

1 AN ACT relating to non-compete clauses.

2 *Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

3 ➔SECTION 1. A NEW SECTION OF KRS CHAPTER 337 IS CREATED TO
4 READ AS FOLLOWS:

5 *(1) As used in this section:*

6 *(a) "Business entity" means a partnership, corporation, association, limited*
7 *liability company, or other legal entity, or a division or subsidiary thereof;*

8 *(b) "Employment" means work for a person;*

9 *(c) "Non-compete clause" means a term or condition of employment that*
10 *prohibits a worker from, penalizes a worker for, or functions to prevent a*
11 *worker from:*

12 *1. Seeking or accepting work in the United States with a different person*
13 *where such work would begin after the conclusion of the employment*
14 *that includes the term or condition; or*

15 *2. Operating a business in the United States after the conclusion of the*
16 *employment that includes the term or condition;*

17 *(d) "Term or condition of employment" includes but is not limited to a*
18 *contractual term or workplace policy, whether written or oral;*

19 *(e) "Officer" means a president, vice president, secretary, treasurer or*
20 *principal financial officer, comptroller or principal accounting officer, and*
21 *any natural person routinely performing corresponding functions with*
22 *respect to any business entity whether incorporated or unincorporated;*

23 *(f) "Person" means any natural person, partnership, corporation, association,*
24 *or other legal entity within the commissioner's jurisdiction, including any*
25 *person acting under color or authority of state law;*

26 *(g) "Policy-making authority" means final authority to make policy decisions*
27 *that control significant aspects of a business entity or common enterprise*

1 and does not include authority limited to advising or exerting influence over
2 such policy decisions or having final authority to make policy decisions for
3 only a subsidiary of or affiliate of a common enterprise;

4 (h) "Policy-making position" means a business entity's president, chief
5 executive officer or the equivalent, any other officer of a business entity
6 who has policy-making authority, or any other natural person who has
7 policy-making authority for the business entity similar to an officer with
8 policy-making authority. An officer of a subsidiary or affiliate of a business
9 entity that is part of a common enterprise who has policy-making authority
10 for the common enterprise may be deemed to have a policy-making position
11 for purposes of this paragraph. A natural person who does not have policy-
12 making authority over a common enterprise may not be deemed to have a
13 policy-making position even if the person has policy-making authority over
14 a subsidiary or affiliate of a business entity that is part of the common
15 enterprise;

16 (i) "Preceding year" means a person's choice among the following time
17 periods:

18 1. The most recent fifty-two (52)-week year;

19 2. The most recent calendar year;

20 3. The most recent fiscal year; or

21 4. The most recent year of anniversary of hire;

22 (j) "Senior executive" means a worker who:

23 1. Was in a policy-making position; and

24 2. Received from a person in exchange for employment:

25 a. Total annual compensation of at least one hundred fifty-one
26 thousand one hundred sixty-four dollars (\$151,164) in the
27 preceding year;

1 b. Total compensation of at least one hundred fifty-one thousand
2 one hundred sixty-four dollars (\$151,164) when annualized if
3 the worker was employed during only part of the preceding year;
4 or

5 c. Total compensation of at least one hundred fifty-one thousand
6 one hundred sixty-four dollars (\$151,164) when annualized in
7 the preceding year prior to the worker's departure if the worker
8 departed from employment prior to the preceding year and the
9 worker is subject to a non-compete clause;

10 (k) "Total annual compensation" means the worker's earnings over the
11 preceding year. "Total annual compensation" may include salary,
12 commissions, nondiscretionary bonuses, and other nondiscretionary
13 compensation earned during that fifty-two (52) week period. "Total annual
14 compensation" does not include board, lodging and other facilities as
15 defined in 29 C.F.R. 541.606, and does not include payments for medical
16 insurance, payments for life insurance, contributions to retirement plans,
17 and the cost of other similar fringe benefits; and

18 (l) "Worker" means a natural person who works or who previously worked,
19 whether paid or unpaid, without regard to the worker's title or the worker's
20 status under any other state or federal laws, including but not limited to
21 whether the worker is an employee, independent contractor, extern, intern,
22 volunteer, apprentice, or a sole proprietor who provides a service to a
23 person. "Worker" includes a natural person who works for a franchisee or
24 franchisor, but does not include a franchisee in the context of a franchisee-
25 franchisor relationship.

26 (2) (a) With respect to workers other than a senior executive, it shall be an unfair
27 method of competition for a person to:

- 1 1. Enter into or attempt to enter into a non-compete clause;
- 2 2. Enforce or attempt to enforce a non-compete clause; or
- 3 3. Represent that the worker is subject to a non-compete clause.

