

DRAFT
FOR DISCUSSION ONLY

COVENANTS NOT TO COMPETE ACT

**[Possible new name:
Restrictive Employment Agreement Act]**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 4, 2020 Drafting Committee Video Conference

INITIAL DRAFT



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November 2, 2020

COVENANTS NOT TO COMPETE ACT

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COVENANTS NOT TO COMPETE ACT

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1 **COVENANTS NOT TO COMPETE ACT**

2 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Covenants Not to Compete
3 [Act].

4 **SECTION 2. DEFINITIONS.** In this [Act]:

5 (1) “Apprentice” is a worker participating in an apprenticeship program registered by the
6 Office of Apprenticeship of the U.S. Department of Labor and meeting the standards established
7 by the office, or registered in any state apprenticeship agency recognized by the office.

8 (2) “Confidential information” means valuable information about the employer’s
9 business not known to competitors, whether or not it is a trade secret, that a worker receives
10 because of the worker’s relationship with the employer.

11 (3) “Confidentiality agreement” means an agreement between an employer and worker
12 restricting the worker from disclosing or using trade secrets or confidential information.

13 (4) “Earned income” means, for an employee, the amount of wages, salaries, tips, and
14 other employee compensation; for an independent contractor, the amount of net earnings from
15 self-employment; and for a partner, the amount of the partner’s salary, equity, dividends, percent
16 of profits, benefits, and other compensation for the taxable year; but only if such amounts are
17 includible in gross income for the taxable year.

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

20 (6) “Employer” means a legal or natural person who hires an individual for services in
21 exchange for earned income.

22 (7) “Forfeiture for competition agreement” means an agreement that by its terms or its
23 manner of enforcement imposes adverse financial consequences on a former worker if the

1 worker engages in competitive activities.

2 (8) “Intern” is [Look to FLSA Fact Sheet 71]

3 (9) “Less restrictive agreement” is an agreement between an employer and worker that
4 does not completely forbid the worker from competing within the worker’s profession, trade, or
5 business after the working relationship has ended, and includes a non-solicitation agreement, a
6 confidentiality agreement, and a forfeiture for competition agreement.

7 (10) “Noncompete agreement” means an agreement between an employer and worker
8 arising out of an anticipated or existing work relationship under which the employer prohibits the
9 worker from competing within the worker’s profession, trade, or business after the work
10 relationship has ended.

11 (11) “Non-solicitation agreement” means an agreement between an employer and worker
12 prohibiting the worker from soliciting the employer’s workers, customers, or clients after the
13 work relationship has ended.

14 (12) “No-business agreement” means an agreement between an employer and worker
15 prohibiting the worker from doing business with the employer’s workers, customers, or clients
16 after the work relationship has ended.

17 (13) “Record” means information that is inscribed on a tangible medium or that is stored
18 in an electronic or other medium and is retrievable in perceivable form.

19 (14) “Restrictive employment agreement” includes a noncompete agreement and lesser
20 restrictive agreements.

21 (15) “Sale of business agreement” means an agreement made in connection with the sale
22 of a business or partnership or substantially all of the operating assets of a business or
23 partnership, or with the disposal of the ownership interest of a business or partnership.

1 (16) “Sign” means, with present intent to authenticate or adopt a record:
2 (A) to execute or adopt a tangible symbol; or
3 (B) to attach to or logically associate with the record an electronic symbol, sound,
4 or process.

5 (17) “Trade secrets” are as defined by the [Uniform Trade Secrets Act].

6 (18) “Worker” means an individual who provides services in exchange for earned
7 income. The term includes an employee, independent contractor, partner, and individual who
8 works in a supervisory, managerial, or confidential position. The term does not include a
9 member of a board of directors. The definition of worker set forth in this subdivision shall be
10 applicable only with respect to this [Act]. The definition is not intended, and shall not be relied
11 upon, to create, change, or affect the employment status of any natural person or the meaning of
12 the terms employee, employment, or employer that may apply in any other context or pursuant to
13 any other provision of law.

