

New Colorado Law Severely Limits the Enforceability of Restrictive Covenants

07.15.2022

There have been many significant developments this year on the Colorado restrictive covenant front. In January, the Colorado legislature amended the state's non-compete statute (C.R.S. § 8-2-113) to criminalize the enforcement of non-compete agreements that violate the statute. Most recently, on May 3, 2022, the Colorado Legislature passed HB 22-1317, which further chips away at the enforceability of a non-compete agreement in Colorado. Governor Jared Polis signed the bill in law on June 8, 2022. The following is a summary of the bill's changes to existing Colorado law.

Exceptions to Unenforceable Agreements

Under prior Colorado law, employment-based non-compete and non-solicitation agreements were void and unenforceable unless the agreement fell within a small category of exceptions (i.e., the "managerial / executive" exception or the "trade secret" exception). The new Colorado law amends the "managerial / executive" exception as follows:

1. *Non-compete agreements.* Instead of the exception for "executive and management personnel" and their "professional staff," this exception now only applies to "highly compensated workers" earning at least \$101,250 per year (which will be adjusted annually by the Division of Labor Standards and Statistics in the Colorado Department of Labor and Employment).
2. *Customer non-solicitation agreements.* For purposes of a customer non-solicitation agreement or provision, the term

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“highly compensated” is defined as “60% of the highly compensated amount” (i.e., 60% of \$101,250, or \$60,750). Additionally, customer non-solicitation agreements or provisions must be no broader than what is reasonably necessary to protect the employer’s trade secrets. The new law does not mention employee non-solicitation agreements, so we will have to wait and see how these are treated by Colorado courts.

Covenants for the purchase and sale of a business (i.e., “sale of business non-competes”) are not subject to the new “highly compensated worker” requirements.

Notice Requirements for Exceptions

Even if the restrictive covenant falls within one of the narrow exceptions provided for in the statute, the new law requires additional notice requirements for the agreement to be enforceable. The notice must:

1. Be written in clear and conspicuous language;
2. Be contained in a separate written document from the restrictive covenants;
3. Be signed by the employee (separate and apart from the signature required on the restrictive covenant agreement itself);
4. Identify the restrictive covenant agreement by name, state that the attached agreement contains a covenant that could restrict the employee’s future employment, and identify the specific paragraph the restrictive covenants are located in;
5. Be provided prior to an applicant accepting employment, or, for existing employees, be provided at least 14 days before the effective date of the agreement; and
6. Include, as an enclosure, a copy of the restrictive covenant agreement.

Confidentiality Agreements

The new law still allows for confidentiality agreements or provisions to be enforced, however, the bill prevents agreements that prohibit disclosure of information that (1) “arises from the employee’s general training, knowledge, skill, or experience” gained either inside or outside the scope of work; (2) is readily ascertainable by the public; or (3) the worker otherwise has a legal right to disclose.

Governing Law, Venue, and Penalties

The new law restricts “forum shopping” and requires that Colorado law and venue govern the agreement if the worker primarily lives or works in Colorado. If an employer violates the new law, the employer may be subject to a penalty of \$5,000 per employee or prospective employee.

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Next Steps

The new Colorado law constitutes a major shift in the status quo. Employers should keep a close eye on these changes as they enter into new agreements with their employees. Notably, this new shift in law is not retroactive and applies only to agreements entered into on or after the effective date (August 10, 2022).

If you have any questions about the bill or your restrictive covenant agreements, please contact one of the members of Koley Jessen's Employment, Labor and Benefits Practice Group.