of agency.

(c) This [act] does not affect [cite to other state law or rule that is compatible with this act and puts additional limits on a restrictive employment agreement].

(d) This [act] does not affect an agreement to take actions to transfer, perfect, or enforce patent, copyright or other similar rights.

Legislative Note: *A state should cite in subsection (c) statutes or rules that impose additional restrictions on a restrictive employment agreement.*

Section 4. Notice Requirements

(a) A restrictive employment agreement is prohibited and unenforceable unless:

(1) the employer provides a copy of the proposed agreement in a record to:

(A) a prospective worker 14 days before before the acceptance of work or the commencement of work, whichever is earlier; or

1 (B) a current worker who receives a material increase in compensation 14
2 days before before the worker accepts a change in job status or responsibilities or the increase,
3 whichever is earlier; or

4 (C) a departing worker who is given consideration in addition to anything
5 of value to which the worker already is entitled and at least 14 days within which to consider the
6 agreement before signing.

7 (2) with the copy of the proposed agreement provided under paragraph (1), the
8 employer provides to the worker a separate notice, in a record, from the [State Department of
9 Labor] under subsection (c) in the preferred language of the worker, if available;

10 (3) the proposed agreement and the signed agreement clearly specify the
11 information, type of work activity, or extent of competition that the agreement restricts or
12 prohibits after the work relationship ends;

13 (4) the agreement is in a record separately signed by the worker and the employer
14 and the employer promptly provides a copy of the executed agreement; and

15 (5) the employer provides an additional copy of the agreement to the worker not
16 later than 14 days after the worker, in a record, and not more frequently than annually, requests a
17 copy, unless the employer when acting reasonably and in good faith is unable to provide the
18 copy within 14 days after the request and the worker is not prejudiced by the delay.

19 (b) A worker may waive the 14-day requirement of subsection (a)(1)(A) that the worker
20 receive a copy of the proposed agreement if the worker receives the signed agreement before
21 accepting work. If the worker waives the requirement, the agreement is not enforceable until 14
22 days after the worker commences work.

23 (c) The [State Department of Labor] shall prepare a notice that the employer provides

1 under subsection (a) informing the worker of the requirements under this [act] in language that
2 can be understood by an average reader. The notice must include the requirements of subsection
3 (a) and the applicable Sections 5 through 12 and state that this [act] establishes penalties against
4 an employer that enters into a prohibited agreement. The [State Department of Labor] shall make
5 the notice available to employers on its publicly accessible Internet Website or in other
6 appropriate ways. The [department] may:

7 (1) produce a separate notice for each type of restrictive employment agreement;
8 and

9 (2) translate the notice into languages other than English used by a substantial
10 portion of the state's labor force.

11 **Section 5. Worker Not Subject to Restrictive Employment Agreement**

12 A restrictive employment agreement, other than a confidentiality agreement as defined in
13 Section 7 (a) and a training-repayment agreement as defined in Section 12 (a), is prohibited and
14 unenforceable unless:
15

16 (1) when the worker signs the agreement and throughout employment, the worker
17 has a stated rate of pay greater than the annual mean wage of employees in this state as
18 determined by the [State Department of Labor] [U.S. Department of Labor, Bureau of Labor
19 Statistics];

20 (2) the worker voluntarily quits without good cause attributable to the employer or
21 is terminated for an individual performance-related cause; and

22 ***Legislative Note:*** a state should choose between the bracketed entities.

23 ***Legislative Note:*** a state may set the unenforceability threshold at a higher than 100 percent
24 multiple of the annual mean wage, either for all workers or for certain professions.

25 **Section 6. Requirements for Noncompete Agreement**

1 (a) “Noncompete agreement” means a restrictive employment agreement that prohibits a
2 worker from working elsewhere. The term does not include a no-business agreement.

