LEGISLATIVE CHANGE TO NONCOMPETE AGREEMENTS WILL IMPACT COLORADO EMPLOYERS

The 2022 Colorado General Assembly passed several bills that will impact how businesses and employers operate in our state. Among them, HB 22-1317 is poised to bring about meaningful changes related to restrictive employment agreements, including noncompete agreements, nonsolicitation agreements, and confidentiality agreements.

Bill Summary

Noncompete agreements are a type of restrictive covenant between an employer and employee, in which the employee agrees not to work for a competitor or in a similar industry for some specified time and within a certain geographic area. Noncompete agreements have been presumed unenforceable under current Colorado law, with certain exceptions that have allowed these agreements to stand. HB 22-1317, Concerning Restrictive Employment Agreements, narrows these exceptions while continuing to presumptively void "any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer." The bill provides exceptions allowing noncompete agreements between employers and highly compensated workers for the protection of trade secrets.

Exceptions

The bill outlines three specific conditions that must all be met to qualify for an exception and allow a noncompete agreement to stand:

1. **Salary:** A valid noncompete agreement must be between an employer and a "highly compensated worker." The Colorado Department of Labor and Employment (CDLE) currently identifies highly compensated workers as those earning at least $101,250 in annual salary. If a worker has been employed less than a calendar year, he or she would be considered highly compensated if the worker would reasonably expect to earn more than this amount. The compensation limit will rise to $112,500 in 2023 and nearly $124,000 in 2024, after which it will be adjusted for inflation.
2. **Trade Secrets:** The agreement must be intended for the protection of trade secrets, which current case law defines as "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Mgmt. Recruiters of Boulder, Inc. v. Miller*, 762 P.2d 763 (Colo. App. 1988).
3. **Scope:** The agreement must be "no broader than reasonably necessary to protect the employer's legitimate interest in protecting trade secrets."

Notably, the bill excludes the former exception for executive and management personnel and their professional staff. Given the added threshold for annual salary, the new rules will be easier for employers and courts to apply.

Allowable Provisions

In addition, the bill allows certain common provisions to remain in noncompete agreements:

- Employers may include a provision to recover education and training expenses where the training is distinct from normal, on-the-job training. In this case, the employer's recovery must be limited to reasonable costs of the training and must decrease over the course of two years after that training takes place.
- Employers may issue a restrictive covenant for the purchase and sale of a business or its assets.
- Employers may require that the employee repay a

scholarship earned while working in an apprenticeship if the employee fails to comply with conditions of the scholarship agreement.

Notice Requirements

The bill requires employers to notify prospective or current employees of any restrictive covenant they enter. Employers must follow these requirements exactly for any such agreement to be valid.

Employers who wish to preserve the enforceability of a permissible noncompete agreement must provide a clear, separate, and signed notice to a prospective worker before the worker accepts an offer of employment; or to a current worker at least 14 days before the earlier of the effective date of the agreement, or the effective date of any additional compensation that provides consideration for the agreement.

Other Considerations

Time and distance requirements: The bill preserves existing state and federal caselaw holding that valid noncompete agreements must be limited to a reasonable duration and geographic distance from the place of employment.

Other types of restrictive covenants: In addition to noncompete agreements, the bill governs nonsolicitation agreements and confidentiality provisions.

- HB 22-1317 limits nonsolicitation agreements in which an employee agrees not to solicit other employees to leave the employer for purposes of working for a competitor. The bill creates an exception for nonsolicitation agreements entered into to protect trade secrets for employees who earn 60% of the CDLE's highly compensated worker threshold, which is $60,750 for 2022.
- The legislation allows reasonable confidentiality provisions or agreements that do not prohibit disclosure of information that arises from the worker's general training, knowledge, skill, or experience, whether gained on the job or otherwise. This includes any information readily available to the public or any information that a worker otherwise has a legal right to disclose.

Venue and choice of law: Under the bill, a noncompete agreement that applies to a worker who primarily resided or worked in Colorado may not require the worker to adjudicate the enforceability of the covenant outside of Colorado.

Damages for Violations

An employer that attempts to enter into, or enforce, a noncompete agreement that is void pursuant to the bill's provisions is subject to the following damages:

- A penalty of $5,000 per worker or prospective worker harmed; but if the employer can demonstrate it acted in good faith, the court may award the worker any amount less than $5,000;
- Injunctive relief;
- Payment of actual damages, reasonable costs, and attorneys' fees.

Finally, the bill now subjects an employer to a criminal class 2 misdemeanor violation for the use of "force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place the person sees fit[,]" whereas current law subjects an employer to a criminal class 2 misdemeanor for any violation of the statute that governs noncompete agreements.

Provisions of this bill apply to restrictive employment agreements entered into, or renewed, on or after August 10, 2022.

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