

# **WEST VIRGINIA LEGISLATURE**

**2022 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 453**

BY SENATORS WOODRUM AND TRUMP

[Originating in the Committee on the Judiciary;

reported on January 27, 2022]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
2 designated §47-29-1, §47-29-2, §47-29-3, §47-29-4, §47-29-5, §47-29-6, §47-29-7, §47-  
3 29-8, §47-29-9, §47-29-10, §47-29-11, §47-29-12, §47-29-13, §47-29-14, §47-29-15, §47-  
4 29-16, §47-29-17, §47-29-18, §47-29-19, and §47-29-20, all relating to establishing  
5 uniform requirements for restrictive employment agreements; providing for civil penalties  
6 for violation of the article; providing a short title; defining terms; creating the scope of the  
7 article; providing for notice requirements; defining low-wage workers; defining the effect  
8 of termination of work; creating a reasonableness requirement; defining the terms of a  
9 noncompete agreement; detailing the confidentiality agreement; providing for a no-  
10 business agreement; creating a nonsolicitation agreement; defining a no-recruit  
11 agreement; defining a payment-for-competition agreement; defining a training-repayment  
12 agreement; providing for nonwaivability; providing for enforcement and remedy; providing  
13 for choice of law and venue; providing for uniformity of application and construction; and  
14 providing a transitional provision.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 29. UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT.**

**§47-29-1. Short title.**

1 This article may be cited as the Uniform Restrictive Employment Agreement Act.

**§47-29-2. Definitions.**

1 When used in this article, the following words have the meanings specified in this section:

2 (1) "Confidentiality agreement" means a restrictive employment agreement that:

3 (A) Prohibits a worker from using or disclosing information; and

4 (B) Is not a condition of settlement or other resolution of a dispute.

5 (2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless,  
6 optical, electromagnetic, or similar capabilities.

7 (3) "Employer" means a person that hires or contracts with a worker to work for the person.

8           (4) “No-business agreement” means a restrictive employment agreement that prohibits a  
9 worker from working for a client or customer of the employer.

10           (5) “Noncompete agreement” means a restrictive employment agreement that prohibits a  
11 worker from working other than for the employer. The term does not include a no-business  
12 agreement.

13           (6) “Nonsolicitation agreement” means a restrictive employment agreement that prohibits  
14 a worker from soliciting a client or customer of the employer.

15           (7) “No-recruit agreement” means a restrictive employment agreement that prohibits a  
16 worker from hiring or recruiting another worker of the employer.

17           (8) “Payment-for-competition agreement” means a restrictive employment agreement that  
18 imposes an adverse financial consequence on a worker for working other than for the employer  
19 but does not expressly prohibit the work.

20           (9) “Person” means an individual, estate, business, nonprofit entity, or other legal entity.  
21 The term does not include a public corporation or government or governmental subdivision,  
22 agency, or instrumentality.

23           (10) “Record” means information:

24           (A) Inscribed on tangible medium; or

25           (B) Stored in an electronic or other medium and retrievable in perceivable form.

26           (11) “Restrictive employment agreement” means an agreement or part of another  
27 agreement between an employer and worker that prohibits, limits, or sets a condition on working  
28 other than for the employer after the work relationship ends or a sale of a business is  
29 consummated. The term includes a confidentiality agreement, a no-business agreement,  
30 noncompete agreement, nonsolicitation agreement, no-recruit agreement, payment-for-  
31 competition agreement, and training-repayment agreement.

32           (12) “Sale of a business” means sale, merger, consolidation, amalgamation,  
33 reorganization, or other transaction, however denominated, of:

34 (A) All or part of a business or nonprofit entity or association, or all or part of its assets; or

35 (B) A substantial ownership interest in the entity or association.

36 (13) "Sign" means, with present intent to authenticate or adopt a record:

37 (A) Execute or adopt a tangible symbol; or

38 (B) Attach to or logically associate with the record an electronic symbol, sound, or process.

39 (14) "Signed agreement" means a restrictive employment agreement signed by the worker

40 and the employer.