3 (b) A noncompete agreement is prohibited and unenforceable unless:

4 (1) the agreement protects any of the following legitimate business interests:

5 (A) the sale of a business in which the worker is a substantial owner and
6 consents to the sale;

7 (B) a trade secret; or

8 (C) the employer’s current and ongoing customer relationships;

9 (2) when the worker signs the agreement and through the time of enforcement, the
10 agreement is reasonable and narrowly tailored in duration, geographical area, and scope of actual
11 competition to protect an interest under paragraph (1), and the interest can only be substantially
12 protected by a noncompete agreement; and

13 (3) the prohibition on competition lasts not longer than:

14 (A) five years after the work relationship ends when protecting an interest
15 under paragraph (1)(A); or

16 (B) one year after the work relationship ends when protecting an interest
17 only under paragraph (1)(B) or (C).

18 **Section 7. Requirements for Confidentiality Agreement**

19 (a) “Confidentiality agreement” means a restrictive employment agreement that:

20 (1) prohibits a worker from using or disclosing information; and

21 (2) is not a condition of settlement or other resolution of a dispute.

22 (b) A confidentiality agreement is prohibited and unenforceable unless the agreement:

23 (1) is reasonable; and

24 (2) does not include information:

- 1 (A) arising from the worker’s general training, knowledge, skill, or
2 experience gained on the job or otherwise;
- 3 (B) that is readily ascertainable to the relevant public; or
- 4 (C) irrelevant to the employer’s business.

5 **Section 8. Requirements for No-business Agreement**

6 (a) “No-business agreement” means a restrictive employment agreement that prohibits a
7 worker from working for a client or customer of the employer.

8 (b) A no-business agreement is prohibited and unenforceable unless the agreement:

- 9 (1) is reasonable;
- 10 (2) applies only to an ongoing client or customer of the employer with whom the
11 worker had worked personally;
- 12 (3) lasts no longer than six months after the work relationship ends.

13 **Section 9. Requirements for No-recruit Agreement**

14 (a) “No-recruit agreement” means a restrictive employment agreement that prohibits a
15 worker from hiring or recruiting another worker of the employer.

16 (b) a no-recruit agreement is prohibited and unenforceable unless the agreement:

- 17 (1) is reasonable;
- 18 (2) applies only to a worker currently working for the employer with whom the
19 worker had worked personally; and
- 20 (3) lasts no longer than six months after the work relationship ends.

21 **Section 10. Requirements for Nonsolicitation Agreement**

22 (a) “Nonsolicitation agreement” means a restrictive employment agreement that prohibits
23 a worker from soliciting a client or customer of the employer.

1 (b) A nonsolicitation agreement is prohibited and unenforceable unless the agreement:

2 (1) is reasonable;

3 (2) applies only to an ongoing client or customer of the employer with whom the
4 worker had worked personally; and

5 (3) lasts no longer than one year after the work relationship ends.

6 **Section 11. Requirements for Payment-for-competition Agreement**

7 (a) “Payment-for-competition agreement” means a restrictive employment agreement that
8 imposes an adverse financial consequence on a worker for working elsewhere but does not
9 expressly prohibit the work.

10 (b) A payment-for-competition agreement is prohibited and unenforceable unless the
11 agreement:

12 (1) is reasonable;

13 (2) imposes a financial consequence that is no greater than the actual competitive
14 harm to the employer caused by the worker; and

15 (3) lasts no longer than one year after the work relationship ends.

16 **Section 12. Requirements for Training-repayment Agreement**

17 (a) “Training-repayment agreement” means a restrictive employment agreement that
18 requires a worker to repay the employer for training costs incurred by the employer.

19 (b) A training-repayment agreement is prohibited and unenforceable unless the
20 agreement:

21 (1) is reasonable;

22 (2) applies only to the cost of special training;

23 (3) lasts no longer than two years after the special training is completed; and

(4) prorates the repayment during the two-year post-training period.

Section 13. Nonwaivability

Except as provided in Section 4(b), a party to a restrictive employment agreement may not waive a requirement of this [act], nor may a party stipulate to a fact to avoid a requirement except in the context of resolving an issue in litigation or other dispute resolution.

