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Colorado Further Restricts Non-Compete Agreements

Consistent with a national trend and Colorado's long-standing disfavor of non-competes, in **May 2022** the Colorado legislature passed **House Bill 22-1317** to restrict further the use of non-compete agreements for lower-wage workers. If Governor Polis signs the bill, the law is expected to be effective in **August 2022** for all new or renewed non-competes. The amendment incorporates language from **SB-21-271**, which imposes criminal penalties for employers attempting to enforce a restrictive covenant that violates the new statute. This conduct is now a class 2 misdemeanor under Colorado law, punishable by up to 120 days' imprisonment, a fine of up to $750, or both. The amendment also imposes strict notice requirements and authorizes the Attorney General or private litigants to pursue damages for violating the statute, plus a penalty of $5,000 per employee, absent proof of the employer's good faith.

The amendment to **C.R.S. § 8-2-113** expressly adopts pre-existing Colorado case law defining a non-compete and the extent to which a non-compete for the protection of trade secrets must be tailored to be enforceable. The statute continues to invalidate all non-competes except for those that fall within the specific categories defined in **C.R.S. § 8-2-113**. As discussed below, those categories are now even further narrowed.

Categories of Agreements

Covenants Not to Compete and Non-Solicitation of Customers. After the amendment, Colorado will no longer permit covenants based solely on the status of an employee (e.g., executive or management personnel and their professional staff) or solely for the "protection of trade secrets." Instead, the amendment combines those two exceptions and adds a salary threshold. The new amendment permits non-competes for "highly compensated workers" only "if the covenant not to compete 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." Employees are "highly compensated workers" if they meet an annualized cash compensation set by the Colorado Department of Labor, currently $101,250 per year.

Because agreements that restrict solicitation of customers are considered non-competes, the amendment also sets a salary threshold for non-solicitation agreements. Customer non-solicitation agreements are only enforceable for personnel earning 60% of the highly compensated employee threshold (currently $60,750 per year), but only "if the non-solicitation covenant is no broader than reasonably necessary to protect the employer's legitimate interest in protecting trade secrets."

Confidentiality Agreements. Reasonable confidentiality agreements will continue to be enforceable, but employers may not limit disclosure of information arising from a 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."

Recovery of Training Expenses. The amendment still allows employers to recover the expense of educating and training a worker so long as the training is distinct from "normal on-the-job training." As revised by **House Bill 22-1317**, recovery of such training expenses is no longer limited to the first two years of an employee's employment, but may be recouped within two years of the completion of training if the following conditions are met: (a) the amount is reasonable; (b) the costs of recovery decrease over the course of the two years after the training; and (c) the amount to be recovered does not result in compensating the employee in violation of the wage laws.

Sale of a Business. The amendment preserves the right to enforce non-competes in connection with the purchase and sale of a business or the assets of a business.

Apprenticeship Scholarship. The amendment adds a new provision allowing an employer to require repayment of a scholarship provided to an individual working in an apprenticeship if the individual fails to comply with the conditions of the scholarship agreement.

Physicians. The amendment preserves the provisions for voiding non-competes among physicians, except allowing for payment of damages upon termination of the relationship.

Notice Requirements

All restrictive covenants, even those permitted under the amendment, will be void if the employer does not provide proper notice to the worker. Notice to a prospective worker must be given before they accept an offer of employment. For new or renewed non-competes, notice to a current worker must be given at least 14 days before the earlier of the effective date of the covenant or the effective date of any additional consideration or change in terms or condition of employment that provides consideration for the restrictive covenant.

The notice must be in writing, signed by the worker, contained in a separate document with clear language and presented with the agreement containing the non-compete provision. Failure to abide by these requirements will render the covenants unenforceable and will subject employers to damages and attorneys' fees.

Choice of Law, Venue and Declaratory Relief

To clarify any uncertainty regarding the enforceability of choice of law and forum selection provisions, the amendment expressly provides that Colorado law applies to a worker primarily residing or working in Colorado.

The amendment also provides for the right of either party to a restrictive covenant to seek a declaratory judgment to determine its enforceability.

Conclusions for Employers

Colorado employers should be mindful of the language in **C.R.S. § 8-2-113(1.5)(a)** which provides "[i]t is unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place the person sees fit." Because doing so in violation of the statute could subject an employer to both criminal and civil penalties, employers should immediately review their current employment agreements, determine the category of workers for whom such agreements are enforceable, identify protectible trade secrets and ensure that any restrictive covenants for highly compensated employees are narrowly drafted for the protection of those trade secrets. An employer may no longer require employees to sign restrictive covenants known to be overbroad, because doing so could subject the employer to both civil and criminal penalties.

If you have any questions about Colorado's new legislation or how it might impact your organization's use of restrictive covenants, please contact your Kutak Rock attorney or a member of the firm's National Employment Law Group. You may also visit us at www.KutakRock.com.