

First Regular Session
Seventy-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 21-0600.01 Bob Lackner x4350

SENATE BILL 21-023

SENATE SPONSORSHIP

Kirkmeyer,

HOUSE SPONSORSHIP

(None),

Senate Committees
Judiciary

House Committees

A BILL FOR AN ACT

101 CONCERNING RESTRICTIONS ON NONDISCLOSURE AGREEMENTS
102 AFFECTING STATE GOVERNMENT EMPLOYEES.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

The bill prohibits the state and any of its departments, institutions, or agencies (state) from making it a condition of employment that an employee or a prospective employee execute a contract or other form of agreement that prohibits, prevents, or otherwise restricts the employee or prospective employee from disclosing factual circumstances concerning the individual's employment with the state (nondisclosure agreement)

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

except where the nondisclosure agreement is necessary to prevent disclosure of:

- Factual circumstances relating to the employment that reasonably implicate privacy interests held by the employee who is a party to the agreement; and
- Matters required to be kept confidential by federal law or rules or by state statute or matters bearing on the specialized details of security arrangements or investigations.

The bill prohibits nondisclosure agreements that prohibit state employees from disclosing factual circumstances concerning their employment. To the extent that an employer includes any such provision in any employment contract or agreement, the provision is deemed against public policy and unenforceable against a current or former employee who is a party to the contract or agreement except where the provision is intended to prevent disclosure of factual circumstances implicating the employee's privacy interests or matters required to be kept confidential under federal or state law or matters bearing on the specialized details of security arrangements or investigations.

The bill prohibits the state from taking any retaliatory action against an individual on the grounds that the individual does not enter into a contract or agreement deemed to be against public policy and unenforceable under the bill. Any person who enforces or attempts to enforce a provision deemed against public policy and unenforceable under the bill is liable for the employee's reasonable attorney fees and costs in defending against the action.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, **add** 24-50.5-105.9
3 as follows:

4 **24-50.5-105.9. Nondisclosure agreements - protection of state**
5 **employees - legislative declaration - intent.** (1) (a) THE GENERAL
6 ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

7 (I) EMPLOYEES OF THE STATE GOVERNMENT, ITS DEPARTMENTS,
8 INSTITUTIONS, AND AGENCIES ARE PUBLIC SERVANTS, HIRED AND
9 UNDERTAKING THEIR JOB DUTIES AND RESPONSIBILITIES TO SERVE THE
10 PUBLIC;

1 (II) AS PUBLIC EMPLOYEES, THESE EMPLOYEES ARE PAID WITH
2 PUBLIC FUNDS AND THEY AND THEIR EMPLOYERS ARE ACCOUNTABLE TO
3 THE PUBLIC FOR THE MANNER IN WHICH THEY CARRY OUT THEIR PUBLIC
4 DUTIES AND RESPONSIBILITIES;

5 (III) THE PUBLIC HAS A FUNDAMENTAL INTEREST IN
6 TRANSPARENCY CONCERNING THE CONDUCT OF STATE GOVERNMENT.
7 FROM THE FREE SPEECH PROVISIONS OF ITS FOUNDING CONSTITUTION TO
8 THE ENACTMENT OF LAWS REQUIRING THAT MEETINGS BE CONDUCTED IN
9 AN OPEN MANNER AND THAT PUBLIC RECORDS BE BROADLY DISCLOSED,
10 THE STATE OF COLORADO HAS BEEN AT THE FOREFRONT OF EFFORTS TO
11 ENSURE THAT THE FORMATION OF PUBLIC POLICY IS PUBLIC BUSINESS AND
12 MAY NOT BE CONDUCTED IN SECRET. THESE CONSTITUTIONAL AND
13 STATUTORY REQUIREMENTS ARE INTENDED TO PROVIDE THE PUBLIC AS
14 MUCH KNOWLEDGE AS POSSIBLE ABOUT HOW THE PUBLIC BUSINESS IS
15 BEING CONDUCTED WHILE IT IS BEING CONDUCTED.

16 (IV) NONDISCLOSURE AGREEMENTS IMPOSED ON STATE
17 EMPLOYEES OR PROSPECTIVE EMPLOYEES THAT EFFECTIVELY PROHIBIT
18 STATE EMPLOYEES FROM DISCLOSING DETAILS ABOUT THEIR GOVERNMENT
19 SERVICE OBSTRUCT THESE FUNDAMENTAL PRINCIPLES OF GOVERNMENT
20 TRANSPARENCY AND PUBLIC ACCOUNTABILITY. THE DETAILS OF PUBLIC
21 BUSINESS SHOULD NOT BE HIDDEN FROM PUBLIC VIEW BY MEANS OF
22 NONDISCLOSURE AGREEMENTS IMPOSED ON GOVERNMENT EMPLOYEES AS
23 A CONDITION OF THEIR EMPLOYMENT OR IN CONNECTION WITH THEIR
24 LEAVING GOVERNMENT SERVICE.

