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HOUSE BILL 22-1317

BY REPRESENTATIVE(S) Tipper, Bacon, Bennett, Duran, Exum, Gonzales-Gutierrez, Jodeh, Lindsay, Lontine, Sirota, Weissman, Woodrow, Garnett, Herod;
also SENATOR(S) Bridges, Hansen, Rodriguez.

CONCERNING RESTRICTIVE EMPLOYMENT AGREEMENTS.

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

SECTION 1. In Colorado Revised Statutes, **amend 8-2-113** as follows:

8-2-113. Unlawful to intimidate worker - agreement not to compete - prohibition - exceptions - notice - definition. (1) **Legislative intent.** THE GENERAL ASSEMBLY INTENDS TO PRESERVE EXISTING STATE AND FEDERAL CASE LAW IN EFFECT BEFORE THE EFFECTIVE DATE OF THIS ACT THAT:

(a) DEFINES WHAT COUNTS AS A COVENANT NOT TO COMPETE THAT IS PROHIBITED BY THIS SECTION; AND

(b) SPECIFIES THE EXTENT TO WHICH A COVENANT NOT TO COMPETE

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

FOR THE PROTECTION OF TRADE SECRETS MUST BE TAILORED IN SCOPE IN ORDER TO BE ENFORCEABLE UNDER THIS SECTION.

~~(1)~~ (1.5) (a) It ~~shall be~~ IS unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place ~~he~~ THE PERSON sees fit.

(b) A PERSON WHO VIOLATES THIS SUBSECTION (1.5) COMMITS A CLASS 2 MISDEMEANOR, AS DEFINED IN SECTION 18-1.3-501.

(2) (a) EXCEPT AS PROVIDED IN SUBSECTIONS (2)(b) AND (3) OF THIS SECTION, any covenant not to compete ~~which~~ THAT restricts the right of any person to receive compensation for performance of ~~skilled or unskilled~~ labor for any employer ~~shall be~~ IS void. ~~but this subsection (2) shall not apply to:~~

(b) THIS SUBSECTION (2) DOES NOT APPLY TO A COVENANT NOT TO COMPETE GOVERNING A PERSON WHO, AT THE TIME THE COVENANT NOT TO COMPETE IS ENTERED INTO AND AT THE TIME IT IS ENFORCED, EARNS AN AMOUNT OF ANNUALIZED CASH COMPENSATION EQUIVALENT TO OR GREATER THAN THE THRESHOLD AMOUNT FOR HIGHLY COMPENSATED WORKERS, IF THE COVENANT NOT TO COMPETE IS FOR THE PROTECTION OF TRADE SECRETS AND IS NO BROADER THAN IS REASONABLY NECESSARY TO PROTECT THE EMPLOYER'S LEGITIMATE INTEREST IN PROTECTING TRADE SECRETS.

~~(a) Any contract for the purchase and sale of a business or the assets of a business;~~

~~(b) Any contract for the protection of trade secrets;~~

(c) AS USED IN THIS SUBSECTION (2):

(I) "ANNUALIZED CASH COMPENSATION" MEANS:

(A) THE AMOUNT OF THE GROSS SALARY OR WAGE AMOUNT, THE FEE AMOUNT, OR THE OTHER COMPENSATION AMOUNT FOR THE FULL YEAR, IF THE PERSON WAS EMPLOYED OR ENGAGED FOR A FULL YEAR;

(B) THE COMPENSATION THAT THE PERSON WOULD HAVE EARNED, BASED ON THE WORKER'S GROSS SALARY OR WAGE AMOUNT, FEE, OR OTHER

COMPENSATION IF THE WORKER WAS NOT EMPLOYED OR ENGAGED FOR A FULL YEAR.

(II) "THRESHOLD AMOUNT FOR HIGHLY COMPENSATED WORKERS" MEANS THE GREATER OF THE THRESHOLD AMOUNT FOR HIGHLY COMPENSATED WORKERS AS DETERMINED BY THE DIVISION OF LABOR STANDARDS AND STATISTICS IN THE DEPARTMENT OF LABOR AND EMPLOYMENT:

(A) AS OF THE EFFECTIVE DATE OF THIS SECTION, AS AMENDED; OR

(B) AT THE TIME THE COVENANT NOT TO COMPETE IS EXECUTED BY THE PARTIES.

~~(c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;~~

~~(d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.~~

(III) IN DETERMINING WHETHER A WORKER'S CASH COMPENSATION EXCEEDS THE THRESHOLD AMOUNT, WHERE THE WORKER HAS BEEN EMPLOYED FOR LESS THAN A CALENDAR YEAR, THE WORKER'S CASH COMPENSATION EXCEEDS THE THRESHOLD AMOUNT IF THE WORKER WOULD REASONABLY EXPECT TO EARN MORE THAN THE THRESHOLD AMOUNT DURING A CALENDAR YEAR OF EMPLOYMENT.

