

Litigation + Dispute Resolution

Colorado Limits Employer Use of Restrictive Covenants

The Bottom Line

- The Act impacts restrictive covenants entered (or renewed) on or after Aug. 10.
- The Act significantly alters the landscape for restrictive covenants in Colorado.
- Employers that have employees who live or work in Colorado should consult with legal counsel and carefully review their non-compete and non-solicit agreements to ensure they comply with the new law's provisions.

Colorado's new employment restrictive covenant law may significantly change the landscape for employee restrictive covenants in the State. [House Bill 22-1317](#) (the Act), which takes effect Aug. 10, imposes new substantive and procedural requirements for a restrictive covenant to be enforceable.

A restrictive covenant in an employment agreement may prohibit a former employee from competing with an ex-employer or from soliciting that employer's customers or employees for a set amount of time after leaving the organization. The Act applies to "workers." While the Act does not define this term, based on prior Colorado case law it is likely that "workers" will include both employees and independent contractors.

Highly Compensated Workers

The Act imposes *per-se* bans on non-compete agreements for workers earning below the "threshold amount for highly compensated workers," which is set on an annual basis by the Colorado Department of Labor and Employment. The 2022 threshold amount is \$101,250 per year. Therefore, an employee non-compete is void if the employee makes less than \$101,250 per year.

Moreover, even if a worker earns more than the threshold amount, a non-compete under the Act is only enforceable if the non-compete serves the employer's legitimate interest

in protecting trade secrets and is no broader than is reasonably necessary to protect that interest.

Additionally, for covenants not to solicit customers, the covenant may be enforced only where the worker earns at least 60% of the threshold amount for highly compensated workers (\$60,750 per year for 2022), and where the customer non-solicit is no broader than reasonably necessary to protect trade secrets. The Act is silent on covenants not to solicit employees, so it remains to be seen whether courts will extend the Act to those covenants or continue to apply existing law.

Notice Requirement

The Act imposes a strict notice requirement. A non-compete is unenforceable unless the employer provides notice of the covenant and the terms to a prospective worker before the worker accepts an employment offer. For current employees, the employer must provide such notice at least 14 days before the earlier of the effective date of the non-compete or the effective date of any additional compensation or change in the terms or conditions of employment that provides consideration for the covenant.

Further, the Act requires that the employer provide notice to the employee or prospective employee in a "separate document" in "clear and conspicuous terms in the language in which the [employee] and employer communicate about the worker's performance." The notice must also identify the relevant agreement by name and direct the employee to the relevant provisions of the agreement. The employee must sign the notice to confirm receipt.

Jurisdictional Limits

The Act applies to workers who primarily reside or work in Colorado at the time the employment relationship ends, and parties are not permitted to contractually agree otherwise. In addition, an employer may not require a worker to adjudicate the enforceability of a restrictive covenant covered by the Act outside of Colorado.

Enforcement

The Act includes public and private enforcement mechanisms. Both the Colorado Attorney General and any impacted employee or prospective employee may bring suit for both injunctive relief and to recover a civil penalty of \$5,000 per violation. A private plaintiff may also recover actual damages, reasonable costs and attorneys' fees.

Exclusions

The Act explicitly carves out from its purview the following:

- A contract for the purchase or sale of a business or the assets of a business;
- A provision providing for an employer's recovery of the expense of educating and training an employee under certain circumstances;
- A reasonable confidentiality provision relevant to the employer's business that does not prohibit disclosure of information that: i) arises from the worker's general training, knowledge, skill or experience, ii) is readily ascertainable to the public or iii) a worker otherwise has a right to disclose;
- A provision requiring the 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.

For More Information

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