25 (V) IN THE ABSENCE OF LEGITIMATE CONCERNS ABOUT THE
26 PROTECTION OF THE PRIVACY INTERESTS OF STATE EMPLOYEES, OR TO
27 PROTECT AGAINST DISCLOSURE MATTERS THAT ARE TRULY CONFIDENTIAL

1 AND SENSITIVE TO THE PUBLIC INTEREST, NEITHER THE STATE NOR ANY OF
2 ITS DEPARTMENTS, INSTITUTIONS, OR AGENCIES SHOULD BE PERMITTED TO
3 SILENCE THEIR EMPLOYEES FROM BEING ABLE TO SPEAK OPENLY ABOUT
4 THEIR GOVERNMENT SERVICE THROUGH THE IMPOSITION OF
5 NONDISCLOSURE AGREEMENTS. SUCH EMPLOYEES SHOULD ORDINARILY BE
6 PERMITTED TO SPEAK OPENLY ABOUT THEIR GOVERNMENT SERVICE.

7 (b) BY ENACTING SENATE BILL 21-___, ENACTED IN 2021, THE
8 GENERAL ASSEMBLY INTENDS TO RESTRICT THE ABILITY OF THE STATE, AND
9 ANY OF ITS DEPARTMENTS, INSTITUTIONS, OR AGENCIES, FROM REQUIRING
10 ITS EMPLOYEES OR PROSPECTIVE EMPLOYEES TO ENTER INTO
11 NONDISCLOSURE AGREEMENTS AS A CONDITION OF THEIR BEING HIRED.
12 NOR MAY THE STATE AND ANY OF ITS DEPARTMENTS, INSTITUTIONS, OR
13 AGENCIES INSIST UPON THE ENFORCEMENT OF SUCH AGREEMENT WHEN
14 EMPLOYEES END THEIR EMPLOYMENT WITH THE STATE. THE GENERAL
15 ASSEMBLY INTENDS THAT, ABSENT THE PRESENCE OF VERY SELECT
16 CIRCUMSTANCES, ENFORCEMENT OF SUCH AGREEMENTS BE PROHIBITED
17 AND THAT SUCH AGREEMENTS BE DEEMED VOID AS AGAINST PUBLIC POLICY
18 AND OF NO LEGAL FORCE AND EFFECT. THE GENERAL ASSEMBLY FURTHER
19 INTENDS THAT THIS SECTION BE LIBERALLY CONSTRUED TO FURTHER THE
20 FUNDAMENTAL PRINCIPLE THAT STATE GOVERNMENT BE CONDUCTED IN
21 PUBLIC TO THE GREATEST EXTENT POSSIBLE.

22 (2) (a) NEITHER THE STATE NOR ANY OF ITS DEPARTMENTS,
23 INSTITUTIONS, OR AGENCIES SHALL MAKE IT A CONDITION OF EMPLOYMENT
24 THAT AN EMPLOYEE OR A PROSPECTIVE EMPLOYEE EXECUTE A CONTRACT
25 OR OTHER FORM OF AGREEMENT THAT PROHIBITS, PREVENTS, OR
26 OTHERWISE RESTRICTS THE EMPLOYEE OR PROSPECTIVE EMPLOYEE FROM
27 DISCLOSING FACTUAL CIRCUMSTANCES CONCERNING THE INDIVIDUAL'S

1 EMPLOYMENT WITH THE STATE OR ANY OF ITS DEPARTMENTS,
2 INSTITUTIONS, OR AGENCIES EXCEPT WHERE THE PROHIBITION OR
3 RESTRICTION IN THE CONTRACT OR AGREEMENT IS NECESSARY TO PREVENT
4 DISCLOSURE OF:

5 (I) FACTUAL CIRCUMSTANCES RELATING TO THE EMPLOYMENT
6 THAT REASONABLY IMPLICATE PRIVACY INTERESTS HELD BY THE
7 EMPLOYEE WHO IS A PARTY TO THE AGREEMENT IF THE EMPLOYEE ELECTS
8 IN THE EMPLOYEE'S SOLE DISCRETION TO RESTRICT DISCLOSURE OF SUCH
9 CIRCUMSTANCES ON SUCH GROUNDS; AND

10 (II) MATTERS REQUIRED TO BE KEPT CONFIDENTIAL BY FEDERAL
11 LAW OR RULES OR BY STATE STATUTE OR MATTERS BEARING ON THE
12 SPECIALIZED DETAILS OF SECURITY ARRANGEMENTS OR INVESTIGATIONS.