14 **SECTION 3. UNENFORCEABILITY OF A RESTRICTIVE EMPLOYMENT**

15 **AGREEMENT.** In addition to any other requirement of the law of this state, a restrictive
16 employment agreement is unenforceable unless:

- 17 (a) The agreement is in a record signed by the worker.
- 18 (b) The employer has provided a copy of the agreement to the prospective worker in a
19 record by the earlier of a formal offer of employment or 10 business days before the
20 commencement of the worker’s employment. If the noncompete agreement is entered into after
21 the commencement of the worker’s employment, it must be entered into upon a subsequent bona
22 fide advancement of the worker by the employer and the employer must provide a copy of the
23 agreement to the worker in a record, and give the worker 10 business days to review and sign the

1 agreement. The agreement must expressly state that the worker has the right to consult with an
2 attorney prior to signing the agreement.

3 (c) In conjunction with a copy of the agreement, the employer has provided the worker
4 with notice of this Act in a record.

5 (d) The worker, at the time of hire and during employment, has earned income from this
6 employer at a rate of at least \$50,000 per year. This amount is adjusted annually for inflation as
7 set forth in Section 4. This requirement does not apply to confidentiality agreements.

8 (e) The worker voluntarily quit or was terminated for individual cause.

9 (f) The worker is at least 18 years old and is not an intern, volunteer, or apprentice.

10 (g) The purpose of the agreement is to protect one or more of the following legitimate
11 business interests:

12 (1) the sale of a business;

13 (2) the employer's trade secrets or other confidential business information;

14 (3) the employer's customer relationships; or

15 (4) the employer's recovery of expense in providing special training to an
16 employee who has worked for the employer for less than two years after the training is
17 completed.

18 (h) The agreement is narrowly tailored in duration, geographical area, and scope of
19 business to further an interest of Section 3(g), and that interest cannot be substantially protected
20 by a less restrictive agreement. An agreement is presumptively narrowly tailored if, in the case
21 of:

22 (1) a noncompete agreement pursuant to a sale of business agreement, the worker
23 has had a substantial investment in the entity and receives a significant benefit from the sale, and

1 the noncompete is for no more than three years;

2 (2) a non-solicitation agreement, it is limited to fellow workers, customers, or
3 clients with whom the worker personally worked, and lasts no more than one year after
4 termination;

5 (3) a no-business agreement, it is limited to fellow workers or customers or clients
6 with whom the worker has personally worked, and lasts no more than 6 months after termination;

7 (4) a confidentiality agreement, it does not prohibit a worker from:

8 (A) using the worker's general training, skill, or experience gained on the
9 job;

10 (B) reporting what the worker reasonably believes to be a violation of law;

11 and

12 (C) disclosing sexual harassment;

13 (5) a forfeiture for competition agreement, the financial consequence is
14 reasonable and the agreement:

15 (A) compensates the employer for no more than the identifiable actual cost
16 of providing special training to a worker who works for the employer for less than two years
17 after the training is completed;

18 (B) applies only to clients or customers with whom the worker personally
19 worked and was introduced to by the employer, and lasts no more than one year after
20 termination;

21 (C) is limited to diminution or delay of retirement benefits because the
22 worker is competing against the employer; or

1 (D) is limited to forfeiture of profit sharing or other bonus compensation
2 that has not yet been paid to the worker because the worker is competing against the employer;

3 **SECTION 4. INFLATION ADJUSTMENT.** Annually on [date], the dollar amounts
4 specified in subsection 3(d) must be adjusted by calculating to the nearest cent using the
5 consumer price index for urban wage earners and clerical workers, CPI-W, or a successor index,
6 for the twelve months prior to each [date] as calculated by the United States department of labor.
7 The adjusted dollar amount calculated under this section takes effect on the following January 1.

8 **SECTION 5. ENFORCEMENT AND REMEDIES.**

9 (a) A court may enforce an actual or threatened breach of a valid restrictive employment
10 agreement with injunctive remedies, damages, and costs.

