

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Commerce and Economic Development to which was
3 referred House Bill No. 1 entitled “An act relating to agreements not to
4 compete” respectfully reports that it has considered the same and recommends
5 that the bill be amended by striking out all after the enacting clause and
6 inserting in lieu thereof the following:

7 Sec. 1. 21 V.S.A. § 495o is added to read:

8 § 495o. AGREEMENTS NOT TO COMPETE; PROHIBITION;

9 EXCEPTIONS

10 (a) Except as otherwise provided by this section, agreements not to
11 compete are prohibited.

12 (b) Notwithstanding subsection (a) of this section, a person may enter into
13 an agreement not to compete under the following circumstances:

14 (1) Sale of a business or interest in a business. A person may enter into
15 an agreement not to compete in relation to:

16 (A) with respect to a business entity, the sale of:

17 (i) all or substantially all of the person’s ownership interest in the
18 business entity or its operating assets; or

19 (ii) all or substantially all of the person’s ownership interest in a
20 subsidiary or division of the business entity or the operating assets of a
21 subsidiary or division of the business entity;

1 (B) with respect to a partnership in which the person is a partner, the
2 dissolution of the partnership or the dissociation of the person from the
3 partnership; or

4 (C) with respect to a limited liability company in which the person is
5 a member, the dissolution of the limited liability company or the termination of
6 the person’s interest in the limited liability company.

7 (2) Agreements supported by consideration. A key employee may enter
8 into an agreement not to compete with a business entity at the commencement
9 of employment or in relation to a promotion or a substantial change in the
10 employee’s job responsibilities if the agreement satisfies all of the following
11 requirements:

12 (A) If the agreement is in relation to a promotion or a substantial
13 change in the employee’s job responsibilities, the employee receives
14 reasonable, material, and valuable consideration.

15 (B) The agreement is supported by garden leave or other similar,
16 substantial consideration.

17 (C) The agreement is in writing and signed by the employer and the
18 employee.

19 (D)(i) If the agreement is entered into in relation to the
20 commencement of employment, it is provided to the employee with the formal

1 offer of employment or 10 days before the commencement of employment,
2 whichever is earlier; or

3 (ii) if the agreement is entered into in relation to a promotion or a
4 substantial change in the employee’s job responsibilities, it is provided to the
5 employee at least 10 days before it will take effect.

6 (E)(i) The agreement states that the employee has the right to consult
7 with an attorney prior to signing the agreement and that the employer shall
8 reimburse the employee for the cost of consulting with an attorney for the
9 purpose of reviewing the agreement and obtaining legal advice.

10 (ii) The agreement shall provide that the employer shall reimburse
11 the employee for a period of up to at least two hours of attorney time at an
12 hourly rate equal to or greater than the rate established by the Commissioner of
13 Labor.

14 (F) The limitations set forth in the agreement are reasonable in time,
15 geographical area, and the scope of activity to be restrained.

16 (c)(1) Nothing in this section shall be construed to prohibit an agreement
17 that prohibits the disclosure of trade secrets as defined in 9 V.S.A. § 4601 or a
18 nondisclosure agreement that protects confidential business information that
19 does not constitute a trade secret.

20 (2) Nothing in this section shall be construed to prohibit a
21 nonsolicitation agreement between an employer and an employee provided that

1 the limitations set forth in the agreement are reasonable in time, geographical
2 area, and the scope of activity to be restrained.

3 (d) Any provision of an employment contract or other agreement entered
4 into on or after July 1, 2020 that violates the provisions of this section shall be
5 void and unenforceable.

6 (e) A provision of an agreement not to compete between an employer and
7 an employee that waives compliance with any provision of this section shall be
8 void and unenforceable if:

9 (1) the primary location of the employment is in Vermont; or

10 (2) the employee is a resident of Vermont.

11 (f)(1) The Commissioner of Labor shall, on or before December 15 of each
12 year, establish for the next calendar year the hourly rate for reimbursement of
13 attorney time pursuant to subdivision (b)(2)(E) of this section.

14 (2) In establishing the rate, the Commissioner shall consider the
15 prevailing market rate for legal services in Vermont and any appropriate
16 inflation factors, access to legal services for the purposes set forth in
17 subdivision (b)(2)(E) of this section, and any other related factors consistent
18 with the purposes of this section.

19 (g) As used in this section:

20 (1) “Administrative employee” means an employee whose primary duty:

1 (A) is the performance of work directly related to the management or
2 general business operations of the employer or the employer’s customers; and

3 (B) requires the exercise of discretion and independent judgment
4 with respect to matters of significance.

5 (2) “Agreement not to compete” means any agreement between a person
6 and a business entity that restrains the person from engaging in a lawful
7 profession, trade, or business within a specified geographic area in which the
8 business entity carries on its business.

9 (3) “Business entity” includes any partnership, limited liability
10 company, corporation, cooperative, or mutual benefit enterprise.

11 (4) “Executive employee” means an employee whose primary duty:

12 (A) is management of the employer's business or of a department or
13 subdivision of the employer's business;

14 (B) involves regularly directing the work of two or more other
15 employees; and

16 (C) includes the authority to hire, fire, or promote other employees.

17 (5) “Garden leave” means a provision in a noncompete agreement
18 pursuant to which an employer agrees to pay an employee on a pro rata basis
19 during the term of the agreement an amount equal to at least 50 percent of the
20 employee’s highest annualized base salary during the two years prior to his or
21 her termination of employment with the employer.

1 (6) “Key employee” means an employee who:

2 (A) is an executive, professional, or administrative employee; and

3 (B) earns wages or a salary equal to at least two times the Vermont
4 average annual wage.

5 (7) “Nonsolicitation agreement” means an agreement between an
6 employer and an employee pursuant to which the employee agrees not to:

7 (A) solicit or recruit the employer’s employees; or

8 (B) solicit or transact business with customers or clients of the
9 employer who were customers or clients while the employee was employed by
10 the employer.

11 (8) “Professional employee” means an employee whose primary duty
12 requires:

13 (A) advanced knowledge in a field of science or learning that is
14 customarily acquired by a prolonged course of specialized intellectual
15 instruction; or

16 (B) invention, imagination, originality, or talent in a recognized
17 artistic or creative field.

18 (9) “Vermont average annual wage” means the most recent average
19 annual wage for Vermont published by the U.S. Bureau of Labor Statistics.

1 Sec. 2. ADOPTION OF RULES; EDUCATION AND OUTREACH;

2 ESTABLISHMENT OF RATE

3 (a) The Secretary of Commerce and Community Development, the
4 Attorney General, and the Commissioner of Labor shall, on or before October
5 15, 2020, jointly develop and make available on the Agency of Commerce and
6 Community Development's, Attorney General's, and Department of Labor's
7 websites information and materials to educate and inform employers and
8 employees about the provisions of 21 V.S.A. § 495o.

9 (b) On or before July 15, 2020, the Commissioner of Labor shall establish
10 for the remainder of calendar year 2020, the hourly rate for reimbursement of
11 attorney time pursuant to 21 V.S.A. § 495o(b)(2)(E). In establishing the rate,
12 the Commissioner shall consider the factors set forth in 21 V.S.A. § 495o(f).

13 Sec. 3. EFFECTIVE DATE

14 This act shall take effect on July 1, 2020 and shall apply to agreements
15 entered into on or after that date.

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17
18 (Committee vote: _____)

19 _____
20 Representative _____

21 FOR THE COMMITTEE