

D R A F T
FOR DISCUSSION ONLY

Covenants Not to Compete Act
[Possible new name:
Restrictive Employment Agreement Act]

Uniform Law Commission

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Second Draft



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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. Title**

3 This [act] may be cited as the Covenants Not to Compete Act.

4 **Section 2. Definitions**

5 In this [act]:

6 (1) “Apprentice” means an individual who is in an apprenticeship program
7 registrable under [state or] federal law to learn a skilled occupation.

8 (2) “Bona fide advancement” means an increase in earned income, job status, and
9 responsibility that justifies a change in the way an employer entrusts a customer relationship,
10 confidential information with a worker, or program of special training.

11 (3) “Competition” means the effort of two or more persons acting independently
12 to secure the same business or employment of a third person.

13 (4) “Confidential business information” means independently valuable business
14 information not known to competitors, whether or not a trade secret, that the worker actually
15 receives from an employer, and does not include the worker’s general training, knowledge, skill,
16 or experience gained on the job or otherwise.

17 (5) “Conspicuous” means so written, displayed, or presented that a reasonable
18 person against which it is to operate ought to have noticed it. Whether a term is conspicuous or
19 not is a decision for the court. Conspicuous terms include the following:

20 (A) a heading in capitals equal to or greater in size than the surrounding
21 text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

22 (B) language in the body of a record or display in larger type than the
23 surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or

1 set off from surrounding text of the same size by a symbol or other mark that calls attention to
2 the language.

3 (6) “Earned income” means a wage, salary, professional fee, tip, bonus,
4 commission, and other amount received as compensation for personal service actually rendered,
5 including the fair market value of all remuneration paid in any medium other than cash. The term
6 does not include a healthcare benefit, severance pay, retirement benefit, expense reimbursement,
7 or amount paid by a person that represents a distribution of earnings and profit rather than as
8 compensation for personal service.

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

11 (8) “Emergency” means an occasion in which immediate service of a worker is
12 needed to protect public health or avoid irreparable economic injury.

13 (9) “Employer” means a person who hires or contracts with an individual for
14 service.

15 (10) “Entity” means a business corporation, nonprofit corporation, general
16 partnership, limited liability partnership, limited partnership, limited liability limited partnership,
17 limited liability company, [general cooperative association], limited cooperative association, an
18 unincorporated nonprofit association, a statutory trust, business trust, common-law business
19 trust, and any other person that has a legal existence separate from an interest holder of that
20 person or the power to acquire an interest in real property in its own name.

21 (11) “Formal offer” means an offer that documents key employment terms such as
22 earned income and job duties sufficiently that a prospective worker can make an informed
23 decision to accept or reject employment.

1 (12) "Intern" means an individual who performs uncompensated service to earn
2 credit awarded by an educational institution, learn a trade or occupation, or gain work
3 experience.

4 (13) "Person" means an individual, estate, business or nonprofit entity, public
5 corporation, government or governmental subdivision, agency, or instrumentality, or other legal
6 entity.

7 (14) "Record" means information:

8 (A) inscribed on a tangible medium; or

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

11 (15) "Restrictive employment agreement" means an agreement, whether alone or
12 part of an agreement between an employer and worker or potential worker that prohibits or
13 requires an action after the work relationship ends or a sale of business is consummated, and
14 includes a:

15 (A) "noncompete agreement", which means an agreement that expressly
16 prohibits the worker from some work; and

17 (B) "less restrictive agreement", which means an agreement that limits but
18 does not expressly prohibit the worker from some work, and includes a:

19 (i) "confidentiality agreement", which means an agreement that
20 expressly prohibits the worker from disclosing or using information, and is not entered into as a
21 condition of settlement or other resolution of a post-employment dispute or lawsuit;

1 (ii) “forfeiture-for-competition agreement”, which means an
2 agreement that by its terms or its manner of enforcement imposes adverse financial
3 consequences on a worker if the worker works;

4 (iii) “no-business agreement”, which means an agreement that
5 expressly prohibits the worker from doing business with a customer or client of the employer;

6 (iv) “no-recruitment agreement”, which means an agreement that
7 expressly prohibits the worker from hiring or recruiting another worker of the employer; and

8 (v) “non-solicitation agreement”, which means an agreement that
9 expressly prohibits the worker from soliciting a client or customer of the employer.

10 (16) “Sale of business” means sale of an entity or substantially all of the operating
11 assets or ownership interest of an entity.

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

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

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

16 (18) “Special training” means instruction, teaching, or other education received by
17 a worker from a source other than the employer that is designed to enhance the ability of the
18 worker to perform the worker’s work, is not normally received by other workers, and is a
19 significant cost to the employer.

20 (19) “Trade secrets” are as defined by the [cite to Uniform Trade Secrets Act].

21 (20) “Volunteer” means an individual who, of the individual's own free will,
22 provides goods or services without any financial gain.

23 (21) “Work” means providing service to an employer.