4 (b) With respect to a senior executive, it shall be an unfair method of
5 competition for a person to:

- 6 1. Enter into or attempt to enter into a non-compete clause;
- 7 2. Enforce or attempt to enforce a non-compete clause entered into after
8 the effective date; or
- 9 3. Represent that the senior executive is subject to a non-compete clause,
10 where the non-compete clause was entered into after the effective date.

11 (3) (a) For each existing non-compete clause that is an unfair method of
12 competition pursuant to subsection (2) of this section, the person who
13 entered into the non-compete clause with the worker must provide clear and
14 conspicuous notice to the worker by the effective date of this Act that the
15 worker's non-compete clause will not be, and cannot legally be, enforced
16 against the worker.

17 (b) The notice to the worker required by paragraph (a) of this subsection shall:

- 18 1. Identify the person who entered into the non-compete clause with the
19 worker; and
- 20 2. Be in writing; and
 - 21 a. Delivered by hand to the worker;
 - 22 b. Delivered by mail at the worker's last known personal street
23 address;
 - 24 c. Emailed to the last known personal email address of the worker;
25 or
 - 26 d. Sent by text message at a mobile telephone number belonging to
27 the worker.

1 (c) If a person who is required to provide notice under this subsection has no
2 record of a street address, email address, or mobile telephone number, that
3 person is exempt from the notice requirement in this subsection.

4 (d) For purposes of this subsection, the inclusion of the following terms
5 constitutes notice to the worker that the worker's non-compete clause
6 cannot legally be enforced and will not be enforced against the worker:

7 1. The date of the employer's choosing, provided it is no later than the
8 effective date of this Act, informing the worker that any non-compete
9 clause will not be enforceable;

10 2. Informing the worker that he or she is able to accept a job with any
11 company or person, even if he or she competes with their current
12 employer;

13 3. Informing the worker that he or she is able to run his or her own
14 business, even if it competes with his or her current employer;

15 4. Informing the worker that he or she is able to compete with his or her
16 current employer following employment with said employer; and

17 5. Informing the worker that this new rule does not affect any other
18 terms or conditions of his or her employment.

19 (e) A person complies with the requirement of this subsection if the person
20 provides notice to a worker in accordance with paragraph (b) of this
21 subsection.

22 (f) In addition to providing the notice required in paragraph (b) of this
23 subsection in English, a person is permitted to provide such notice in a
24 language (or in languages) other than English, or to include internet links
25 to translations in additional languages.

26 (4) (a) The requirements of this section shall not apply to a non-compete clause
27 that is entered into by a person pursuant to a bona fide sale of a business

1 entity, of the person's ownership interest in a business entity, or of all or
2 substantially all of a business entity's operating assets.

3 (b) The requirements of this section shall not apply where a cause of action
4 related to a non-compete clause accrued prior to the effective date.

5 (c) It is not an unfair method of competition to enforce or attempt to enforce a
6 non-compete clause or to make representations about a non-compete clause
7 where a person has a good-faith basis to believe that this section is
8 inapplicable.

9 (5) (a) This section shall not be construed to annul, or exempt any person from
10 complying with any state statute, regulation, order, or interpretation
11 applicable to a non-compete clause, including, but not limited to, state
12 antitrust and consumer protection laws and state common law, except that
13 this part supersedes such laws to the extent, and only to the extent, that such
14 laws would otherwise permit or authorize a person to engage in conduct
15 that is an unfair method of competition under subsection (2)(a) of this
16 section or in conflict with the notice requirement in subsection (3) of this
17 section.

18 (b) Except with respect to laws superseded under paragraph (a) of this section,
19 no provision of this section shall be construed as altering, limiting, or
20 affecting the authority of the Kentucky Attorney General or any other
21 regulatory or enforcement agency or entity or the rights of a person to bring
22 a claim or regulatory action arising under any state statute, regulation,
23 order, or interpretation, including, but not limited to, state antitrust and
24 consumer protection laws and state common law.

25 (6) If any provision of this section is held to be invalid or unenforceable by its terms,
26 or as applied to any person or circumstance, or stayed pending further agency
27 action, the provision shall be construed so as to continue to give the maximum

1 effect to the provision permitted by law and such invalidity shall not affect the
2 application of the provision to other persons or circumstances or the validity or
3 application of other provisions. If any provision or application of this section is
4 held to be invalid or unenforceable, the provision or application shall be
5 severable from this section and shall not affect the remainder thereof.