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CHANGES TO COLORADO'S NONCOMPETE LAW

With the craze of summer vacations and kids going back to school, Colorado employers could understandably overlook a new and significant change to noncompete law, which is expected to take effect on Aug. 9, 2022. This new law (House Bill 22-1317) applies to all Colorado employers and any business that employs a person who primarily lives or works in Colorado. These changes will apply to any agreement entered into or renewed after the law becomes effective (e.g., older agreements will be grandfathered in under the old noncompete law).

The default in Colorado remains that noncompetition agreements are unenforceable. Companies need to show that a certain exception applies in order for the restrictive covenant to be valid. To that point, the first significant change to the new noncompete law is that it removes the exception for executives and management personnel and their professional staff. Instead, the new law would allow noncompete agreements for those employees who are "highly compensated" (the current threshold amount is $101,250). Thus, after Aug. 9, for a noncompete agreement to be enforceable, it would need to be with a "highly compensated" employee, for the protection of trade secrets, and no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.

This new law also limits nonsolicitation agreements and places a minimum compensation to make them enforceable. Specifically, nonsolicitation agreements will be invalid unless the worker makes no less than 60% of the "highly compensated" amount (e.g., currently $60,750). Additionally, the employer must show that the restrictive covenant is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.

Confidentiality Agreements are Limited. Under the new law, a reasonable confidentiality provision that is relevant to a company's business will be permitted, but only if the nondisclosure agreement does not protect information that arises from the worker's general training, knowledge, skill or experience, whether gained on the job or otherwise, information that is readily ascertainable to the public, or information that a worker otherwise has a right to disclose as legally protected conduct. The standard that courts will use to determine the reasonableness of a confidentiality agreement will most likely be the subject of scrutiny and debate. Until there is more published guidance, employers are encouraged to reach out to legal counsel with questions about

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this issue.

QUICK FACTS ABOUT HB 22-1317 THAT EMPLOYERS AND EMPLOYEES SHOULD CONSIDER:

- **New procedural requirements make a covenant not to compete that is otherwise permissible void unless notice of the covenant not to compete, and its terms, are provided within certain timeframes.** Notice to prospective employees and job candidates must be given before the candidate accepts employment. Notice to current employees must occur at least 14 days before the agreement will become effective, or 14 days before any additional compensation/consideration becomes effective.
- **The Long Arm of the Law.** If a worker primarily lives or works in Colorado, the restrictive covenant must be governed by Colorado law and can only be enforced in Colorado. Employers are encouraged to carefully review all forum and venue provisions of their agreements before the law goes into effect in August, to ensure that all renewals contain proper forum provisions.
- **HB 22-1317 Includes Civil and Criminal Penalties for Employers**. An employer who presents a worker or prospective worker a noncompetition agreement that is void as a term or condition of their employment, or who enters into a void noncompetition agreement, or who attempts to enforce a void noncompetition agreement can be liable for actual damages and a penalty of $5,000 per worker or prospective worker harmed by the conduct. In addition, a court may award injunctive relief, and the worker or prospective worker may recover actual damages, reasonable costs and attorney fees in any private action brought under the law. However, penalties may be reduced in the court's discretion if the employer was acting in good faith, and if the court determines that the employer had reasonable grounds for believing that the employer's act was not a violation of the law. The new law confirms that criminal penalties (a Class 2 misdemeanor) are still possible for anyone who tries to "use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation…" However, it is still unclear what would constitute a "threat" in what could become an adversarial proceeding.

Employers should review existing agreements containing covenants not to compete, agreements not to solicit customers, and confidentiality clauses to determine whether they comply with Colorado's new law. Additionally, employers should also carefully review internal policies and practices, forms and deadlines for eliciting such agreements, and make sure they comply with

the new statute.

Armstrong Teasdale's Employment and Labor lawyers have significant experience advising individuals and businesses of all sizes on compliance with noncompete laws in various states. Please contact our team for additional information on proactive guidance specific to your employment situation or the needs of your organization.