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COLORADO'S NEW LAW RESTRICTS ENFORCEABILITY OF NON-COMPETE AGREEMENTS

A new Colorado law takes effect on August 10, 2022, that significantly limits the enforceability of non-compete agreements made with employees working or living in Colorado. HB 22-1317, enacted by the Colorado legislature and signed into law by Colorado's governor, amends Colorado's current statute addressing non-compete agreements. This summary addresses the most significant changes, what remains unchanged under the new law, the impact of the amended statute on existing non-compete agreements, and action items for employers moving forward.

A. WHAT REMAINS UNCHANGED UNDER THE NEW LAW

Colorado's non-compete statute remains unchanged in several important ways. First, the law still imposes a general prohibition against non-compete agreements (sometimes called "restrictive covenants") and then provides limited exceptions to the general prohibition. Likewise, the amendments do not disrupt existing case law. Rather, the amendments specifically preserve existing state and federal precedent regarding what constitutes a reasonable and permissible covenant not to compete.

B. COLORADO'S NEW LAW IS NOT RETROACTIVE

Colorado's new non-compete law is not retroactive. Therefore, the enforceability of any existing restrictive covenant agreements executed before August 10, 2022, will be assessed by the current, less stringent standard under Colorado law. Valid and enforceable agreements entered into before August 10, 2022 under the prior statute will remain enforceable.

C. EXCEPTIONS TO THE GENERAL PROHIBITION AGAINST NON-COMPETES

Under Colorado's amended law, there are six exceptions to the general prohibition against covenants not to compete:

1. If the covenant not to compete governs a "highly compensated employee" and is designed to protect trade secrets, the agreement is enforceable.

   According to the Colorado Department of Labor, the current annual salary threshold for a "highly compensated employee" is $101,250. The employee must be "highly compensated" at the time the agreement is entered into ***and*** at the time it is enforced. Additionally, the covenant

not to compete can be no broader than is reasonably necessary to protect the employer's trade secrets.

2. A covenant not to solicit customers that governs an employee who at the time the agreement is entered into is making sixty percent or more of the "highly compensated employee's" salary and is intended to protect the employer's trade secrets is also enforceable.

   Under this exception, the employee must be paid the requisite salary at the time the agreement is entered into ***and*** at the time it is enforced, and the protection of trade secrets can be no broader than is reasonably necessary.

3. An agreement designed to allow an employer to recover expenses from educating and training an employee – where the training is distinct from normal on-the-job training – is enforceable. Recovery under this type of agreement is limited to the reasonable costs of the training.

4. Likewise, an agreement designed to protect the employer's confidential information is also enforceable, unless it prohibits disclosure of information that arises from the employee's general training, knowledge, skill, or experience, information that is readily ascertainable to the public, or information that an employee otherwise has a right to disclose as legally protected conduct.

5. A non-compete agreement that arises as part of the purchase and sale of a business or its assets is enforceable.

6. An employer may enforce an agreement that requires an employee to repay a scholarship that was provided to an employee working in an apprenticeship, in the event the employee fails to comply with the conditions of the scholarship agreement.

The exceptions provided by the new law *significantly narrow* the exceptions previously permitted under Colorado law. Most notably, there is no longer a stand-alone exception for executive and management personnel and their professional staff. Likewise, there is no exception for trade secrets alone. Rather, any restrictive covenant purporting to protect an employer's trade secrets is limited to highly compensated individuals.

D. NOTICE REQUIREMENTS FOR EMPLOYERS

Colorado's new law imposes strict notice requirements on employers who want the protection of a non-compete agreement. **First**, any agreement will be considered void under the new law unless the employer provides the employee with notice *before* the employee accepts the employer's offer of employment.

Second, if the employee is already employed by the employer, then notice must be provided by the earlier of fourteen days *before* the effective date of the agreement or the effective date of the consideration for the agreement.

Third, notice must be provided in a separate document signed by the employee. In practical terms, an employer satisfies this obligation by:

- providing the employee with a copy of the agreement containing the covenant not to compete;
- identifying the agreement by name and stating the agreement contains a covenant not to compete that could restrict the employee's options for subsequent employment following their separation; and
- directing the employee to the specific sections of the agreement that contain the covenant not to compete.

E. PENALTIES FOR NONCOMPLIANCE

Colorado's amended law introduces new penalties for employers who attempt to enter into, ***present an employee or prospective employee with***, or attempt to enforce any non-compete agreement that is void under the statute. Specifically, employers who engage in such conduct are liable for actual damages as well as statutory penalties of up to $5,000 per employee or prospective employee harmed by the conduct. An employer may also be liable for reasonable costs and attorney fees.

F. ACTION ITEMS FOR EMPLOYERS

Looking ahead, employers should proceed with caution when drafting and entering into non-compete agreements with employees living or working in Colorado. Given the limited exceptions under the new law, employers should consider whether the underlying purpose of the agreement is to restrict competition (which is less likely to be enforceable) or to protect trade secrets and/or confidential information.

Additionally, if the employer believes one of the narrow exceptions applies to the employee at issue, the agreement should be crafted within the confines of the exception and presented to the employee pursuant to the requisite notice provisions. As was the case before, employers should ensure that there is sufficient legal consideration for the agreement and that the restriction is no broader than is necessary to protect the employer's interests.

For more information about Colorado's new law, please reach out to the authors of this article, Cristin M. McGarry and Tara A. Stingley, or another member of Cline Williams' Labor and Employment Law Section at www.clinewilliams.com.