1 (22) “Worker” means an individual who provides service to an employer. The
2 term includes an employee, independent contractor, partner, intern, volunteer, and apprentice.
3 The term does not include a member of a board of directors, investor, or provider of goods.

4 **Section 3. Scope**

5 (a) This [act] applies to a restrictive employment agreement. To the extent a restrictive
6 employment agreement is part of an agreement, the restrictive employment agreement is subject
7 to this [act], and the rest of the agreement is not affected by this [act].

8 (b) This [act] supersedes the statutory and common law of a restrictive employment
9 agreement but does not affect:

10 (1) the common law of contract;

11
12 (2) the common law of agency;

13
14 (3) any law or regulation that restricts an attorney's ability to enter into a
15 restrictive employment agreement; and

16 (4) [cite to other state law that prohibits or limits enforceability of a restrictive
17 employment agreement.]

18 *Legislative Note: The state should identify pre-existing statutes that prohibit or limit the*
19 *enforceability of a specific type of restrictive employment agreement that are consistent with this*
20 *[act] and can remain in force. [To the Drafting Committee only: For example, many states, such*
21 *as Arizona, Connecticut, and Illinois, prohibit the use of noncompete agreements in the*
22 *broadcasting industry.]*

23
24 **Section 4. Notice Requirements**

25 A restrictive employment agreement is unenforceable unless:

26 (a) a copy of the proposed agreement is provided in a record to:

27 (1) a prospective worker by the earlier of a formal offer of employment or
28 10 business days before the commencement of employment; or

1 (2) the worker receiving a subsequent bona fide advancement by the
2 earlier of a formal offer of the advancement or 10 business days before the commencement of the
3 advancement;

4 (b) in conjunction with a copy of the proposed agreement, the employer:

5 (1) notifies the worker in a record of the worker's right to consult with an
6 attorney prior to signing the agreement; and

7 (2) gives proper notice in a record of this [act], as determined by the
8 [Department of Labor];

9 (c) the proposed agreement and the agreement are conspicuous;

10 (d) the agreement is in a record separately signed by the worker and an agent of
11 the employer.

12 (e) the employer provides a copy of the agreement to the worker at least once
13 every five years the worker has worked for the employer; and

14 (f) the employer gives a copy of the agreement to the worker within 10 business
15 days of any request of the worker for a copy.

16 **Comment**

17 The separately signed requirement is included for those situations where the restrictive
18 employment agreement is part of a larger work agreement. In this situation, the worker and agent
19 of the employer are specifically required to sign the restrictive employment agreement on its own
20 whether or not they sign the larger work agreement.

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

22 A restrictive employment agreement, except for a confidentiality agreement, is
23 unenforceable unless:
24

25 (a) the worker, at the time of hire and throughout employment, including at the
26 end of employment, has earned income from the employer at a rate of at least the median yearly

1 earnings of a full-time wage and salary worker in [State];

2 (b) The worker voluntarily quits without good cause attributable to the employer
3 or is terminated for individual performance-related cause; and

4 (c) The worker is at least 18 years of age and is not an intern, volunteer, or
5 apprentice when the agreement is signed.

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

7 A noncompete agreement is unenforceable unless:

8 (a) the purpose of the agreement is to protect one or more of the following
9 legitimate business interests:

10 (1) the sale of a business;

11 (2) the employer’s trade secrets or other confidential business information;

12 or

13 (3) the employer’s current and ongoing customer relationships;

14 (b) The agreement is reasonable and narrowly tailored in duration, geographical
15 area, and scope of actual competition to further an interest of subsection (a), and the interest
16 cannot be substantially protected by a less restrictive agreement. Except as provided in
17 subsection (c), a noncompete agreement is not narrowly tailored if it lasts longer than two years
18 after termination; and

19 (c) when entered in connection with a sale of business, the worker has had a
20 substantial investment of at least five percent in the entity or receives significant benefit from the
21 sale and the prohibition period is no longer than five years.

22 **Section 7. Requirements for Less Restrictive Agreement**

23 A less restrictive agreement is unenforceable unless the agreement is reasonable and

1 narrowly tailored in duration, geographical area, and scope of actual competition. An agreement
2 is not narrowly tailored, if in the case of:

3 (a) a confidentiality agreement, it prohibits the worker from using or disclosing:

4 (1) the worker's general training, knowledge, skill, or experience gained
5 on the job or otherwise; or

6 (2) information that is;

7 (A) generally known to the public; or

8 (B) not relevant to the operation of the employer's business;

9 (b) a forfeiture-for-competition agreement, the financial consequence is
10 unreasonable or the agreement:

11 (1) compensates the employer for more than the cost of special training or
12 requires repayment for longer than two years after the training is completed;

13 (2) is not limited to a client or customer with whom the worker personally
14 worked and was introduced to by the employer, requires payment of more than the annual net
15 profit gained from servicing the client or customer, or lasts more than one year after termination;

16 (3) is not limited to diminution or delay of a retirement benefit during the
17 period the worker is competing against the employer; or

18 (4) is not limited to forfeiture of profit sharing or other bonus
19 compensation that has not yet been paid to the worker and would be paid to the worker during
20 the period the worker is competing against the employer;

21 (c) a no-business agreement, it is not limited to a current and ongoing client or
22 customer of the employer with whom the worker had personally worked or lasts longer than six
23 months after termination;

1 (d) a no-recruitment agreement, it is not limited to a fellow worker currently
2 working for the employer with whom the worker had personally worked or lasts longer than six
3 months after termination.