41 (15) "Special training" means instruction or other education a worker receives from a

42 source other than the employer that:

43 (A) Is designed to enhance the ability of the worker to perform the worker's work;

44 (B) Is not normally received by other workers; and

45 (C) Requires a significant and identifiable expenditure by the employer distinct from

46 ordinary on-the-job training.

47 (16) "Stated rate of pay" means the compensation, calculated on an annualized basis, an

48 employer agrees to pay a worker. The term:

49 (A) Includes a wage, salary, professional fee, other compensation for personal services,

50 and the fair market value of all remuneration other than cash; and

51 (B) Does not include:

52 (i) A health care benefit, severance pay, retirement benefit, or expense reimbursement;

53 (ii) Distribution of earnings and profit that is not compensation for personal service; or

54 (iii) Anticipated but indeterminable compensation, including tip, bonus, or commission.

55 (17) "Trade secret" has the same meaning as defined in §47-22-1 et seq. of this code.

56 (18) "Training-repayment agreement" means a restrictive employment agreement that

57 requires a worker to repay the employer for training costs incurred by the employer.

58 (19) "Work" means providing service.

59 (20) "Worker" means an individual who works for an employer. The term:

60 (A) Includes an employee, independent contractor, extern, intern, volunteer, apprentice,  
61 or sole proprietor who provides service to a client or customer, and an individual who provides  
62 service through a business or nonprofit entity or association;

63 (B) Does not include an individual, even if the individual performs incidental service for the  
64 employer, whose sole relationship with the employer is:

65 (i) As a member of a board of directors or other governing or advisory board;

66 (ii) An individual under whose authority the powers of a business or nonprofit entity or  
67 association are exercised;

68 (iii) An investor; or

69 (iv) A vendor of goods.

**§47-29-3. Scope.**

1 (a) This article applies to a restrictive employment agreement. If a restrictive employment  
2 agreement is part of another agreement, this article does not affect other parts of the other  
3 agreement.

4 (b) This article supersedes common law only to the extent that it applies to a restrictive  
5 employment agreement but otherwise does not affect principles of law and equity consistent with  
6 this article.

7 (c) This article does not affect §47-11E-1 et seq. of this code.

8 (d) This article does not affect an agreement to take an action solely to transfer, perfect,  
9 or enforce a patent, copyright, trade secret, or similar right.

10 (e) This article does not affect a noncompetition obligation arising solely as a result of an  
11 existing ownership interest in a business entity.

12 (f) This article does not affect an agreement that requires a worker to forfeit compensation  
13 after the work relationship ends, including vacation or retirement benefits, the right to which  
14 accrued before the relationship ends.

**§47-29-4. Notice requirements.**

1           (a) Except as provided in §47-29-4(e) of this code, a restrictive employment agreement is  
2 prohibited and unenforceable unless:

3           (1) The employer provides a copy of the proposed agreement in a record to:

4           (A) Subject to §47-29-4(b) of this code, a prospective worker at least 14 days before the  
5 prospective worker accepts work or commences work, whichever is earlier;

6           (B) A current worker who receives a material increase in compensation at least 14 days  
7 before the increase or the worker accepts a change in job status or responsibilities, whichever is  
8 earlier; or

9           (C) A departing worker who is given consideration in addition to anything of value to which  
10 the worker is already entitled at least 14 days before the agreement is required to be signed;

11           (2) With the copy of the proposed agreement provided under this section, the employer  
12 provides the worker in a record the separate notice, in the preferred language of the worker, if  
13 available, prescribed by the West Virginia Division of Labor under this section;

14           (3) The proposed agreement and the signed agreement clearly specify the information,  
15 type of work activity, or extent of competition that the agreement prohibits, limits, or sets conditions  
16 on after the work relationship ends;

17           (4) The agreement is in a record separately signed by the worker and employer and the  
18 employer promptly provides the worker a copy of the signed agreement; and

19           (5) Subject to §47-29-4(c) of this code, the employer provides an additional copy of the  
20 agreement to the worker, not later than 14 days after the worker, in a record, requests a copy,  
21 unless the employer reasonably and in good faith is unable to provide the copy not later than 14  
22 days after the request and the worker is not prejudiced by the delay.