11 (b) A court shall not modify a restrictive employment agreement in violation of Section 3
12 or Section 7 of this act to make it enforceable. A restrictive employment agreement otherwise in
13 violation of this act may be reformed to the extent necessary to preserve the interests of the
14 parties and render the agreement enforceable.

15 (c) A worker or other employer may seek a declaratory judgment that a restrictive
16 employment agreement is invalid. If the court so finds, it may award costs and attorney fees.

17 (d) An employer that requires a worker to sign an agreement in violation of Section 3 or
18 Section 7 of this act commits a civil violation for which a fine of not more than \$5,000 may be
19 adjudged.

20 (1) The [Attorney General of State X] may bring an action against an employer to
21 enforce this subsection.

22 (2) A worker or other employer has a private right of action to enforce this
23 subsection.

1 **SECTION 6. POSTING REQUIREMENT.** Every employer shall post a copy or a
2 summary approved by the [Department of Labor] of this [act] in the same location where other
3 worker notices required by state or federal law are posted. For every day that an employer fails to
4 post a copy or an approved summary of this section, the employer shall be subject to a \$300 civil
5 penalty.

6 **SECTION 7. PHYSICIANS.** Notwithstanding any other section of this [Act], a
7 noncompete agreement, non-solicitation agreement, or no-business agreement is unenforceable
8 against a physician or other healthcare provider as defined by [state regulation of healthcare
9 providers] unless:

10 (1) The agreement is made in connection with the sale of a physician practice; and

11 (2) The agreement is narrowly tailored in duration, geographical area, and scope of
12 business to further an interest of Section 3(f)(1), and that interest cannot be substantially
13 protected by a less restrictive agreement.

14 **SECTION 8. PERSONAL JURISDICTION; CHOICE OF LAW AND FORUM;**
15 **PREEMPTION OF OTHER LAW.**

16 (a) In a dispute arising under this [act], a court may exercise personal jurisdiction over
17 any non-domiciliary who works for the employer in the state, or who worked for the employer in
18 the state at the time of the work relationship's termination.

19 (b) A dispute arising out of or related to a restrictive employment agreement shall be
20 exclusively:

21 (1) decided by a court in the state in which the worker works for the employer or,
22 if the work relationship has ended, the state in which the worker worked for the employer at the
23 time of the work relationship's termination; and

1 (2) governed by the laws of that state.

2 (c) No choice of law provision that would have the effect of avoiding the requirements of
3 this statute will be enforceable if the worker is, and has been for at least 30 days immediately
4 preceding the worker's cessation of employment, a resident of or employed in this state at the
5 time of his or her termination of employment. The criteria for enforceability of a noncomplete
6 agreement and the procedures and remedies in an action to enforce a noncomplete agreement
7 provided in this statute preempt any other criteria, procedures, and remedies under common law
8 or otherwise.

9 **SECTION 9. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND**
10 **NATIONAL COMMERCE ACT.** This [act] modifies, limits, or supersedes the Electronic
11 Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not
12 modify, limit, or supersede Section 39 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize
13 electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C.
14 Section 7003(b).

15 **SECTION 10. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
16 applying and construing this act, consideration must be given to the need to promote uniformity
17 of the law with respect to its subject matter among states that enact it.

18 **SECTION 11. SAVINGS CLAUSE.** This [act] does not affect the validity or effect of a
19 notarial act performed before [the effective date of this [act]].

20 **SECTION 12. SEVERABILITY.** If any provision of this [act] or its application to any
21 person or circumstance is held invalid, the invalidity does not affect other provisions or
22 applications of this [act] which can be given effect without the invalid provision or application,
23 and to this end the provisions of this [act] are severable.]

1 **SECTION 13. REPEALS; CONFORMING AMENDMENTS.**

2 (a)

3 (b)

4 (c)

5 **SECTION 14. EFFECTIVE DATE.** This [act] takes effect