

COLORADO SET TO SEVERELY LIMIT NON-COMPETES AND OTHER RESTRICTIVE COVENANTS: A 5-STEP ACTION PLAN FOR EMPLOYERS

Insights
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Colorado lawmakers just [passed a law](#) that will bring dramatic change to the non-compete landscape by significantly limiting the circumstances under which restrictive covenants may be used – virtually ending the practice of most non-competes in the state – and empowering workers and the Attorney General to punish violations through lawsuits for damages, statutory penalties, and attorneys’ fees. Governor Polis is all but certain to sign the non-compete reform bill that will then become effective 90 days after the legislature adjourns – which means the law should be in place by early August 2022. What do Colorado employers need to know about this significant development, and what are the five crucial steps you should take to prepare for the dawning of this new day?

Which Restrictive Covenants Will Be Allowed?

The easiest way to understand the impact of the legislation is to examine which restrictive covenants will be allowed in Colorado after the effective date of this law. Boiled down to its core, the new legislation provides as follows:

- **All restrictive covenants presented to or signed by workers after the effective date – including non-competes, non-solicitation agreements, and similar variations – will be void.** The sole exceptions that will be permitted are those accompanying a sale of business, those signed by a highly compensated employees when the non-compete is no broader than reasonably necessary to protect trade secrets, and customer non-solicitation agreements signed by workers earning sixty

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percent or more of the highly compensated employee threshold. "Highly compensated employees" in 2022 are those earning \$101,250 per year or more. This figure will be indexed to the threshold set by the Colorado Department of Labor and will increase annually.

- **Confidentiality agreements** are permitted, but only if they do not prohibit disclosure of information arising from a worker's general training, knowledge, skill, or experience. Where the line will be drawn in this regard is likely to be frequently litigated in the coming years. We expect confidentiality agreements to become much more important in Colorado workplaces given the impending limitations on non-competes.
- **Training cost recovery agreements** are permitted, provided:
 - the training is distinct from normal, on-the-job training; and
 - the amount sought to be recovered is reasonable and prorated on a monthly basis over a two-year period following the training.

Strict Notice Requirements Will Be in Place

Even the covenants allowed above will be considered **void** (and therefore subject to financial penalties) if you do not provide proper notice to the worker. But doing so will be tricky – and it will require planning and training on your part. Once the new law becomes effective, you must provide notice of any restrictive covenant you wish to have in force:

- to a **prospective worker** before they accept the offer of employment; and
- to a **current worker** at least 14 days before the earlier of the effective date of either the covenant or the additional consideration to be provided to the worker.

To be effective, this notice must be in a writing signed by the worker, in a separate document with clear and conspicuous language, and the agreement containing the non-compete must be provided at the same time. The writing must identify the non-compete agreement by name, and state that it contains a covenant that could restrict the worker's future employment options. Finally, it must direct the worker to the specific paragraphs of the non-compete agreement that

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contain the non-compete. As discussed below, **failure to comply not only renders the covenants void, but it subjects employers to statutory penalties, compensatory damages and attorneys' fees.**

Colorado Law and Venue Will Be Required

Another jolt to the system: **choice-of-forum provisions** applicable to non-competes may not require adjudication outside of Colorado if the worker primarily resided or worked in Colorado at the time their employment was terminated. Further, notwithstanding any contractual provision to the contrary, **Colorado law will govern** the enforceability of non-compete agreements for workers who primarily resided or worked in Colorado at the time their employment was terminated.

Serious Consequences for Non-Compliance

As noted above, all non-competes will be void unless they meet the statutory requirements. This is significant because employers will be subject to significant damages – including a \$5,000 penalty per employee if they enter into, attempt to enforce, or present to current or prospective workers any non-compete that is void under the new statute.

There is a sliver of good news: courts will have discretion not to award a penalty, or to award less than the full amount of a penalty, if the employer shows that it **acted in good faith and had reasonable grounds** for believing it was not acting in violation of the statute. This may be a steep hill to climb for employers who do not take care to analyze the statute and change their agreements and procedures.

In addition to actual damages and penalties, workers and prospective workers may obtain injunctive relief and recover reasonable attorneys' fees and costs. The Attorney General is likewise authorized to sue for relief under the statute.

5-Step Plan for Employers

The new statute will contain serious lurking dangers for employers. The \$5,000-per-worker penalty can add up to astronomical sums for employers who are not careful. You should consider the following five-step plan to put yourself in the best position for this impending new law.

1. **Carefully analyze and adjust as needed** the restrictive covenants you use, when they are used, with whom they

are used, and the procedures you use to roll them out.

2. **Beware of the one-size-fits all restrictive covenants** you would otherwise present to all employees. Once the new law is in place, you can only use non-competes with highly compensated employees (currently \$101,250/year) and customer non-solicitation agreements with those earning sixty percent of the highly compensated employee threshold (i.e., \$60,750). Even then, make certain the covenants are no broader than reasonably necessary to protect trade secrets.
3. Carefully **implement strict notice procedures** for all of your covenants. The notice requirements described above are intricate – but vitally important. Failure to comply not only renders agreements void, but provides exposure to statutory penalties, damages, and attorneys' fee awards.
4. Check your **stock option, restricted stock, and similar plans**. These plans commonly contain boilerplate and far-reaching covenants that apply to employees on a nationwide basis. They commonly purport to apply the law of the employer's state of incorporation. And they almost certainly do not meet the new statute's notice requirements. Failure to rethink these agreements and the procedures for rolling them out could form a basis for sizable claims.
5. Finally, you will want to take **good faith action steps** to demonstrate that your organization takes this new law seriously. As explained above, doing so may allow you to escape harsher penalties and damages should an unintentional violation occur. Document your efforts to train your leaders and otherwise comply with the law – including completion of this five-step plan – so that you can show reasonable good faith efforts.

Conclusion

We will continue to monitor this situation and provide updates as necessary. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information directly to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this

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