23           (b) A worker may waive the 14-day requirement of §47-29-4(a)(1)(A) of this code if the  
24 worker receives the signed agreement before beginning work. If the worker waives the  
25 requirement, the worker may rescind the entire employment agreement not later than 14 days  
26 after the worker receives the agreement.

27 (c) An employer is not required under §47-29-4(a)(5) of this code to provide an additional  
28 copy of the agreement more than once during a calendar year.

29 (d) The West Virginia Division of Labor shall prescribe the notice an employer must provide  
30 under this section. The notice must inform the worker, in a language an average reader can  
31 understand, of the requirements of this article, including the requirements of this section and §47-  
32 29-5 through §47-29-14 of this code, inclusive, and state that this article establishes penalties  
33 against an employer that enters into a prohibited agreement. The West Virginia Division of Labor  
34 shall make the notice available to employers on its publicly accessible website or in other  
35 appropriate ways. The West Virginia Division of Labor may:

36 (1) Produce a separate notice for each type of restrictive employment agreement; and

37 (2) Translate the notice into languages other than English used by a substantial portion of  
38 the state's labor force.

39 (e) This section does not apply to a restrictive employment agreement in connection with  
40 the sale of a business of which the worker is a substantial owner and consents to the sale.

**§47-29-5. Low-wage worker.**

1 A restrictive employment agreement, other than a confidentiality agreement or training-  
2 repayment agreement, is:

3 (1) Prohibited and unenforceable if, when the worker signs the agreement, the worker has  
4 a stated rate of pay less than the annual mean wage of employees in this state as determined by  
5 the Bureau of Labor Statistics; and

6 (2) Unenforceable if, at any time during the work relationship, the worker's compensation  
7 from the employer, calculated on an annualized basis, is less than the annual mean wage of  
8 employees in this state as determined by the Bureau of Labor Statistics.

**§47-29-6. Effect of termination of work.**

1 A restrictive employment agreement, other than a confidentiality agreement or training-  
2 repayment agreement, is unenforceable if:

- 3           (1) The worker resigns for good cause attributable to the employer; or  
4           (2) The employer terminates the worker for a reason other than gross misconduct or the  
5 completion of the agreed work or the term of the contract.

**§47-29-7. Reasonableness requirement.**

1           A restrictive employment agreement is prohibited and unenforceable unless is it  
2 reasonable.

**§47-29-8. Noncompete agreement.**

1           A noncompete agreement is prohibited and unenforceable unless:

2           (1) The agreement protects any of the following legitimate business interests:

3           (A) The sale of a business of which the worker is a substantial owner and consents to the  
4 sale;

5           (B) The creation of a business in which the worker is a substantial owner;

6           (C) A trade secret; or

7           (D) An ongoing client or customer relationship of the employer;

8           (2) When the worker signs the agreement and through the time of enforcement, the  
9 agreement is narrowly tailored in duration, geographical area, and scope of actual competition to  
10 protect an interest under this section, and the interest cannot be protected adequately by another  
11 restrictive employment agreement; and

12           (3) The prohibition on competition lasts not longer than:

13           (A) Five years after the work relationship ends when protecting an interest under §47-29-  
14 8(1)(A) of this code or §47-29-8(1)(B) of this code; or

15           (B) One year after the work relationship ends when protecting an interest under §47-29-  
16 8(1)(C) or §47-29-8(1)(D) of this code but not an interest under §47-29-8(1)(A) or §47-29-8(1)(B)  
17 of this code.

**§47-29-9. Confidentiality agreement.**

1           A confidentiality agreement is prohibited and unenforceable unless the worker may use

2 and disclose information that:

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

5 (2) Is readily ascertainable to the relevant public; or

6 (3) Is irrelevant to the employer's business.

**§47-29-10. No-business agreement.**

1 A no-business agreement is prohibited and unenforceable unless the agreement:

2 (1) Applies only to a prospective or ongoing client or customer of the employer with which  
3 the worker had worked personally; and

4 (2) Lasts not longer than six months after the work relationship between the employer and  
5 worker ends.

