

# LAW WEEK COLORADO

## Congress Targets Non-Compete Agreements

By **Doug Chartier**  
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WHILE THE U.S. Congress considers a one-size-fits-all restriction on non-compete clauses, some employers may be second-guessing the enforceability of their own restrictive covenants.

Democratic Sens. Chris Murphy from Connecticut and Al Franken from Minnesota introduced a bill earlier this month that would ban non-compete clauses for lower-income workers. The Mobility and Opportunity for Vulnerable Employees, or MOVE, Act would prohibit the restrictive agreements for employees earning less than \$15 an hour, or \$31,200 a year.

The bill is a response to employers' increasing use of non-compete clauses when hiring for positions even below the managerial tier. Last year, national media outlets reported that sandwich chain Jimmy John's required its low-wage sandwich makers to sign two-year non-competes. Employees had to agree not to work at any retail stores making at least 10 percent of their sales from sandwiches and located within three miles of any Jimmy John's location.

Restrictive covenants are traditionally used to keep competitors from employing former workers who may have trade secrets or specialized training and to keep employees from engaging in unfair competition post-employment.

Many states allow employers to require their workers to sign a restrictive covenant as long as that agreement's restrictions are reasonable in protecting the employer's legitimate competitive interests. For example, a legitimate concern may arise when an employer provides specialized training for an employee only to see that employee leave and a competitor step in to hire that person, reaping the benefits of the employer's training investment.

Restrictive covenants also include non-solicitation agreements, in which the employee agrees not to pursue a business relationship with the employer's customers or clients after that employee leaves the company.

Another competitive interest is an employer's goodwill with its clients: a salesperson can develop client relationships under an employer, and after taking a position with a competitor, help pull those clients over to the competitor.

Most laws governing restrictive



MIKE GRECO | COURTESY PHOTO

covenants aim to allow a company to protect its competitive interests without unduly handicapping its employees' ability to find work elsewhere upon separation.

But the MOVE Act might be oversimplifying this issue by just designating a wage standard, according to Mike Greco, a partner with Fisher & Phillips' Denver office who specializes in employee defection claims.

When determining whether someone should be contractually precluded from engaging in unfair competition, "there's nothing magical about the amount of compensation" the employer is paying him or her, Greco said. He added there are cases in which someone earning less than a \$31,200 salary, the bill's chosen ceiling, could nonetheless possess trade secrets or have exploitable customer relationships.

Pet groomers may not be high-wage earners, but they might be the face of the employer's company and can therefore

legitimately take customer relationships with them if they leave, Greco said.

The MOVE Act would establish a standard across the litany of state statutes governing restrictive covenants. Non-competes for post-employment, for example, are void in states such as California, Oklahoma and North Dakota.

Colorado prohibits restrictive covenants except when applied to contracts for the purchase or sale of a business, contracts to protect trade secrets, recovery of educating or training an employee who's been with the company for less than two years and for "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel."

When the Colorado General Assembly prohibited restrictive covenants with these exceptions in 1973, it stopped short of allowing goodwill protections. Greco, who recently relocated to Denver from Fisher & Phillips' Philadelphia office,

said that's a unique gap he has seen among restrictive covenant state laws.

"If you've got a salesperson who may not have had access to trade secret information but routinely developed relationships with your clients, you will be in a difficult spot in Colorado — unless they're a manager or an executive — to require them to abide by a restrictive covenant," Greco said. "I really think it's something that Colorado ought to take a look at again."

In addition to being aware of Colorado's goodwill gap, employers should bear in mind that there's no such thing as an "ironclad" non-compete provision; the most employers can realistically aim for is one that maximizes the prospects for enforceability.

"You can literally have the same non-compete agreement be enforceable one day against one employee and unenforceable the next day against another one," Greco said. •

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