(d) THIS SUBSECTION (2) DOES NOT APPLY TO A COVENANT NOT TO SOLICIT CUSTOMERS GOVERNING A PERSON WHO, AT THE TIME THE COVENANT IS ENTERED INTO AND AT THE TIME IT IS ENFORCED, EARNS AN AMOUNT OF ANNUALIZED CASH COMPENSATION EQUIVALENT TO OR GREATER THAN SIXTY PERCENT OF THE THRESHOLD AMOUNT FOR HIGHLY COMPENSATED WORKERS IF THE NONSOLICITATION COVENANT IS NO BROADER THAN REASONABLY NECESSARY TO PROTECT THE EMPLOYER'S LEGITIMATE INTEREST IN PROTECTING TRADE SECRETS.

(3) THE FOLLOWING COVENANTS ARE NOT PROHIBITED BY SUBSECTION (2) OF THIS SECTION:

(a) A PROVISION PROVIDING FOR AN EMPLOYER'S RECOVERY OF THE EXPENSE OF EDUCATING AND TRAINING A WORKER WHERE THE TRAINING IS DISTINCT FROM NORMAL, ON-THE-JOB TRAINING, THE EMPLOYER'S RECOVERY IS LIMITED TO THE REASONABLE COSTS OF THE TRAINING AND DECREASES OVER THE COURSE OF THE TWO YEARS SUBSEQUENT TO THE TRAINING PROPORTIONATELY BASED ON THE NUMBER OF MONTHS THAT HAVE PASSED SINCE THE COMPLETION OF THE TRAINING, AND THE EMPLOYER RECOVERING FOR THE COSTS OF THE TRAINING WOULD NOT VIOLATE THE "FAIR LABOR STANDARDS ACT OF 1938", 29 U.S.C. SEC. 201 ET SEQ., OR ARTICLE 4 OF TITLE 8;

(b) A REASONABLE CONFIDENTIALITY PROVISION RELEVANT TO THE EMPLOYER'S BUSINESS THAT DOES NOT PROHIBIT DISCLOSURE OF INFORMATION THAT ARISES FROM THE WORKER'S GENERAL TRAINING, KNOWLEDGE, SKILL, OR EXPERIENCE, WHETHER GAINED ON THE JOB OR OTHERWISE, INFORMATION THAT IS READILY ASCERTAINABLE TO THE PUBLIC, OR INFORMATION THAT A WORKER OTHERWISE HAS A RIGHT TO DISCLOSE AS LEGALLY PROTECTED CONDUCT;

(c) A COVENANT FOR THE PURCHASE AND SALE OF A BUSINESS OR THE ASSETS OF A BUSINESS; OR

(d) A PROVISION REQUIRING THE REPAYMENT OF A SCHOLARSHIP PROVIDED TO AN INDIVIDUAL WORKING IN AN APPRENTICESHIP IF THE INDIVIDUAL FAILS TO COMPLY WITH THE CONDITIONS OF THE SCHOLARSHIP AGREEMENT.

(4) (a) ANY COVENANT NOT TO COMPETE THAT IS OTHERWISE PERMISSIBLE UNDER SUBSECTION (2) OR (3) OF THIS SECTION IS VOID UNLESS NOTICE OF THE COVENANT NOT TO COMPETE AND THE TERMS OF THE COVENANT NOT TO COMPETE ARE PROVIDED TO:

(I) A PROSPECTIVE WORKER BEFORE THE WORKER ACCEPTS THE EMPLOYER'S OFFER OF EMPLOYMENT; OR

(II) A CURRENT WORKER AT LEAST FOURTEEN DAYS BEFORE THE EARLIER OF:

(A) THE EFFECTIVE DATE OF THE COVENANT; OR

(B) THE EFFECTIVE DATE OF ANY ADDITIONAL COMPENSATION OR CHANGE IN THE TERMS OR CONDITIONS OF EMPLOYMENT THAT PROVIDES CONSIDERATION FOR THE COVENANT.

(b) AN EMPLOYER SHALL PROVIDE THE NOTICE REQUIRED IN SUBSECTION (4)(a) OF THIS SECTION IN A SEPARATE DOCUMENT FROM ANY OTHER COVENANTS BETWEEN THE WORKER AND EMPLOYER AND IN CLEAR AND CONSPICUOUS TERMS IN THE LANGUAGE IN WHICH THE WORKER AND EMPLOYER COMMUNICATE ABOUT THE WORKER'S PERFORMANCE. THE NOTICE MUST BE SIGNED BY THE WORKER.

(c) (I) A WORKER MAY REQUEST AN ADDITIONAL COPY OF THE COVENANT NOT TO COMPETE REQUIRED BY THIS SUBSECTION (4) ONCE EACH CALENDAR YEAR.

(II) AN EMPLOYER IS NOT REQUIRED UNDER THIS SUBSECTION (4) TO PROVIDE THE WORKER WITH AN ADDITIONAL COPY OF THE COVENANT NOT TO COMPETE MORE THAN ONCE DURING A CALENDAR YEAR.

