



Colorado's Newly Revised Non-Compete Act

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Colorado's Legislature Makes Significant Changes to Non-Compete Act

- **The Colorado General Assembly made significant changes to the Unlawful to Intimidate Worker-Agreement Not to Compete Act, C.R.S. § 8-2-113 (“Non-Compete Act”).**
 - On June 8, 2022, Gov. Jared Polis signed the bill amending the Non-Compete Act into law.
 - The revised Non-Compete Act makes it significantly more difficult for employers to enforce restrictive covenants.
 - There is a possibility that a Constitutional referendum could be on the ballot this fall seeking to overturn the changes in the new Non-Compete Act.

Legislative Intent Narrows Existing Case Law

- The legislative intent set forth in the revised Non-Compete Act “. . . intends to preserve existing state and federal case law in effect before the effective date of this act [August 10, 2022] . . .” that:
 - Defines what counts as a covenant not to compete that is prohibited by this section; and
 - Specifies the extent to which a covenant not to compete for the protection of trade secrets must be tailored in scope in order to be enforceable under this section.

Unlawful Use of Force, Threats or Intimidation are Still Criminal Offenses

- The Legislature has criminalized an unlawful use of force, threats or other means of intimidation to prevent any person from engaging in a lawful occupation at any place the person chooses.
 - Violation of this provision is a class 2 misdemeanor punishable by up to 120 days imprisonment in the county jail and/or a fine of up to \$750 or both.
 - Currently, it is unclear whether sending a cease-and-desist letter to a former worker would constitute a “threat” or “other means of intimidation,” subjecting the former employer to criminal liability.
 - Employers cannot present a worker or job applicant with a restrictive covenant that is void under the revised Non-Compete Act.

Executive and Managerial Exception to Non-Compete Act Stricken

- **The Colorado Legislature eliminated the Executive and Managerial exception from the prior Non-Compete Act:**
 - Executive and management personnel and officers and workers who constitute professional staff to executive and management personnel.
 - Noncompete provisions may be enforceable against highly compensated individuals.

Noncompete Covenants that Protect Trade Secrets May Be Enforceable Against Highly Compensated Individuals

- **The following requirements must be met for this exception:**
 - The restrictive covenant is for the protection of trade secrets and is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets; and
 - The worker's salary at the time the noncompete covenant is entered into and the time it is enforced, must either meet or exceed the "threshold amount for highly compensated individuals" as determined by the Colo. Dept. of Labor and Employment Labor Standards and Statistics Division.
 - The current threshold amount is: \$101,250.
 - If a worker has only been employed part of the year, then the "threshold amount" is based on the worker's annualized compensation.

Confidentiality Provisions Must Be Reasonably Related to Employer's Business

- **Confidentiality provisions in worker agreements must be reasonably related to the employer's business and cannot:**
 - Prohibit disclosure of information that arises from the worker's general training, knowledge, skill or experience, whether gained on the job or elsewhere;
 - Include information that is readily ascertainable to the public, or information that a worker otherwise has a right to disclose cannot be included in a confidentiality provision.

Nonsolicitation of Customers May Be Enforceable to Protect Trade Secrets

- To be enforceable, a nonsolicitation of customers' provision must:
 - Be no broader than *reasonably necessary* to protect an employer's legitimate interest in protecting trade secrets; and
 - The worker's compensation at the time the nonsolicitation provision is entered into and the time it is enforced, must be equivalent to or greater than sixty (60) percent of the "threshold amount for highly compensated workers."

Recovery of Education and Training Expenses

- **Employers can only recover cost of education and training expenses:**
 - If the education and training is separate and distinct from normal on-the-job training, e.g., specialized license or certificate;
 - Is limited to the reasonable costs of the training and decreases over the course of the two years subsequent to the training proportionately based on the number of months that have passed since the training was completed and it does not violate the federal Fair Labor Standards Act.

Sale of a Business/Recovery of Apprenticeship Scholarship

- A restrictive covenant for the purchase and sale of a business or the assets of a business may be enforceable;
- A provision requiring the repayment of a scholarship provided to an individual working in an apprenticeship if the individual fails to comply with the terms of the scholarship agreement.

Job Applicants/workers Must be Provided Notice of Noncompete/Confidentiality Covenants

- Job applicants must be provided notice of a noncompete/confidentiality covenant before the worker accepts the job offer;
- Current workers must be provided at least 14 (fourteen) days prior notice before:
 - The effective date of the covenant; or
 - The effective date of any additional compensation or change in the terms and conditions of employment that provides consideration for the covenant.

Notice to Job Applicants/workers of Non-Compete/Confidentiality Covenants

- **An employer must provide notice to job applicants and workers:**
 - In a separate document, in clear and conspicuous language that the job applicant/worker can understand; and
 - The separate document notifying the job applicant/worker must be signed by the job applicant/worker.
 - A worker may request a copy of the restrictive covenant once each calendar year.

Notice Requirements (Cont.)

- **An Employer complies with the notice requirements of the Non-Compete Act if:**
 - It is provided as a separate document with the agreement containing the covenant not to compete and/or confidentiality provision; and
 - Directs the worker to the specific sections or paragraphs of the agreement that contain the covenant not to compete and/or confidentiality provision.

Covenant Not to Compete Cannot be Litigated Outside of Colorado; Worker Can Seek Declaratory Relief

- **If a worker primarily resides in or works in Colorado at the time of termination, the worker cannot be required to adjudicate the enforceability of the restrictive covenant outside of Colorado.**
 - Choice of law provisions for a state different from Colorado are unenforceable if the worker primarily resided or worked in Colorado at the time of their termination.
- **A worker can seek declaratory relief from a court or arbitrator concerning the enforceability of non-compete covenant.**

Employer Penalties

- **An employer that presents an unenforceable covenant not to compete to a job applicant/worker is liable for actual damages and a penalty of \$5,000.00 per worker or job applicant harmed by the conduct.**
 - A successful plaintiff may recover their reasonable attorneys' fees and costs;
 - If an employer can show that the act or omission giving rise to such action was in good faith and employer had reasonable grounds for believing that its act or omission was not a violation of the Non-Compete Act, the Court can exercise its discretion award no penalty or not to award a penalty in excess of \$5,000.



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