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Colorado Drastically Restricts the Use of Noncompetition and Nonsolicitation Agreements

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Colorado has significantly revised its laws concerning noncompetition and nonsolicitation covenants and has drastically narrowed employers' ability to both use and enforce them. Currently, Colorado law generally permits noncompete and nonsolicitation covenants in connection with: (1) the purchase and sale of a business or its assets, (2) protecting trade secrets, (3) recouping certain education or training expenses from employees, and (4) executive or management personnel.

The new law, which applies to agreements made or renewed on and after August 10, 2022, narrows the trade secret and training expenses exceptions and eliminates the executive or management personnel exemption. Employers should contact their Vorys lawyer with questions about how these changes will affect their agreements that contain restrictive covenants.

Trade Secret Protection

The new law authorizes noncompete covenants to protect trade secrets, and the covenant must be "no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets." Further, a noncompete covenant to protect trade secrets may only be used with employees who earn an amount equivalent to or greater than what a "highly compensated worker" earns – **both** when the covenant is entered into **and** when it is enforced. In 2022, a highly compensated worker is one who earns \$101,250. This salary threshold will increase to \$112,500 in 2023 and to \$123,750 in 2023; thereafter, it will adjust annually for inflation.

Agreements that prohibit customer solicitation are also subject to the "no broader than is reasonably necessary to protect ... trade secrets" restriction. A nonsolicitation covenant may only be enforced against employees making 60% of the highly-compensated worker threshold (i. e., \$60,750 in 2022).

Recouping Training Expenses

Colorado also narrowed its exception for recouping training expenses. As of August 10, 2022, employers are able to recover only education and training expenses for training that “is distinct from normal, on-the-job training.” Additionally, an employer’s recovery decreases proportionately as the employee continues to work for the employer after receiving the training.

Confidentiality Provisions

The new law permits “reasonable confidentiality provisions.” However, a confidentiality provision cannot prohibit employees from disclosing information obtained from general training, knowledge, skill, or experience; information readily ascertainable to the public; or information that an employee otherwise has a right to disclose as legally protected conduct.

Employer's Duty to Notify Employees

A noncompete covenant is void unless its terms are provided to an applicant before the applicant accepts the offer of employment. Similarly, for current employees, such a covenant is void unless its terms are provided at least 14 days before the earlier of the covenant’s effective date or the effective date of new consideration supporting the covenant. The notice must be provided in a separate document and must identify the agreement by name, state “the agreement contains a covenant not to compete that could restrict the worker’s options for subsequent employment,” direct the employee to the specific section of the agreement containing noncompete covenant, and be signed by the employee.

Enforcement and Damages

If a court finds that a restrictive covenant is void, the party seeking enforcement is liable for actual damages, reasonable costs, attorneys’ fees, and a penalty of \$5,000 per worker or applicant harmed. A court may decline to assess the penalty if an employer can establish a good faith belief that it was not violating the statute. Further, Colorado courts will deem the restrictive covenant void if it seeks to apply non-Colorado law or require adjudication in courts outside Colorado.