

## Colorado Adds New Limitations to Non-Compete and Non-Solicit Agreements

**August 19, 2022**

In recent years, a number of states have adopted legislation restricting the ability of employers to enter into non-compete agreements with employees who are not “highly compensated.” The State of Colorado has now followed this trend. Colorado’s new restrictive covenants law, effective August 10, 2022, bans new non-competes and non-solicits with employees who do not meet the state’s compensation threshold. The law requires advance notice before entering into a non-compete with a highly compensated employee, and provides that disputes with workers in Colorado regarding non-competes must be adjudicated in Colorado pursuant to Colorado law.

### **Ban for Non-Highly Compensation Employees**

The new Colorado statute prohibits non-competes with employees who are not highly compensated. Highly compensated employees have annualized cash compensation that exceeds a threshold determined by the Colorado Department of Labor and Employment. That threshold is currently \$101,250 and will be adjusted annually. For a non-compete to be valid, the employee’s annualized cash compensation must exceed this threshold both at the time the employee enters into the non-compete and “at the time it is enforced.”

Colorado’s new statute also prohibits agreements not to solicit customers with employees whose annualized cash compensation is less than 60% of the threshold amount (currently \$60,750). The statute is silent as to agreements not to solicit employees. The restrictions in the new statute do not apply to reasonable confidentiality agreements, restrictive covenants imposed as part of a sale of a business, or agreements to recover certain costs of education and training that are distinct from standard on the job training.

Restrictive covenants with highly compensated employees in Colorado whose annualized cash compensation exceeds the required threshold will still be subject to the existing limitations on restrictive covenants, including that they be designed to protect a legitimate interest of the employer and be no broader than necessary to protect that legitimate interest.

### **Notice**

The new law requires employers in Colorado to give notice to employees that they will be asked to enter into a non-compete. The statute imposes several notice obligations:

- An employer must give a new employee notice of the covenant not to compete and the actual terms of the covenant before the employee accepts the offer of employment.
  - Existing employees must get notice and the terms of the covenant not to compete at least 14 days before the effective date of the covenant or the effective date of any change in employment terms (including compensation) that provides consideration for the covenant not to compete.
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- The employer must give this notice in a separate document, and the notice must be in “clear and conspicuous terms in the language in which the worker and employer communicate about the worker’s performance.”
- The statute provides that an employer meets its notice obligation if the notice includes a copy of the agreement with the covenant not to compete, identifies the agreement by name, states that the agreement contains a covenant not to compete that could restrict subsequent employment options, and identifies the specific provisions of the agreement that contain the covenant not to compete.
- Importantly, the worker must sign the notice to acknowledge receipt.

### **Choice of Law and Forum**

Under the new statute, a covenant not to compete with a worker who primarily resided or worked in Colorado at the time of termination of employment must be governed by Colorado law, even if the agreement provides for the law of a different state. Similarly, a covenant not to compete with an employee who primarily resided or worked in Colorado at the time employment ends may not require the employee to adjudicate the enforceability of that covenant outside of Colorado.

### **Enforcement**

An employer who seeks to enter into, present or enforce a covenant not to compete that is void under the new Colorado law is liable for actual damages and a penalty of \$5,000 per worker harmed. The statute gives the courts discretion to reduce or eliminate the penalty if the employer acted in good faith and had reasonable grounds for believing that its conduct did not violate the statute. An employee or prospective employee may seek actual damages and may recover attorneys’ fees in any action brought under the new statute. An impacted employee (or prospective employee) or the Colorado Attorney General may seek injunctive relief or penalties. An employee or the employee’s actual or potential subsequent employer may seek a declaratory judgment that the covenant not to compete is unenforceable.

### **Conclusion**

With this new statute, Colorado joins jurisdictions from Washington state to Washington, D.C. that have recently enacted laws prohibiting non-competes with employees who are not highly compensated and requiring specific and detailed notice for highly compensated employees who do have non-competes. Colorado, like many of these other states, has also taken steps to try to ensure that employers and employees based in Colorado cannot avoid the Colorado statute by choosing to apply the law of another state or requiring disputes to be resolved in another state. As with many of these statutes, the Colorado law presents challenges to employers, but also provides some clarity about steps employers can take to ensure that their agreements with employees in Colorado are enforceable.

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