(d) AN EMPLOYER SATISFIES THE NOTICE REQUIREMENT OF THIS SUBSECTION (4) WHEN THE NOTICE:

(I) IS PROVIDED WITH A COPY OF THE AGREEMENT CONTAINING THE COVENANT NOT TO COMPETE;

(II) IDENTIFIES THE AGREEMENT BY NAME AND STATES THAT THE AGREEMENT CONTAINS A COVENANT NOT TO COMPETE THAT COULD RESTRICT THE WORKERS' OPTIONS FOR SUBSEQUENT EMPLOYMENT FOLLOWING THEIR SEPARATION FROM THE EMPLOYER; AND

(III) DIRECTS THE WORKER TO THE SPECIFIC SECTIONS OR PARAGRAPHS OF THE AGREEMENT THAT CONTAIN THE COVENANT NOT TO COMPETE.

~~(3)-(a)~~ (5) (a) Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians that restricts the right of a physician to practice medicine, as defined in section 12-240-107, upon termination of the agreement, is void; except that all other provisions of the agreement enforceable at law, including provisions that require the payment of damages in an amount that is reasonably related

to the injury suffered by reason of termination of the agreement, are enforceable. Provisions of a covenant not to compete that require the payment of damages upon termination of the agreement may include damages related to competition.

(b) Notwithstanding ~~subsection (3)(a)~~ SUBSECTION (5)(a) of this section, after termination of an agreement described in ~~subsection (3)(a)~~ SUBSECTION (5)(a) of this section, a physician may disclose his or her continuing practice of medicine and new professional contact information to any patient with a rare disorder, as defined in accordance with criteria developed by the National Organization for Rare Disorders, Inc., or a successor organization, to whom the physician was providing consultation or treatment before termination of the agreement. Neither the physician nor the physician's employer, if any, is liable to any party to the prior agreement for damages alleged to have resulted from the disclosure or from the physician's treatment of the patient after termination of the prior agreement.

~~(4) A person who violates this section commits a class 2 misdemeanor:~~

(6) A COVENANT NOT TO COMPETE THAT APPLIES TO A WORKER WHO, AT THE TIME OF TERMINATION OF EMPLOYMENT PRIMARILY RESIDED OR WORKED IN COLORADO, MAY NOT REQUIRE THE WORKER TO ADJUDICATE THE ENFORCEABILITY OF THE COVENANT OUTSIDE OF COLORADO. NOTWITHSTANDING ANY CONTRACTUAL PROVISION TO THE CONTRARY, COLORADO LAW GOVERNS THE ENFORCEABILITY OF A COVENANT NOT TO COMPETE FOR A WORKER WHO AT THE TIME OF TERMINATION OF EMPLOYMENT PRIMARILY RESIDED AND WORKED IN COLORADO.

(7) A WORKER WHO IS A PARTY TO A COVENANT NOT TO COMPETE, OR A SUBSEQUENT EMPLOYER THAT HAS HIRED OR IS CONSIDERING HIRING THE WORKER, MAY SEEK A DECLARATORY JUDGMENT FROM A COURT OF COMPETENT JURISDICTION OR AN ARBITRATOR THAT THE COVENANT NOT TO COMPETE IS UNENFORCEABLE.

(8) (a) AN EMPLOYER SHALL NOT ENTER INTO, PRESENT TO A WORKER OR PROSPECTIVE WORKER AS A TERM OF EMPLOYMENT, OR ATTEMPT TO ENFORCE ANY COVENANT NOT TO COMPETE THAT IS VOID UNDER THIS SECTION.

(b) AN EMPLOYER THAT VIOLATES SUBSECTION (8)(a) OF THIS SECTION IS LIABLE FOR ACTUAL DAMAGES AND A PENALTY OF FIVE THOUSAND DOLLARS PER WORKER OR PROSPECTIVE WORKER HARMED BY THE CONDUCT. THE ATTORNEY GENERAL AND ANY WORKER OR PROSPECTIVE WORKER HARMED BY AN EMPLOYER'S CONDUCT MAY BRING AN ACTION FOR INJUNCTIVE RELIEF AND TO RECOVER PENALTIES. IN ADDITION TO INJUNCTIVE RELIEF AND THE PENALTY ALLOWED IN THIS SUBSECTION (8)(b), A WORKER OR PROSPECTIVE WORKER MAY RECOVER ACTUAL DAMAGES, REASONABLE COSTS, AND ATTORNEY FEES IN ANY PRIVATE ACTION BROUGHT UNDER THIS SECTION.

(c) IN ANY ACTION BROUGHT UNDER THIS SUBSECTION (8), IF THE EMPLOYER SHOWS THAT THE ACT OR OMISSION GIVING RISE TO SUCH ACTION WAS IN GOOD FAITH AND THAT THE EMPLOYER HAD REASONABLE GROUNDS FOR BELIEVING THAT THE EMPLOYER'S ACT OR OMISSION WAS NOT A VIOLATION OF THIS SECTION, THE COURT MAY, IN ITS SOUND DISCRETION, AWARD THE WORKER OR WORKERS NO PENALTY OR AWARD A PENALTY OF ANY AMOUNT NOT TO EXCEED THE AMOUNT SPECIFIED IN SUBSECTION (8)(b) OF THIS SECTION.

SECTION 2. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2022 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to covenants not to compete entered into or renewed on or after the applicable effective date of this act.

Alec Garnett
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Steve Fenberg
PRESIDENT OF
THE SENATE

Robin Jones
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED _____
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO