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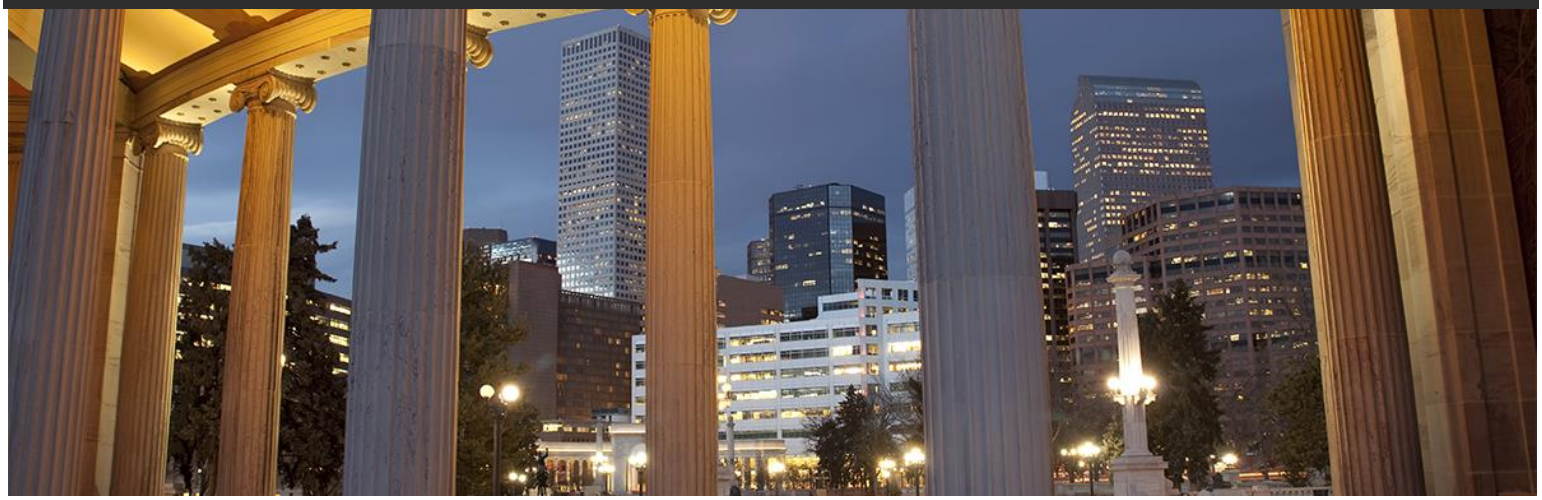

January 2023

A Warning for Companies with Colorado Employees Seeking to Enforce Restrictive Covenants and Non-Competition Agreements

In June 2022, the Colorado legislature passed and Gov. Polis signed into law House Bill 22-1317 amending CRS 8-2-113, "Unlawful to intimidate worker - agreement not to compete – prohibition – exemptions – notice – definition" (the "Act"). The Act became effective Aug. 10, 2022, and applies to all covenants entered into after that date. As corporate and employment lawyers in Colorado know, prior to this amendment the Act treated restrictive non-competition covenants as void *unless* the covenant was contained in a contract or contractual provision (a) for the purchase and sale of a business or the assets of a business; (b) for the protection of trade secrets; (c) for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years; (d) between executive and management personnel and officers and employees who constitute professional staff to executive and management personnel. And even within these exceptions, restrictive non-competition covenants were disfavored and often construed against the employer and in favor of the employee.

The amended Act expands the general prohibition against covenants not to compete that restrict a person's right to receive compensation for performance of labor. The exception contained in (a), above (for contracts for the purchase and sale of a business or the assets of a business), is preserved (CRS 8-2-113 (3)(c)). However, the Act significantly revises the other exceptions, establishes notice requirements, and adds criminal penalties and civil remedies for certain violations. These revisions include the following:

- Subsection 2(b) limits covenants not to compete to persons who, at the time the covenant was entered into or at the time it is being enforced, earn an amount of annualized cash compensation equivalent to or greater than the threshold amount for highly compensated workers, provided the covenant is for the protection of trade secrets and is no broader than reasonably necessary. ("Annualized cash compensation" and "threshold amount for highly compensated workers" are both defined in Sections (2)(c)(I) and (II).)
- Section 2(d) limits covenants that prohibit the solicitation of customers to persons who earn an amount of annualized cash compensation equivalent to or greater than 60% of the threshold amount for highly compensated workers if the covenant is reasonably necessary to protect the employer's interest in protecting trade secrets.
- Section (3)(a) continues to provide for an employer's recovery of education and training expenses where the training is distinct from normal, on-the-job training. Recovery, however, is limited to the reasonable cost of the training and decreases over the course of two years based on the number of months that have passed since the completion of the training.
- Section (3)(b) preserves reasonable confidentiality provisions relevant to the employer's business distinct from information arising from general on-the-job training or otherwise publicly available.
- Section (3)(d) permits a provision requiring the repayment of a scholarship in an apprenticeship if the individual fails to comply with the conditions of the scholarship agreement.

Even if a covenant falls into one of the exceptions above, it still has to comply with the instructions in Section 4, which state that any potential noncompete exception is void if notice of the covenant is not provided. Under Section 4 a prospective worker must receive notice before accepting the offer of employment and a current worker must receive notice at least 14 days before the earlier of the effective date of the covenant and the effective date of any additional compensation or change in the terms or conditions of employment that provide consideration for the covenant. The notice must be (i) provided on a separate document from other portions of the employment agreement(s); (ii) stated in clear and conspicuous terms; and (iii) signed by the worker. The notice requirement is satisfied when a copy of the agreement with the noncompete is provided; it identifies the agreement by name and highlights the inclusion of a noncompete that could restrict a workers' options for subsequent employment; and it directs the worker to the specific sections and paragraphs of the agreement that contain the provisions governing competition.

Section 5 of the amended Act is specifically dedicated to physicians and is not discussed in this GT Alert.

Section 6 states that the Act only applies to workers who primarily resided in Colorado at the time of termination. Regardless of contractual provisions to the contrary, Colorado law would govern the enforceability of a non-competition agreement if the worker resided primarily in Colorado and worked in Colorado at the time of termination.

Section 8 of the amended Act prevents an employer from using, as a term of employment, a non-competition agreement that is void under this Section. Section 8(b) outlines the penalty if this is violated: (i) actual damages; (ii) a penalty of $5,000 per worker or prospective worker; and (iii) the employee may bring a claim for injunctive relief.

The expansion of the Act has altered the scope of restrictive covenants and non-competition agreements in Colorado while presenting potentially serious penalties for employers who do not fully comply. The element of the Act that will likely have the most impact is the expansive notice requirements in Section 4.

Under the Act, Colorado is the only state in the country that requires noncompete agreements to be provided as separate documents, to both prospective and current employees. This change may require employers to rewrite their current employment agreements and provide certain employees with that separate documentation. The Act is new, and there will likely be some litigation needed to clear up the exact machinations of the Act. Nevertheless, the revisions in the Act have altered how restrictive covenants and non-competition agreements will work in Colorado.

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