Comment

This section prevents a worker or employer from waiving a requirement of this act, but for the exception in Section 4(b). The act's requirements are mandatory for the same reason that restrictive employment agreements are not enforceable like other contracts. The overall public interest in competition and mobility in labor markets means that these agreements are prohibited and unenforceable even when agreed to by employer and worker. Those policies would be vitiated if the act's requirements are waivable. On similar grounds, an employee cannot stipulate that the requirements of this act have been met, regardless of whether the stipulation is fact or fiction. If stipulations are generally allowed, an employer could require an employee to sign a contract stating, for example, that the requirements of Section 4(a)(2) have been met, when in reality, the employer never gave the required notice. Stipulations are allowed during litigation or other dispute resolution to move the proceedings along

Section 14. Enforcement and Remedy

Alternative A

(a) The court may not modify a restrictive employment agreement to make it enforceable.

Alternative B

(a) The court may not modify a restrictive employment agreement that restricts a worker beyond a duration imposed under this [act] to make it enforceable. The court may modify an agreement that otherwise violates this [act] only on a finding that the employer reasonably and in good faith believed the agreement was enforceable under this [act] and only to the minimum extent necessary to protect the employer's interest and render the agreement enforceable.

End of Alternatives

(b) A worker who is a party to a restrictive employment agreement or an employer that

1 has hired or is considering hiring the worker may seek a declaratory judgment that the agreement
2 is unenforceable.

3 (c) In addition to other judicial remedies, a court may award statutory damages specified
4 under subsection (e) and reasonable attorney's fees to a private party that successfully challenges
5 or defends against enforceability of a restrictive employment agreement or proves a violation of
6 this [act].

7 (d) An employer seeking to enforce a restrictive employment agreement has the burden
8 of of proving compliance with this [act].

9 (e) An employer that enters a restrictive employment agreement that the employer knows
10 or reasonably should know is unenforceable under this [act] commits a civil violation. The
11 [Attorney General] [Department of Labor] may bring an action on behalf of the worker, or the
12 worker may bring a private action, against the employer to enforce this subsection. The court
13 may award statutory damages of not more than \$[5,000] per worker per agreement for each
14 violation of this subsection.

15 ***Legislative Note:*** *A state should specify that the Attorney General or Department of Labor, or*
16 *both, in bringing an action under subsection (f), has its usual powers to investigate claims and*
17 *reach conciliation or settlement.*

18 **Section 15. Choice of Law and Forum**

19 (a) A choice of law provision that applies to a restrictive employment agreement is
20 prohibited and unenforceable unless it requires that a dispute arising under the agreement be
21 governed by the law of the jurisdiction where the worker primarily works for the employer or, if
22 the work relationship has ended, the jurisdiction where the worker primarily worked when the
23 relationship ended.

24 (b) A choice of forum provision that applies to a restrictive employment agreement is
25 prohibited and unenforceable unless it requires that a dispute arising under the agreement be

1 decided in a jurisdiction where:

2 (1) the worker primarily works or, if the work relationship has ended, a
3 jurisdiction where the worker primarily worked when the relationship ended, or

4 (2) or where the worker resides at the time of the dispute.

5 **Section 16. Uniformity of Application and Construction**

6 In applying and construing this uniform act, a court shall consider the promotion of
7 uniformity of the law among jurisdictions that enact it.

8 **Section 17. Saving Provision**

9 Except as provided in Section 14, this [act] does not affect the validity of an agreement in
10 effect before [the effective date of this [act]].

11 **Section 18. Transitional Provision**

12 Sections 4(a)(5) and 5 apply to a restrictive employment agreement regardless of the date
13 on which the agreement was signed.

14 **[Section 19. Severability**

15 If a provision of this [act] or its application to a worker or employer is held invalid, the
16 invalidity does not affect another provision or application that can be given effect without the
17 invalid provision.]

18 ***Legislative Note:*** *Include this section only if the state lacks a general severability statute*
19 *or a decision by the highest court of the state adopting a general rule of severability.*

20 **[Section 20. Repeals; Conforming Amendments**

21 (a) . . .

22 (b) . . .

23 ***Legislative Note:*** *The state should examine its statutes to determine whether conforming*
24 *revisions are required by provisions of this act relating to {a restrictive employment}. See*
25 *Section {3(b)}.*

1 **Section 21. Effective Date**

2 This [act] takes effect . . .