Companies Beware—Colorado Continues its Assault on Restrictive Covenants

Colorado enacted a restrictive covenant statute on March 1, 2022 that voided restrictive covenant agreements unless the agreements a) concerned the purchase and/or sale of a business, b) were specifically designed to protect trade secrets, c) covered only "executive and management personnel," or d) arose out of the recoupment of education and training expenses for employees that stayed with the company for less than two years. Unlike other states, Colorado also included criminal misdemeanors in its statute that made unenforceable restrictive covenant agreements punishable by a $750 fine or 120 days imprisonment (or both). Lastly, the March statute contained language announcing that it was "unlawful" in Colorado to use "means of intimidation" to prevent a person from engaging in a lawful occupation.

These changes to Colorado law, especially the potential criminalization of restrictive covenant enforcement, were staggering. Apparently not done with its staggering changes to restrictive covenant law, the Colorado legislature recently passed a bill that, if signed by the governor, will continue to reduce a company's ability to enforce restrictive covenant agreements in the state of Colorado.

Colorado House Bill 22-1317, if signed by the governor (which we expect to happen), will go into effect in mid-August. Under the bill, non-competition agreements are banned unless the agreements relate to the sale of a business or are executed by a "highly compensated worker." A "highly compensated worker" is determined by the Colorado Department of Labor and Employment's Division of Labor Standards and Statistics. For 2022, a highly compensated worker is any worker making more than $101,252 per year. The bill also bans non-solicitation agreements unless the agreements relate to the sale of a business or are executed by a worker earning 60% or more of a "highly compensated worker" (i.e. $60,750). Thus, and in simpler terms, any worker making less than $101,252 per year in Colorado cannot be subject to a non-competition agreement and any worker making less than $60,750 cannot be subject to a non-competition agreement or a non-solicitation agreement.

In addition, both non-competition and non-solicitation agreements can be "no broader than reasonably necessary to protect trade secrets." Although the bill does contain a carveout for the recoupment of education and training expenses, as well as a carve out for "enforceable

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confidentiality agreements that do not prohibit the worker from using his/her general skills and knowledge or information that is readily ascertainable to the public," these two carveouts are a small consolation to most employers. A slightly larger consolation to employers is that the bill is not retroactive.

The bill also contains notice requirements for Colorado employees and mandates that Colorado law and forum govern all restrictive covenant agreements involving employees who reside and work in Colorado. Similar to the restrictive covenant notice that is working its way through the Washington, DC city council, the Colorado bill requires that the notice be in writing and contained in a separate document. The notice must also have "clear and conspicuous language" that identifies the restrictive covenant by name and paragraph in the restrictive covenant agreement and informs the worker that the covenant could restrict the worker's future employment options. Furthermore, the "notice" must be signed by the individual worker so that there is no confusion over whether the worker was aware of and acknowledged the restrictive covenant(s).

A company's compliance with the notice requirement is crucial because if proper notice is not given, then the restrictive covenants are void. Just as important, failure to comply with the notice requirements, or any attempt to enforce a restrictive covenant agreement that does not comply with the bill, can result in the worker recovering his/her "reasonable costs and attorney's fees." And the employer could also face a fine of $5,000 per worker or prospective worker who signed the unenforceable agreement. The $5,000 fine is in addition to the criminal penalties that went into effect in March.

Since the bill will not become law until the middle of August, companies have time to revise their agreements and create policies and documents that comply with both the notice and restrictive covenant requirements contained in the bill. Please reach out to Benesch's Trade Secrets, Restrictive Covenants and Unfair Competition Group if you have any questions or would like assistance in complying with the bill.

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