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WHAT WE DON'T KNOW: TEN UNANSWERED QUESTIONS REGARDING COLORADO'S NEWLY-AMENDED NONCOMPETE STATUTE

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SUMMARY

Some of the changes imposed by the 2022 amendments to Colorado's noncompete statute (C.R.S. §8-2-113) are clear and unambiguous. The amendments eliminated the former exception for management employees, imposed salary thresholds for noncompetition and customer-nonsolicitation covenants (collectively, "Covenants"), and added a requirement of written notice.

But many questions remain. Here are ten of the most frequently asked questions, along with some possible answers based on educated guesses:

1. Is continued at-will employment still valid consideration?

We don't know. Subsection (1) states that the General Assembly intends to preserve existing case law that (a) "defines what counts as a covenant not to compete" and (b) "specifies the extent to which a covenant not to compete for the protection of trade secrets must be tailored in scope." But what about existing case law regarding adequate consideration for a Covenant? Has that case law now been eliminated by the maxim of "expressio unius est exclusio alterius" (the expression of one thing is the exclusion of others)?

2. Does the statute protect service providers other than W-2 employees?

For example, does it protect contractors or corporate directors? The answer appears to be "yes." As reflected in the legislative history, House Bill 22-1317 was amended twice to ensure that "employee" was changed to "worker" through out the statute in order to make clear that the statute covers more than W-2 employees.

3. Does the statute restrict entities other than W-2 employers?

For example, does it restrict a parent or affiliate of the employer that includes a Covenant in a grant of equity or options to an employee of the employer? That seems likely. The statute makes repeated references to "employer." But the operative provision of the statute makes no such reference. Subsection (2)(a) provides: "Except as provided in subsections (2)(b) and (3) of this section, any covenant not to compete that restricts the right of any person to receive compensation for performance of labor for any employer is void." As written, that provision would seem to prohibit anyone from imposing a noncompete unless an exception applies.

4. Does the statute apply to employee non-solicitation covenants?

The answer seems to be "no." Such covenants have historically not been treated as noncompetes prohibited by the statute, and Subsection 1 preserves existing case law regarding what constitutes a noncompete covered by the statute.

5. How do we measure someone's compensation at the time the covenant is enforced?

The statute permits Covenants with employees who earn a specified amount of annualized cash compensation "at the time the [Covenant] is entered into and at the time it is enforced." C.R.S. §8-2-113(2)(b), (d). But most Covenants are enforced after employment has ended, when the (former) employee is no longer earning any compensation from the protected employer. In such cases, this provision will presumably be construed to measure the compensation at the time employment ended. But that is not certain.

6. Is notice required for a confidentiality agreement?

We don't know. Subsection (3) exempts four types of covenants from the general prohibition in Subsection (2): (a) a provision for recovery of the expense of education and training; (b) a reasonable confidentiality provision (with certain restrictions); (c) a sale-of-business Covenant, and (d) a scholarship repayment provision. And Subsection (4)(a) requires notice for "any covenant not to compete that is otherwise permissible under subsection (2) or (3)." Therefore, on its face, Subsection (4)(a) would appear to require notice of a confidentiality agreement. However, that would conflict with Subsection (1), which states the General Assembly's intention to preserve existing case law regarding "what counts as a covenant not to compete that is prohibited by this section." Colorado case law has not construed confidentiality agreements as noncompetes. How Colorado courts will resolve this conflict remains to be seen.

7. Is notice required for a sale-of-business covenant?

Probably not, except as to service providers. Sale-of-business Covenants have historically been treated as covered by the general prohibition against noncompetes (but also covered by an exception to that prohibition). Therefore, it seems clear that the notice requirement applies to a sale-of-business Covenant. But the notice requirement is limited to "workers" and "prospective workers." Therefore, it seems likely that notice would be required only if the Buyer were entering into the

Covenant with a seller or owner who is also a “worker” or “prospective worker” for the Buyer or one of its affiliates.

8. Is the form of notice described in subsection 4(d) the only acceptable form of notice?

We don’t know. Subsection 4(d) states: “An employer satisfies the notice requirement of this subsection (4) when . . . .” Is that intended to describe one method of satisfying the notice requirement - or the only method? The language could not be more ambiguous.

9. Does the same standard apply to the choice-of-law and forum-selection provisions?

Apparently not. Regarding choice of law, Subsection 6 states: “Colorado law governs the enforceability of a covenant not to compete for a worker who at the time of termination of employment primarily resided **and** worked in Colorado.” Regarding forum selection, Subsection 6 states: “A covenant not to compete that applies to a worker who, at the time of termination of employment primarily resided **or** worked in Colorado, may not require the worker to adjudicate the enforceability of the covenant outside of Colorado.” Given that these two sentences were added to the statute at the same time, in the same paragraph, a Colorado court will likely conclude that the choice of two different conjunctions was intentional.

10. Will employers really be prosecuted if a covenant is found to be void?

Who knows? It certainly seems that prosecutors would have far better uses for their limited resources than going after employers for overly broad noncompetes. But this is Colorado - the new California - so it’s anybody’s guess . . . .

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