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HOUSE BILL NO. 949

Offered January 14, 2026

A BILL to amend and reenact § 40.1-28.7:8 of the Code of Virginia, relating to covenants not to compete prohibited; exceptions; civil penalty.

Patron—Lopez

Referred to Committee on Labor and Commerce

Be it enacted by the General Assembly of Virginia:**1. That § 40.1-28.7:8 of the Code of Virginia is amended and reenacted as follows:****§ 40.1-28.7:8. Covenants not to compete prohibited; exceptions; civil penalty.****A. As used in this section:**

"Covenant not to compete" means a covenant or agreement, including a provision of a contract of employment, between an employer and employee that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer. A "covenant not to compete" shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client.

"Key employee" means an employee who, by reason of the employer's investment of time, training, money, trust, exposure to the public, or exposure to customers, vendors, or other business relationships during the course of employment with the employer, has gained a high level of notoriety, fame, reputation, or public personal as the employer's representative or spokesperson or has gained a high level of influence or credibility with the employer's customers, vendors, or other business relationships or is intimately involved in the planning for or direction of the business of the employer or a defined unit of the business of the employer. "Key employee" includes an employee in possession of selective or specialized skills, learning, or abilities or customer contacts or information who has obtained such skills, learning, abilities, contacts, or information by reason of having worked for the employer.

"Low-wage employee" means an employee (i) whose average weekly earnings, calculated by dividing the employee's earnings during the period of 52 weeks immediately preceding the date of termination of employment by 52, or if an employee worked fewer than 52 weeks, by the number of weeks that the employee was actually paid during the 52-week period, are less than the average weekly wage of the Commonwealth as determined pursuant to subsection B of § 65.2-500 or (ii) who, regardless of his average weekly earnings, is entitled to overtime compensation under the provisions of 29 U.S.C. § 207 for any hours worked in excess of 40 hours in any one workweek. "Low-wage employee" includes interns, students, apprentices, or trainees employed, with or without pay, at a trade or occupation in order to gain work or educational experience. "Low-wage employee" also includes an individual who has independently contracted with another person to perform services independent of an employment relationship and who is compensated for such services by such person at an hourly rate that is less than the median hourly wage for the Commonwealth for all occupations as reported, for the preceding year, by the Bureau of Labor Statistics of the U.S. Department of Labor. For the purposes of this section, "low-wage employee" shall not include any employee whose earnings are derived, in whole or in predominant part, from sales commissions, incentives, or bonuses paid to the employee by the employer.

"Professional" means an employee who has as a primary duty the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavors. "Professional" does not include an employee performing technician work using knowledge acquired through on-the-job and classroom training, rather than by acquiring knowledge through prolonged academic study, such as might be performed by a mechanic, manual laborer, or ministerial employee.

B. No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee.

C. No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any employee who does not in the course of his employment:

1. Customarily and regularly solicit for the employer customers or prospective customers;
2. Customarily and regularly engage in making sales to or obtaining orders or contracts for products from or services to be performed by others;
3. Perform the duties of (i) managing the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, (ii) customarily and regularly directing the work of two or more other employees, and (iii) hiring or firing other employees or having particular weight given

to suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees; or

4. Perform the duties of a key employee or of a professional.

D. Notwithstanding any other provision of this section, an employee who is not a low-wage employee may agree in writing for the benefit of an employer to refrain, for a stated period of time following termination of employment, from soliciting or attempting to solicit, directly or by assisting others, any business from any of such employer's customers, including actively seeking prospective customers, with whom the employee had material contact during his employment for purposes of providing products or services that are the same as or substantially similar to those provided by the employer. Any reference to a prohibition against soliciting or attempting to solicit customers shall be narrowly construed to apply only to (i) the employee's customers, including actively sought prospective customers, with whom the employee had material contact during employment; and (ii) products and services that are the same as or substantially similar to those provided by the employer.

E. Nothing in this section shall serve to limit the creation or application of nondisclosure agreements intended to prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information to which an employee has access, including trade secrets, as defined in § 59.1-336, and proprietary or confidential information.

~~D. A low-wage~~ F. An employee may bring a civil action in a court of competent jurisdiction against any former employer or other person that attempts to enforce a covenant not to compete against such employee in violation of this section. An action under this section shall be brought within two years of the latter of (i) the date the covenant not to compete was signed, (ii) the date the ~~low-wage~~ employee learns of the covenant not to compete, (iii) the date the employment relationship is terminated, or (iv) the date the employer takes any step to enforce the covenant not to compete. The court shall have jurisdiction to void any covenant not to compete with a ~~low-wage~~ an employee in violation of this section and to order all appropriate relief, including enjoining the conduct of any person or employer, ordering payment of liquidated damages, and awarding lost compensation, damages, and reasonable attorney fees and costs. No employer may discharge, threaten, or otherwise discriminate or retaliate against a ~~low-wage~~ an employee for bringing a civil action pursuant to this section.

~~E. G.~~ Any employer that violates the provisions of subsection B as determined by the Commissioner shall be subject to a civil penalty of \$10,000 for each violation. Civil penalties owed under this subsection shall be paid to the Commissioner for deposit in the general fund.

~~F. H.~~ If the court finds a violation of the provisions of this section, the plaintiff shall be entitled to recover reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the former employer or other person who attempts to enforce an unlawful covenant not to compete against such plaintiff.

G. I. Every employer shall post a copy of this section or a summary approved by the Department in the same location where other employee notices required by state or federal law are posted. An employer that fails to post a copy of this section or an approved summary of this section shall be issued by the Department a written warning for the first violation, shall be subject to a civil penalty not to exceed \$250 for a second violation, and shall be subject to a civil penalty not to exceed \$1,000 for a third and each subsequent violation as determined by the Commissioner. Civil penalties owed under this subsection shall be paid to the Commissioner for deposit in the general fund.

The Commissioner shall prescribe procedures for the payment of proposed assessments of penalties that are not contested by employers. Such procedures shall include provisions for an employer to consent to abatement of the alleged violation and to pay a proposed penalty or a negotiated sum in lieu of such penalty without admission of any civil liability arising from such alleged violation.

2. That the provisions of this act shall apply to contracts entered into, amended, or renewed on or after July 1, 2026.