

## Updates

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### Colorado Expands Restrictive Covenant Law



Colorado's noncompete statute, C.R.S. § 8-2-113, has long voided covenants not to compete unless certain exceptions are met. Starting on August 10, 2022, an amendment to that law ([HB 22-1317](#), the Amended Law) will substantially narrow the list of permissible exceptions.

Perhaps most significantly, the Amended Law will establish wage-based thresholds for certain restrictive covenants and eliminate two oft-invoked exceptions to Colorado's general ban—namely, covenants not to compete for (1) "[e]xecutive and management personnel and officers and employees who constitute professional staff to executive and management personnel" and (2) the protection of trade secrets. The Amended Law also prohibits the use of confidentiality provisions that, among other things, "prohibit the disclosure of information that arises from the worker's general training, knowledge, skill, or experience, whether gained on the job or otherwise." Failure to comply with the Amended Law could result in criminal penalties and fines up to \$5,000 per harmed worker. Although the Amended Law will not affect existing agreements, employers that plan to hire Colorado employees should review and update their employment agreements. This Update provides a brief summary of the Amended Law.

### **Permissible Restrictive Covenants**

Under the Amended Law, all restrictive covenants—including noncompetes, nonsolicits, and similar covenants—that restrict a person's right to receive compensation for their labor are void *unless* they fit into one of the narrow exceptions provided below:

- **Noncompetes.** Employers may enforce noncompetes against *highly compensated workers* that are no broader than reasonably necessary to protect the employer's trade secrets. For 2022, a highly compensated worker is considered to make \$101,250 per year. The Colorado Department of Labor and Employment (CDLE) sets and may increase this threshold on an annual basis.
- **Nonsolicits.** The Amended Law will permit employers to enforce *customer* nonsolicits against employees earning at least 60% of the highly compensated worker threshold (currently \$60,750 annually). Again, these covenants must be no broader than reasonably necessary to protect the employer's trade secrets. The Amended Law does not discuss *employee* nonsolicits.
- **Physicians.** The Amended Law voids covenants not to compete that restrict physicians' rights to practice medicine upon termination of the agreement, but provisions requiring the payment of damages arising from the termination and related to competition are enforceable. In addition, a physician may disclose certain information to patients with rare disorders whom the physician was providing consolation or treatment before termination of the agreement.
- **Other permitted covenants.** Employers may recover the expense of educating and training a worker if the training is "distinct from normal, on-the-job training." There are also exceptions for covenants regarding the purchase and sale of a business, or assets of a business, and the repayment of a scholarship provided to an individual working in an apprenticeship.

## Notice Requirements

A new feature of the Amended Law requires employers to notify existing workers (e.g., workers that are promoted or moved to new roles) and prospective workers of a restrictive covenant and the terms of the covenant contained in their agreement; otherwise the covenants are void. The requirements include the following:

- **Timing.** For *prospective* workers, notice of the agreement and its terms must be provided before the worker accepts the employment offer. For *current* workers, notice must be provided at least 14 days before (1) the effective date of the agreement or (2) the effective date of any additional compensation or change in the terms of employment.
- **Form.** The employer must provide the notice in a separate document from any other covenants between the employer and employee, and the notice must be provided in clear and conspicuous terms.
- **Contents.** The notice must (1) be provided with a copy of the agreement containing the covenant, (2) identify the agreement by name, (3) state that the agreement contains restrictive covenants, and (4) direct the employee to the specific section(s) of the agreement that contain the covenants.
- **Effectiveness.** The employee must sign the notice.

## Confidentiality Provisions

Importantly, the Amended Law only permits employers to enforce reasonable confidentiality provisions relevant to the employer's business that do not prohibit the disclosure of (1) information that arises from the worker's general training, knowledge, skill, or experience (whether gained on the job or otherwise); (2) information that is readily ascertainable to the public; or (3) information that a worker otherwise has a right to disclose as legally

protected conduct. It is unclear how courts might interpret these exceptions, but employers should review their employee confidentiality clauses to ensure they are complying with these exceptions.

## **Choice of Law and Forum**

The Amended Law will void any choice of law provision that seeks to apply out-of-state law to a covenant not to compete applicable to any worker who, at the time of termination of employment, primarily resided and worked in Colorado. Similarly, choice of forum provisions applicable to such workers may not require the workers to adjudicate the enforceability of the covenant outside of Colorado if the worker primarily resided in or worked in Colorado at the time of termination.

## **Enforcement and Penalties**

Employers that enter into, present, or attempt to enforce any covenant that is void may be liable for actual damages and a \$5,000 penalty per harmed worker. The state attorney general and any harmed worker may pursue injunctive relief and recover penalties. The harmed worker may also recover actual damages, reasonable costs, and attorneys' fees.

## **Recommendations**

Employers with workers in Colorado should:

- Review and amend (as necessary) their form employment *and employee confidentiality agreements* to determine if they meet the requirements of the Amended Law.
- Prepare a form notice that can be sent to Colorado employees who will be subject to restrictive covenants starting on August 10, 2022.
- Prepare training materials and guidelines regarding the Amended Law, the wage-based thresholds, and notice requirements for employees that onboard existing and prospective workers.

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