Colorado Overhauls Noncompete Law to Limit Enforcement to High Wage Earners, Impose Penalties for Employer Violations

Article By

Michael H. Bell
Roger G. Trim
Harrison J. Meyers

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
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Colorado has enacted the most significant change to its legal landscape concerning restrictive covenants in the employment context in the state’s history. By
enacting House Bill (HB) 22-1317, Colorado has a) eliminated a major exception and drastically limited the remaining exceptions permitted for restrictive covenants; b) explicitly addressed nonsolicitation and confidentiality restrictive covenants for the first time; c) outlined formal notice requirements; d) limited adjudication of Colorado-based employees’ restrictive covenants to Colorado courts and Colorado law; and e) added damages, attorneys’ fee-shifting, and monetary penalties for unsuccessful efforts to enforce restrictive covenants under C.R.S. § 8-2-113. These changes will affect any restrictive covenants made or renewed on or after August 10, 2022. Those made or renewed prior to August 10, 2022, are not affected by this new law.

**Current Law**

Currently, under C.R.S. § 8-2-113, certain restrictive covenants, such as covenants not to compete or solicit customers, are void unless they qualify for one or more of the following exceptions: (1) the purchase and sale of a business or its assets, (2) the protection of trade secrets, (3) the recovery of education or training expenses associated with an employee who has been with an employer for less than two years, or (4) a restriction on executive or management personnel or staff.

**The Amended Law: Narrower Exceptions**

However, starting August 10, 2022, Colorado will only allow the following exceptions: (1) the purchase and sale of a business or its assets, (2) the protection of a trade secret if the individual earns an amount equal to or greater than a highly compensated worker ($101,250 in 2022) both at the time the covenant is entered into and at the time it is enforced, and (3) the recovery of training or scholarship expenses under certain conditions. This represents a sea change in Colorado noncompete law. Colorado will completely eliminate the executive and management personnel exception. Even more significantly, the often-used trade secret exception will not only require a six-figure-plus compensation threshold, but must also be “no broader than is reasonably necessary to protect the employer’s legitimate interest in protecting trade secrets.” This language will likely eliminate a court’s ability to rewrite (i.e., blue pencil) a restrictive covenant that is overbroad on its face, and instead render such covenants void and in violation of the new law.

While prior courts may have saved an overly broad restrictive covenant by narrowing geographical or temporal scope, employers are now at risk of violating the statute simply by offering, entering into, or attempting to enforce an overly broad restrictive covenant. Covenants that more narrowly forbid solicitation of customers (as opposed to broad restrictions on any competitive activities) are likewise subject to the same “no broader than is reasonably necessary to protect … trade secrets” restriction, but may be enforced against employees making only 60 percent of the highly-compensated worker threshold ($60,750 in 2022).

**Healthcare Professionals**

Physicians in Colorado continue to be free from any constraints on their ability to practice medicine, but they can still be liable for damages related to violations of valid restrictive covenants. Importantly, the law makes it clear that physicians and
their employers will not be held liable for disclosing their new practice or even treating a former patient, so long as (1) the patient has a rare disorder; and (2) the disclosure/treatment was after the termination of the applicable employment, partnership, or corporate agreement.

**New Training Expenses Exception**

While Colorado retained its exception for recovery of training expenses, it narrowed it significantly, by making it clear that recovery must be for training that “is distinct from normal, on-the-job training” and that available recovery will decrease proportionally as the employee continues to work for the employer post-training.

**Confidentiality Provisions**

HB22-1317 also explicitly allows for reasonable confidentiality provisions, but its structure suggests that overbroad confidentiality provisions may be interpreted to violate the statute. Specifically, the law provides that a reasonable confidentiality provision relevant to the business that does not prohibit disclosure of information generally obtained through the job, information available to the public, and/or information an employee has a right to disclose, is not prohibited by the law.

This is significant because Colorado courts have never held simple confidentiality provisions to the standards of § 8-2-113, and HB22-1317 raises the specter of an employer with no intention to enforce a noncompete or customer nonsolicitation provision nevertheless committing a violation of the statute through a poorly drafted confidentiality provision.

**Notice to New Employees**

As yet another barrier to enforcement, the new law deems a restrictive covenant void unless notice of the covenant is provided to a prospective worker prior to any acceptance of an offer of employment or to “[a] current worker at least fourteen days before the earlier of ... the effective date of the covenant[,]” or the provision of new consideration supporting the covenant. It also requires that the notice be separate from the covenant itself, specifically explain the significance of the covenant, direct the worker to the location of the covenant, and be signed by the employee. Additionally, Colorado will deem the restrictive covenant void if it seeks to apply any law other than Colorado’s or require adjudication in any courts other than Colorado’s.

**Damages**

Moreover, enforcement now comes with even more significant risks. If a restrictive covenant is found void under C.R.S. § 8-2-113, the party seeking enforcement is liable for actual damages, reasonable costs, attorneys’ fees, and a penalty of $5,000 per worker or prospective worker harmed. If an employer can show a good faith belief that it was not violating the statute, a judge may decline to assess any penalty, but still has the power to impose penalties up to the full amount. An employer’s good faith belief may turn on how closely the restrictive covenants at issue fall within the exceptions and the employer’s conduct in any ensuing litigation. The penalty
provision is quite broad, and it appears that even offering or entering into a restrictive covenant that is void under Colorado law may give rise to penalties.

**Key Takeaways**

In light of these significant changes, employers may want to review their employment contract templates and determine whether to modify the language (or procedures) concerning restrictive covenants. Additionally, those wishing to enforce restrictive covenants may want to adjust their typical cost-benefit analysis, as Colorado has raised the stakes in restrictive covenant litigation, especially if considering these changes in conjunction with the recent enactment of criminal penalties for violations of C.R.S. § 8-2-113.


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