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COLORADO BILL RESTRICTS NON-COMPETE AGREEMENTS AND CREATES SUBSTANTIAL PENALTIES FOR VIOLATIONS

By Susan Sperber and Katerina Grainger (2022 Summer Associate*) on 06/13/2022
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A Colorado law will take effect in August 2022 that substantially changes what is permissible for non-compete and non-solicitation employment agreements.

Currently, Colorado allows employers to require non-compete agreements for, among other things, (1) the sale of assets of a business, (2) the protection of trade secrets, with limited duration and geographic scope, and (3) executive and management personnel, officers, and professional staff to executive and management personnel.

House Bill 22-1317, which was signed last week, will effectively eliminate *all* non-compete agreements, except for those applying to highly compensated employees (earning $101,250/year) or more, *if* the non-compete is for the protection of trade secrets *and* is no broader than reasonably necessary to protect trade secrets. Customer non-solicitation agreements will also be void, except for those entered into by a person who earns at least 60% of the threshold for highly compensated workers ($60,750/year), and again only if the covenant is no broader than reasonably necessary to protect the employer's trade secrets. These new standards will apply to agreements entered into or renewed on or after the effective date of the law. Employers will not be required to amend existing agreements, but Colorado courts will likely not enforce non-competes that violate the new law against their departing employees.

Non-compete covenants can include reasonable confidentiality provisions relevant to the employer's business, so long as they do not prohibit disclosure of information arising from general training, experience, public information, or legally protected conduct. Similarly, stand-alone non-disclosure and confidentiality agreements must be narrowly constructed so as not to impede competition in the marketplace. Notably, the law continues to permit non-competition covenants for the purchase and sale of a business or the assets of a business, but it is not entirely clear how these will work in the context of employees who are provided stock options or ownership as a part of their employment.

In addition to changing which non-compete agreements are enforceable, the new law also contains specific requirements when a non-compete is being presented to an applicant or employee. For applicants, notice of a non-compete requirement and the applicable terms must be provided to a prospective worker *before* the worker accepts the offer of employment. Employers satisfy the notice requirement by:

1. providing a copy of the agreement,
2. identifying the agreement by name and stating that the agreement contains a non-compete that could restrict the workers' options for subsequent employment, and
3. directing the worker to the sections or paragraphs of the agreement that contain the non-compete covenant language.

For current workers, notice and terms must be provided 14 days before either (a) the effective date of the covenant or (b) change in employment terms that provide additional consideration for the covenant, whichever comes first. Additionally, employers must give adequate notice in a separate document and receive an employee signature on the contract. Upon request, employers must provide a supplemental copy of the covenant to the employee once per year.

The law also states that an employer may not require a worker who, at the time of termination, primarily resides or works in Colorado, to adjudicate the covenant outside of Colorado, and bans employers from trying to select any governing law other than Colorado law for workers who reside and work in Colorado.

Finally, House Bill 22-1317 creates significant exposure to employers who disregard its terms. Employers that enter into, present to a worker as a term of employment, or attempt to enforce any impermissible non-compete covenant can be liable for actual damages and a penalty of $5,000 per worker harmed by the conduct. The Attorney General and any worker harmed may also bring an action for injunctive relief and recover penalties. Additionally, a worker may bring a private action and recover actual damages, reasonable costs, and attorney fees. In such actions, if the employer shows the violation was in good faith and that the employer had reasonable grounds for believing that the act was not in violation of the law, the court may in its discretion limit the penalties otherwise available.

Due to these sweeping changes, companies and organizations who regularly use non-compete and non-solicitation agreements should analyze their practices to confirm any non-compete agreements apply only to covered highly compensated employees and are not broader than reasonably necessary to protect trade secrets.

If you have questions about Colorado House Bill 22-1317 or how to plan for the coming changes in employment regulations, please contact Susan Sperber at ssperber@lewisroca.com.

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