**§47-29-11. Nonsolicitation agreement.**

1 A nonsolicitation agreement is prohibited and unenforceable unless the agreement:

2 (1) Applies only to a prospective or ongoing client or customer of the employer with which  
3 the worker had worked personally; and

4 (2) Lasts not longer than one year after the work relationship between the employer and  
5 worker ends.

**§47-29-12. No-recruit agreement.**

1 A no-recruit agreement is prohibited and unenforceable unless the agreement prohibits  
2 hiring or recruiting only:

3 (1) Another worker currently working for the employer with whom the worker had worked  
4 personally; and

5 (2) Lasts not longer than six months after the work relationship between the employer and  
6 worker ends.

**§47-29-13. Payment-for-competition agreement.**

1 A payment-for-competition agreement is prohibited and unenforceable unless the

2 agreement:

3 (1) Imposes a financial consequence that is not greater than the actual competitive harm  
4 to the employer; and

5 (2) Lasts not longer than one year after the work relationship between the employer and  
6 worker ends.

**§47-29-14. Training-repayment agreement.**

1 A training-repayment agreement is prohibited and unenforceable unless the agreement:

2 (1) Requires repayment only of the cost of special training;

3 (2) Lasts not longer than two years after the special training is completed; and

4 (3) Prorates the repayment for work done during the post-training period.

**§47-29-15. Nonwaivability.**

1 Except as provided in §47-29-4(b) of this code or in the context of resolving an issue in  
2 litigation or other dispute resolution, a party to a restrictive employment agreement may not waive  
3 a requirement of this article or stipulate to a fact to avoid a requirement of this article.

**§47-29-16. Enforcement and remedy.**

1 (a) The court may not modify a restrictive employment agreement that restricts a worker  
2 beyond a period imposed under this article to make the agreement enforceable. The court may  
3 modify an agreement that otherwise violates this article only on a finding that the employer  
4 reasonably and in good faith believed the agreement was enforceable under this article and only  
5 to the extent necessary to protect the employer's interest and render the agreement enforceable.

6 (b) A worker who is party to a restrictive employment agreement or subsequent employer  
7 that has hired or is considering hiring the worker may seek declaratory judgment that the  
8 agreement is enforceable.

9 (c) In addition to other judicial remedies, a court may award statutory damages under this  
10 section and in a private action reasonable attorney's fees to a party that successfully challenges  
11 or defends against enforceability of a restrictive employment agreement or proves a violation of

12 this article.

13 (d) An employer seeking to enforce a restrictive employment agreement has the burden  
14 of proving compliance with this article.

15 (e) An employer that enters a restrictive employment agreement that the employer knows  
16 or reasonably should know is prohibited by this article commits a civil violation. The worker may  
17 bring a private action against the employer to enforce this subsection. The court may award  
18 statutory damages of not more than \$5,000 per worker per agreement for each violation of this  
19 subsection.

**§47-29-17. Choice of law and venue.**

1 (a) A choice of law provision that applies to a restrictive employment agreement is  
2 prohibited and unenforceable unless it requires that a dispute arising under the agreement be  
3 governed by the law of the jurisdiction where the worker primarily works for the employer or, if the  
4 work relationship has ended, the jurisdiction where the worker primarily worked when the  
5 relationship ended.

6 (b) A choice of venue provision that applies to a restrictive employment agreement is  
7 prohibited and unenforceable unless it requires that a dispute arising under the agreement be  
8 decided in a jurisdiction where:

9 (1) The worker primarily works, or if the work relationship has ended, a jurisdiction where  
10 the worker primarily worked when the relationship ended; or

11 (2) The worker resides at the time of the dispute.

**§47-29-18. Uniformity of application and construction.**

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

**§47-29-19. Saving provision.**

1 Except as provided in §47-29-20 of this code, this article does not affect the validity of a  
2 restrictive employment agreement in effect before the effective date of this act.

**§47-29-20. Transitional provision.**

- 1           Sections §47-29-4(a)(5) of this code and §47-29-5 of this code apply to a restrictive
- 2 employment agreement entered into before, on, or after the effective date of this article.