13 (b) ANY PROVISION IN ANY EMPLOYMENT CONTRACT OR
14 SETTLEMENT AGREEMENT ENTERED INTO BETWEEN AN EMPLOYEE OF THE
15 STATE AND ANY OF ITS DEPARTMENTS, INSTITUTIONS, OR AGENCIES THAT
16 HAS THE PURPOSE OR EFFECT OF CONCEALING FACTUAL CIRCUMSTANCES
17 CONCERNING THE INDIVIDUAL'S EMPLOYMENT WITH THE STATE OR ANY OF
18 ITS DEPARTMENTS, INSTITUTIONS, OR AGENCIES IS PROHIBITED. TO THE
19 EXTENT THAT AN EMPLOYER INCLUDES ANY SUCH PROVISION IN ANY
20 EMPLOYMENT CONTRACT OR AGREEMENT, THE PROVISION IS DEEMED
21 AGAINST PUBLIC POLICY AND UNENFORCEABLE AGAINST A CURRENT OR
22 FORMER EMPLOYEE WHO IS A PARTY TO THE CONTRACT OR AGREEMENT
23 EXCEPT WHERE THE PROVISION IS INTENDED TO PREVENT DISCLOSURE OF:

24 (I) FACTUAL CIRCUMSTANCES RELATING TO THE EMPLOYMENT
25 THAT REASONABLY IMPLICATE PRIVACY INTERESTS HELD BY THE
26 EMPLOYEE WHO IS A PARTY TO THE AGREEMENT IF THE EMPLOYEE ELECTS
27 IN THE EMPLOYEE'S SOLE DISCRETION TO RESTRICT DISCLOSURE OF SUCH

1 CIRCUMSTANCES ON SUCH GROUNDS; AND

2 (II) MATTERS REQUIRED TO BE KEPT CONFIDENTIAL BY FEDERAL
3 LAW OR RULES OR BY STATE STATUTE OR MATTERS BEARING ON THE
4 SPECIALIZED DETAILS OF SECURITY ARRANGEMENTS OR INVESTIGATIONS.

5 (3) (a) NEITHER THE STATE NOR ANY OF ITS DEPARTMENTS,
6 INSTITUTIONS, OR AGENCIES SHALL TAKE ANY RETALIATORY ACTION,
7 INCLUDING, WITHOUT LIMITATION, FAILURE TO HIRE, DISCHARGE,
8 SUSPENSION, DEMOTION, DISCRIMINATION IN THE TERMS, CONDITIONS, OR
9 PRIVILEGES OF EMPLOYMENT, OR OTHER ADVERSE ACTION AGAINST AN
10 INDIVIDUAL ON THE GROUNDS THAT THE INDIVIDUAL DOES NOT ENTER INTO
11 A CONTRACT OR AGREEMENT DEEMED TO BE AGAINST PUBLIC POLICY AND
12 UNENFORCEABLE UNDER SUBSECTION (2)(b) OF THIS SECTION.

13 (b) ANY PERSON WHO ENFORCES OR ATTEMPTS TO ENFORCE A
14 PROVISION DEEMED AGAINST PUBLIC POLICY AND UNENFORCEABLE
15 PURSUANT TO SUBSECTION (2)(b) OF THIS SECTION SHALL BE LIABLE FOR
16 THE EMPLOYEE'S REASONABLE ATTORNEY FEES AND COSTS IN DEFENDING
17 AGAINST THE ACTION.

18 (4) FOR PURPOSES OF THIS SECTION, "THE STATE" INCLUDES
19 WITHOUT LIMITATION EACH OF THE STATE OFFICERS LISTED IN SECTION 1
20 OF ARTICLE IV OF THE STATE CONSTITUTION.

21 **SECTION 2. Act subject to petition - effective date -**
22 **applicability.** (1) This act takes effect at 12:01 a.m. on the day following
23 the expiration of the ninety-day period after final adjournment of the
24 general assembly; except that, if a referendum petition is filed pursuant to
25 section 1 (3) of article V of the state constitution against this act or an
26 item, section, or part of this act within such period, then the act, item,
27 section, or part will not take effect unless approved by the people at the

1 general election to be held in November 2022 and, in such case, will take
2 effect on the date of the official declaration of the vote thereon by the
3 governor.

4 (2) This act applies to all contracts and agreements entered into,
5 renewed, modified, or amended on or after the applicable effective date
6 of this act.