

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

ENGROSSED

*This Version Includes All Amendments Adopted
on Second Reading in the House of Introduction*

LLS NO. 22-0956.01 Yelana Love x2295

HOUSE BILL 22-1317

HOUSE SPONSORSHIP

Tipper,

SENATE SPONSORSHIP

Bridges,

House Committees
Judiciary

Senate Committees

A BILL FOR AN ACT

101 **CONCERNING RESTRICTIVE EMPLOYMENT AGREEMENTS.**

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 declares that a restrictive employment agreement or covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void, with certain exceptions.

Additionally, if the employer provides proper notice of the restrictive employment agreement or covenant not to compete to the employee or prospective employee, the following agreements or covenants are not prohibited:

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.

HOUSE
Amended 2nd Reading
April 14, 2022

- A provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than 2 years, unless the education and training was primarily for the benefit or convenience of the employer;
- A reasonable confidentiality provision relevant to the employer's business that does not prohibit disclosure of information that arises from the employee's general training, knowledge, skill, or experience, whether gained on the job or otherwise, or information that is readily ascertainable to the public; and
- Agreements or covenants with a person earning annual cash compensation greater than the threshold amount for highly compensated employees.

The bill limits choice of law and choice of venue provisions in restrictive employment agreements and covenants not to compete.

The bill prohibits an employer from entering into, presenting to an employee or prospective employee as a term of employment, or attempting to enforce any restrictive employment agreement or covenant not to compete that is void under the bill. An employer who violates this provision is subject to a penalty of \$5,000 for each employee or prospective employee, injunctive relief, and actual damages.

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

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

4 **8-2-113. Unlawful to intimidate worker - agreement not to**
 5 **compete - prohibition - exceptions - notice - definition.** (1) **Legislative**
 6 **intent.** THE GENERAL ASSEMBLY INTENDS TO PRESERVE EXISTING STATE
 7 AND FEDERAL CASE LAW IN EFFECT BEFORE THE EFFECTIVE DATE OF THIS
 8 ACT THAT:

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

11 (b) SPECIFIES THE EXTENT TO WHICH A COVENANT NOT TO
 12 COMPETE FOR THE PROTECTION OF TRADE SECRETS MUST BE TAILORED IN
 13 SCOPE IN ORDER TO BE ENFORCEABLE UNDER THIS SECTION.

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

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

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

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

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

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

23 (c) AS USED IN SUBSECTION (2)(b) OF THIS SECTION:

24 (I) "ANNUALIZED CASH COMPENSATION" MEANS:

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

1 (B) THE COMPENSATION THAT THE PERSON WOULD HAVE EARNED,
2 BASED ON THE WORKER'S GROSS SALARY OR WAGE AMOUNT, FEE, OR
3 OTHER COMPENSATION IF THE WORKER WAS NOT EMPLOYED OR ENGAGED
4 FOR A FULL YEAR.

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

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

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

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

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

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

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

27 (a) A PROVISION PROVIDING FOR AN EMPLOYER'S RECOVERY OF

1 THE EXPENSE OF EDUCATING AND TRAINING A WORKER WHO HAS SERVED
2 AN EMPLOYER FOR A PERIOD OF LESS THAN TWO YEARS, WHERE THE
3 TRAINING IS DISTINCT FROM NORMAL, ON-THE-JOB TRAINING, THE
4 EMPLOYER'S RECOVERY IS LIMITED TO THE REASONABLE COSTS OF THE
5 TRAINING AND DECREASES OVER THE COURSE OF THE TWO YEARS
6 SUBSEQUENT TO THE TRAINING PROPORTIONATELY BASED ON THE NUMBER
7 OF MONTHS THAT HAVE PASSED SINCE THE COMPLETION OF THE TRAINING,
8 AND THE EMPLOYER RECOVERING FOR THE COSTS OF THE TRAINING WOULD
9 NOT VIOLATE THE "FAIR LABOR STANDARDS ACT OF 1938", 29 U.S.C. SEC.
10 201 ET SEQ., OR ARTICLE 4 OF TITLE 8;

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

18 (c) A COVENANT FOR THE PURCHASE AND SALE OF A BUSINESS OR
19 THE ASSETS OF A BUSINESS.

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

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

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

1 (A) THE EFFECTIVE DATE OF THE █ COVENANT; OR

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

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

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

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

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

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

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

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

1 COMPETE.

2 ~~(3)(a)~~ (5) (a) Any covenant not to compete provision of an
3 employment, partnership, or corporate agreement between physicians that
4 restricts the right of a physician to practice medicine, as defined in section
5 12-240-107, upon termination of the agreement, is void; except that all
6 other provisions of the agreement enforceable at law, including
7 provisions that require the payment of damages in an amount that is
8 reasonably related to the injury suffered by reason of termination of the
9 agreement, are enforceable. Provisions of a covenant not to compete that
10 require the payment of damages upon termination of the agreement may
11 include damages related to competition.

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

24 ~~(4) A person who violates this section commits a class 2~~
25 ~~misdemeanor.~~

26 (6) A COVENANT NOT TO COMPETE THAT APPLIES TO A WORKER
27 WHO, AT THE TIME OF TERMINATION OF EMPLOYMENT PRIMARILY RESIDED

1 OR WORKED IN COLORADO, MAY NOT REQUIRE THE WORKER TO
2 ADJUDICATE THE ENFORCEABILITY OF THE COVENANT OUTSIDE OF
3 COLORADO. NOTWITHSTANDING ANY CONTRACTUAL PROVISION TO THE
4 CONTRARY, COLORADO LAW GOVERNS THE ENFORCEABILITY OF A
5 COVENANT NOT TO COMPETE FOR A WORKER WHO AT THE TIME OF
6 TERMINATION OF EMPLOYMENT PRIMARILY RESIDED AND WORKED IN
7 COLORADO.

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

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

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

27 (c) IN ANY ACTION BROUGHT UNDER THIS SUBSECTION (8), IF THE

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

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

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