



Colorado's Recent Restrictions on Non-Compete, Non-Solicitation, and Confidentiality Agreements

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After August 10, 2022, Colorado employers have a more limited range of options to negotiate Non-Compete Agreements with workers or prospective workers. In addition, the new legislation requires employers to provide additional notice. Failure to comply with these new requirements renders an agreement void and unenforceable. The revised statute, HB 22-1317 was signed into law by Governor Polis on June 8, 2022, and includes criminal and civil penalties, along with provisions allowing employees to recover damages, attorneys' fees, and costs. These new statutory requirements (C.R.S. § 8-2-113 (2022)) are prospective only and do not apply to non-compete, non-solicitation, or confidentiality agreements properly entered into prior to August 10, 2022.

Permissible Covenants:

A permissible covenant not to compete must include the following elements:

1. The employee or prospective employee must earn an Annualized Cash Compensation of at least that of a highly compensated worker, both at the time the covenant is created and at the time it is enforced. The amount is set by the DOL annually and is \$101,250 for 2022.
2. The covenant must be to protect the employer's trade secrets.
3. The covenant may not be broader in time or scope than is reasonably necessary to protect the listed trade secrets.

A permissible covenant not to solicit customers must include the following elements:

1. The employee or prospective employee must earn an Annualized Cash Compensation of at least 60% that of a highly compensated worker both at the time the covenant is created and at the time it is enforced. Sixty percent of the DOL's 2022 highly compensated worker amount of \$101,250 annually is \$60,750.
2. The covenant may not be broader in time or scope than is reasonably necessary to protect the employer's trade secrets.

Other permissible covenants:

1. To recover expenses to educate and train workers.
2. Confidentiality of the employer's proprietary and trade secret information, as long as it does not prohibit the employee from disclosing (a) information obtained from

- “general training, knowledge, skill, or experience;” (b) information already known to the public; or (c) information that the employee “has a right to disclose as legally protected conduct.”
3. A covenant not to compete or solicit regarding the purchase and sale of a business or its assets.
 4. To require a scholarship to be repaid if the worker undertaking an apprenticeship fails to comply with the terms of the scholarship agreement.

Notice Requirements: One of these otherwise permissible covenants will nonetheless be *void* unless the employer complies with 4 steps:

1. Notice of the covenant and its terms must be provided to (a) a prospective employee before she accepts the job offer; and (b) a current worker at least 14 days before the earlier of (i) the effective date of the covenant; or (ii) the effective date of any additional compensation or changes in the terms and conditions of employment that is given in exchange for the agreement.
2. The Notice must be a separate document from the covenant and must be clear and understandable by the employee/prospective worker. Importantly the Notice must be signed by the employee/prospective worker.
3. The employer must provide the employee with a copy of the Notice and the covenant once a calendar year if requested.
4. The Notice must (a) identify the name of the covenant; (b) state that the covenant could restrict the worker’s future employment; (c) list the paragraph number in the covenant where the restriction(s) is spelled out; and (d) the covenant must be attached to the Notice.

Jurisdiction and governing law for the enforceability of the covenant:

The enforceability of the agreement may not be adjudicated outside of Colorado if the employee primarily resided *or* worked in Colorado at the time the employment ended. Colorado law governs the enforceability of the covenant, regardless of a contrary contractual provision, for a worker who primarily resided *and* worked in Colorado at the time the employment ended.

Employer penalties for non-compliance with the terms of the revised statute:

1. Criminal charge - Class II Misdemeanor.
2. Civil penalties - \$5,000 per incident.
3. Actual damages, plus attorneys’ fees and costs.
4. Injunctive relief - void and unenforceable agreement.

If you are using a form Non-Compete, Non-Solicitation and Confidentiality Agreement, you should revise it for use on and after August 10, 2022, and create your Notice document to be compliant with the revised statute. C.R.S. § 8-2-113 (2022).

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