4 (e) a non-solicitation agreement, it is not limited to a current and ongoing client or
5 customer of the employer with whom the worker had personally worked or lasts longer than one
6 year after termination.

7 **Section 8. Waivable and Nonwaivable Provision**

8 (a) Except as provided in subsection (b), a party to a restrictive employment agreement
9 may not waive or stipulate to avoid a requirement of this [act].

10 (b) The time requirements of Section 4(a) may be waived by the worker when an
11 emergency exists.

12 **Section 9. Enforcement and Remedy**

13 (a) A court may not modify a restrictive employment agreement that is facially
14 unenforceable under this [act] to make it enforceable. An agreement that otherwise violates this
15 [act] may be modified only to the minimum extent necessary to preserve the interest of the party
16 seeking enforcement and render the agreement enforceable. A court may reform an agreement so
17 that it is consistent with the intent of the parties in conformity with the doctrine of reformation of
18 contracts as it otherwise exists in this state or in the state whose law governs the contract.

19 (b) A court may remedy an actual or threatened breach of a valid agreement or a failure
20 to comply with this [act] with injunctive relief, actual damages, legally enforceable liquidated
21 damages specified in the agreement, and costs.

22 (c) A court may award reasonable attorney's fees, actual and liquidated damages, and
23 costs to a party that successfully challenges the enforceability of an agreement.

1 (d) A worker or employer, including an employer of the worker who is not party to the
2 agreement, may seek a declaratory judgment that the agreement is unenforceable.

3 (e) The party seeking to enforce an agreement has the burden of proof on every element
4 in any proceeding.

5 (f) An employer that requests that a worker sign an agreement that the employer knows
6 or reasonably should know is unenforceable under this [act] commits a civil violation.

7 (g) The [Attorney General and Department of Labor] have a cause of action against an
8 employer to enforce subsection (f), for which a fine of not more than \$[5,000] may be adjudged
9 for each worker so requested.

10 (h) A worker or other employer not a party to the agreement has a cause of action to
11 enforce subsection (f), for which a court may award liquidated damages of \$[5,000] for each
12 violation.

13 **Section 10. Healthcare Provider**

14 A noncompete agreement, no-business agreement, no-recruitment agreement, or non-
15 solicitation agreement is unenforceable against a physician or other healthcare provider as
16 defined by [state regulation of healthcare providers].

17 **Comment**

18 This section makes the listed agreements unenforceable against a healthcare provider
19 even when ancillary to a sale of business. This is similar to the regulation of the equivalent
20 lawyer agreements, which generally are not enforceable even ancillary to a sale of business. Just
21 as the Rules of Professional Conduct allow for the enforceability of some forfeiture-for-
22 competition agreements against lawyers, however, this section allows for the enforceability of
23 forfeiture-for-competition agreements against a healthcare provider, so long as the agreement
24 meets the other requirements of this [act].

25
26 **Section 11. Choice of Law and Forum**

27 A choice of law or forum provision is unenforceable if it has the effect of causing a

1 dispute arising out of a restrictive employment agreement to not be governed by the law of, or
2 decided by a court or arbitrator in, the state where the worker works for the employer or, if the
3 work relationship has ended, the state in which the worker worked at the time of termination.

4 **Section 12. Uniformity of Application and Construction**

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

7 **Section 13. Relation to Electronic Signatures in Global and National Commerce Act**

8 This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National
9 Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or
10 supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices
11 described in 15 U.S.C. Section 7003(b).

12 *Legislative Note: It is the intent of this act to incorporate future amendments to the cited federal*
13 *law. In a state in which the constitution or other law does not permit incorporation of future*
14 *amendments when a federal statute is incorporated into state law, the phrase “as amended”*
15 *should be omitted. The phrase also should be omitted in a state in which, in the absence of a*
16 *legislative declaration, future amendments are incorporated into state law.*

17

18 **Section 14. Saving Provision**

19 This [act] does not affect the validity or effect of a restrictive employment agreement in
20 effect before [the effective date of this [act]].

21 **Section 15. Severability**

22 If a provision of this [act] or its application to a person or circumstance is held invalid,
23 the invalidity does not affect another provision or application that can be given effect without
24 the invalid provision.

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

27

1 **Section 16. Repeals; Conforming Amendments**

2 (a) . . .

3 (b) . . .

4 ***Legislative Note:** The state should examine its statutes to determine whether conforming*
5 *revisions are required by provisions of this act relating to { }. See Section { }.*

6

7 **Section 17. Effective Date.** This [act] takes effect