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Colorado's New Limitations on Restrictive Covenants Take Effect in August 2022

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Effective August 10, 2022, Colorado employers will need to comply with significant new limitations on noncompete agreements and other post-termination restrictive covenants. The Colorado legislature passed House Bill 22-1317, which imposes new employee income thresholds on noncompete and customer nonsolicitation agreements, and includes additional notice, venue and choice of law rules for restrictive covenants. HB 22-1317 builds on Colorado's existing restrictive covenant statute (CRS §8-2-113), which already restricts the use of noncompete and customer nonsolicitation agreements to limited situations, and imposes criminal liability and fines for violations of the state's noncompete rules.

Colorado's existing noncompete statute

Under CRS §8-2-113, Colorado employers currently are prohibited from entering into noncompete agreements, including customer nonsolicitation provisions, unless the restrictive covenant is one of the following:

1. Part of a contract for the purchase and sale of a business or its assets.
2. Part of a contract for the protection of trade secrets.
3. Part of a contractual provision providing for recovery of the expense of educating and training an employee who has worked for an employer for less than two years.
4. Entered into with executive and management personnel and officers and employees who constitute business professionals to executive and management personnel.

Though this statute has been in effect for years, Colorado recently introduced **criminal liability** for violations of the restrictive covenant requirements. As of March 1, 2022, any violation of the noncompete and customer nonsolicitation restrictions in CRS §8-2-113 is classified as a class 2 misdemeanor, which could lead to up to 120 days in prison and/or a $750 fine.

New limitations on restrictive covenants

Beginning August 10, 2022, HB 22-1317 will further limit the use of restrictive covenants in Colorado. The new law's requirements (summarized below) will apply to any agreements entered into with Colorado employees on or after August 10, 2022. Restrictive covenants entered into on or after that date must comply with these new requirements or otherwise will be **void**. Failure to comply also subjects employers to serious penalties.

Although HB 22-1317 does not explicitly address independent contractors, Colorado courts have extended CRS §8-2-113 to independent contractors in the past and may follow suit with the amended statute.

'Highly compensated' salary thresholds

Most significantly, noncompete and customer nonsolicitation agreements, with limited exceptions, will be void unless the employees meet certain salary thresholds for "highly compensated" workers at the time the agreement is entered into **and** at the time it is enforced. For **noncompete agreements**, employees must earn **$101,250 annually** (or the adjusted salary threshold then in effect). For customer **nonsolicitation agreements**, the employee must earn at least 60% of the "highly compensated" threshold (currently **$60,750**). In addition to these new salary threshold requirements, a restrictive covenant in Colorado must be no broader than reasonably necessary to protect the employer's legitimate interests in trade secrets.

Nevertheless, certain existing exceptions for restrictive covenants will remain in effect under the new statute. For example, even if the applicable salary threshold is not met, a noncompete or customer nonsolicitation restriction

will be permissible in connection with the purchase and sale of a business or its assets, as well as in agreements providing for recovery of training and education expenses. However, in order for an employer to make use the training and education exception, the training must be distinct from standard on-the-job training, and recovery of expenses must be limited to the reasonable costs of the training and decrease over time after completion of the applicable training.

Additionally, HB 22-1317 still permits reasonable confidentiality provisions as long as they do not prohibit the disclosure of:

1. Information arising from the worker's general training, knowledge, skill or experience.
2. Information that is readily ascertainable by the public.
3. Information that the worker otherwise has a legal right to disclose.

Strict notice requirements

Under HB 22-1317, employers must provide notice of a noncompete or customer nonsolicitation restriction to **prospective employees before they accept an offer of employment**. For **existing employees**, such notice must be provided **at least 14 days** before either the effective date of the restrictive covenant or the effective date of the change(s) in the employee's terms or conditions of employment that serve as consideration for the midstream restrictive covenant.

Notice under HB 22-1317 also must identify the agreement by name, state that the agreement contains a covenant not to compete and/or a customer nonsolicitation restriction, and direct the worker to the specific sections or paragraphs of the agreement that contain the restrictive covenant(s). Additionally, the notice must be provided in a **separate document** signed by the employee and accompanied by a copy of the restrictive covenant agreement.

Colorado governing law and venue required

HB 22-1317 also mandates the use of Colorado law and venue in all agreements containing covered restrictive covenants. If the employee primarily resides and works in Colorado as of the date of termination, the restrictive covenants agreement cannot require adjudication outside of Colorado.

Additional penalties for noncompliance

In addition to existing criminal liabilities for violation of CRS §8-2-113, employers may now be subject to additional penalties for entering into, presenting or attempting to enforce any restrictive covenant that is void. Employers that violate the provision may be liable for a penalty of $5,000 for each worker or prospective worker, as well as actual damages, injunctive relief, reasonable costs and attorneys' fees.

Insight and next steps

Employers with Colorado employees should review their restrictive covenant agreements and prepare to comply with HB 22-1317's new requirements, which will apply to agreements entered into or renewed on or after August 10, 2022. When proposing and entering into noncompete and customer nonsolicitation agreements, employers should ensure that the employees meet the applicable salary thresholds or that the agreements otherwise satisfy one of the statutory exceptions. Employers also should tailor restrictive covenants to be no broader than reasonably necessary to protect their legitimate interests in trade secrets and prepare the required notices to be provided alongside any restrictive covenants.

If you have questions about the new statute or Colorado's treatment of restrictive covenants more generally, please contact a member of Cooley's employment group.

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