

Changes To Non-Compete Rules Also Mean Paying More Attention To Your Trade Secrets

Colorado's legislature recently passed an update to Colorado's non-competition statute. It will apply to any agreement entered into OR RENEWED after its effective date. The effective date is currently August 10, 2022.

These changes do not affect the laws currently in place when the restrictions on competition and solicitation of customers is for the purchase and sale of a business or the assets of a business, as long as they are reasonable as to what cannot be done, any geographic area restriction, and how long the restriction lasts.

However, the statutory language regarding noncompete covenants for workers has changed, and because of these changes now a big practical issue is that the business owner should be much more careful about protecting the business' trade secrets.

In the past, the law allowed covenants not to compete and covenants not to solicit customers for workers who are "executive or management personnel or officers or employees who constitute professional staff to executive or management personnel" - and that meant a lot of questions about exactly who qualified by this standard.

The new law changes that, and says that a covenant not to compete for workers can only be used with those who are earning a certain threshold amount (currently that is \$101,250) at the time the covenant is entered into and at the time it is enforced (that dollar amount adjusts as the Department of Labor standards adjust). A further limitation is that these covenants not to compete can also only be used to the extent it is for the protection of trade secrets and is no broader than is reasonably necessary.

For a covenant not to solicit customers, these can be used for workers who are earning less – 60% of that threshold amount noted above, with the same restrictions about being for the protection of trade secrets.

Some businesses don't use covenants like those, but only a confidentiality agreement. If the restriction is solely a reasonable confidentiality provision relevant to the employer's business then that is not subject to the above. However, a reasonable confidentiality provision would not prohibit disclosure of information that arises from the worker's general training, knowledge or experience, or that is readily available to the public (or otherwise information that the worker has a legal right to disclose).

So that big practical issue is that the business now should be much more careful about the business' trade secrets, because if they aren't then they can not only lose claims for wrongful taking of trade secrets but they may not be able to enforce the covenant not to compete or not solicit customers.

Under the Colorado Uniform Trade Secrets Act the term "trade secret" means "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value". Further, that law goes on to say that to be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

Many businesses are pretty casual about protecting their trade secrets. They allow access to information (and may even actively share information) to a broader array of people in their workforce than is really needed. That might be good for transparency with the workforce and fit the company culture, but it does not help when the business is then trying to make a claim that someone has taken their trade secrets or trying to enforce covenants not to compete and not to solicit.

The new law has a lot of specific requirements, including sufficient advance notice to workers bound by these covenants, the worker has the right to a copy of the agreement each year, and certain penalty provisions may apply for failure to comply.

Bottom line - any business that uses these types of arrangements will need to look at their current agreements, and if the agreement is renewed then the new law applies and changes may need to be made. New agreements entered into after the effective date will likely need to be different than those used by the business before. And as noted above the business needs to be proactively thinking harder about protecting its trade secrets.