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**HOUSE BILL NO. 794**

Offered January 8, 2014

Prefiled January 7, 2014

A *BILL to amend the Code of Virginia by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered 40.1-28.7:5, relating to employment; nonsolicitation agreements between employers and employees.*

\_\_\_\_\_  
 Patron—LeMunyon

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 Referred to Committee for Courts of Justice

**Be it enacted by the General Assembly of Virginia:**

**1. That the Code of Virginia is amended by adding in Article 1 of Chapter 3 of Title 40.1 a section numbered 40.1-28.7:5 as follows:**

**§ 40.1-28.7:5. Nonsolicitation agreements.**

A. As used in this section, unless the context requires a different meaning:

"Business entity" means a stock corporation, a general or limited partnership, a registered limited liability partnership, a limited liability company, a professional limited liability company, or a business trust.

"Customer" includes patients and clients.

"Employee" means any individual who, in consideration of wages, salaries, or commissions, may be permitted, required, or directed by any employer to engage in any employment directly or indirectly, and includes an individual who was previously employed by an employer if the employer and employee entered into a nonsolicitation agreement while the employer employed the employee.

"Employer" means an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating within the Commonwealth who employs another to work for wages, for salary, or on commission, and includes (i) any similar entity acting directly or indirectly in the interest of an employer in relation to an employee and (ii) any of the foregoing entities that previously employed an employee if the employer and employee entered into a nonsolicitation agreement while the employee was employed by the employer.

"Employer's legitimate business interest" means an employer's relationships with its employees or specific prospective or existing customers.

"Nonsolicitation agreement" means an agreement or covenant, including a provision of a contract of employment or other agreement, between an employer and employee that restrains, prohibits, or otherwise restricts an employee's ability, during his period of employment, after his period of employment, or both, to engage in solicitation activities.

"Owner-employee" means an individual who, while employed by a business entity, owned greater than five percent of the ownership interests of the business entity employing the individual.

"Ownership interest" means (i) partnership interest, in the case of a business entity that is a partnership, including a limited partnership or a limited liability partnership; (ii) membership interest, in the case of a business entity that is a limited liability company; (iii) share, in the case of a business entity that is a stock corporation; or (iv) beneficial interest, in the case of a business interest that is a business trust.

"Solicitation activities" means an action by an employee, directly or through a third party with the knowledge or acquiescence of the employee, to initiate a contact or communication with:

1. Any of the employer's (i) current customers or (ii) prospective customers, whether or not they had previously been customers of the employer, with whom the employer was engaged in soliciting business during the period of the employee's employment with the employer, for the purpose of selling or offering a product or service that is (a) the same or substantially the same as a product or service sold or offered by the employer, (b) directly derived from a product or service sold or offered by the employer, or (c) known by the employee to have been under development by the employer; or

2. Other employees of the employer for the purpose of persuading such other employees to engage in activities described in subdivision 1.

"Solicitation activities" does not include an employee's contacts or communications with persons who were not known by the employee to be current or prospective customers of the employer.

B. Any provision of a nonsolicitation agreement between an employer and an employee shall be valid and enforceable if:

1. The agreement is in writing and the instrument containing the agreement is signed by the employee;

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59       2. The agreement does not purport to restrict the employee from engaging in activities other than  
60 solicitation activities;

61       3. The excluded employee is provided with a copy of this section before or at the time the employee  
62 signs the instrument containing the nonsolicitation agreement;

63       4. The restrictions imposed by the nonsolicitation agreement are reasonable in duration and  
64 functional scope; and

65       5. The restrictions imposed by the nonsolicitation agreement are protective of the employer's  
66 legitimate business interest.

67       C. The provisions of subsection B shall not apply to nonsolicitation agreements between an employer  
68 and an owner-employee.

69       D. The solicitation activities that are restrained, prohibited, or otherwise restricted by a  
70 nonsolicitation agreement shall not be increased or expanded as a result of the employer being acquired  
71 by or merging with another business entity, unless the employee agrees to such increase or expansion by  
72 executing a written amendment to the nonsolicitation agreement that identifies the new types of products  
73 or services to be subject to the nonsolicitation agreement.

74       E. Regardless of the existence of a contractual provision authorizing an award of attorney fees and  
75 costs to the prevailing party, a court shall award attorney fees and costs to the prevailing party in any  
76 action seeking enforcement of, or challenging the enforceability of, a nonsolicitation agreement. A court  
77 shall not enforce any contractual provision that conflicts with this subsection.

78       F. Nothing in this section shall be construed or interpreted to:

79       1. Limit the rights of any employer to protect its proprietary tangible and intangible property,  
80 including trade secrets, customer or prospective customer or employee information, or other proprietary  
81 information, by injunction or any other lawful means under other applicable laws, during or after the  
82 term of an employee's employment; or

83       2. Legalize or make enforceable any agreement or activity in restraint of trade or commerce that is  
84 otherwise illegal or unenforceable under federal law or the laws of the Commonwealth.

85       G. This section shall not apply in proceedings to determine the enforceability of any nonsolicitation  
86 agreement entered into prior to July 1, 2014.