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# Laws barring noncompete clauses spreading

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**Judy Greenwald**

Colorado is the latest state to enact a law curbing noncompete and nonsolicitation agreements, but it will not be the last, experts predict.

H.B. 22-1317, "Concerning Restrictive Employment Agreements," was signed into law in June and took effect Aug. 10. It eliminates noncompete agreements for employees earning less than $101,250 a year and provides for the protection of trade secrets.

The law, which is prospective, also applies to customer nonsolicitation agreements unless they are entered into by someone who earns at least 60% of the threshold for highly compensated workers, or $60,750. Workers must also be provided notice of the law before they accept employment.

Companies that apply noncompetes that do not meet statutory requirements are subject to penalties of $5,000 per worker.

The new law is more stringent than the one it replaced, under which noncompetes could, for instance, be used to recover the expense of educating an employee who worked for the employer for less than two years.

Colorado employers have expressed frustration with the new law, said Carrie Hoffman, a partner with Foley & Lardner LLP in Dallas. "Nobody likes being told when they're about to hire someone" that that person does not make enough to be eligible for a noncompete, she said.

While some complain the law is vague, Ms. Hoffman said, "Employers at least know what they can and cannot agree to."

Ms. Hoffman said also the $101,250 a year salary threshold can be a challenge in cases involving lower-level salespeople.

The Colorado law "falls within a trend that has been occurring within the states to set wage floors for noncompetes," said Erik W. Weibust, a partner at Epstein Becker Green P.C. in Boston.

Experts say the Colorado law falls in the middle of the pack in terms of its stringency among the states that have enacted similar legislation.

They note, however, that Colorado sets itself apart with another law, which became effective in March, that criminalizes restrictive covenants, including noncompetes; the misdemeanor carries a $750 fine per violation, possible punishment of 120 days in prison, or both.

To date, Illinois, Maine, Maryland, Massachusetts, Nevada, New Hampshire, Oregon, Rhode Island, Virginia, Washington and Washington D.C. have all enacted noncompete measures.

More states are expected to address the issue, according to experts, who recommend that multistate employers be careful to comply with each state's laws (see story, below).

Ms. Hoffman said Democratic-leaning states are more likely to enact such legislation.

Observers say that while President Biden issued an executive order in July 2021 ordering the Federal Trade Commission to explore the issue of noncompetes, there has been little federal action so far on the issue.

Legislative activity in the area of noncompetes will likely remain focused on the state level for at least the next four to five years, said Jeanne Fugate, a partner with King & Spalding LLP in Los Angeles.

Observers say insurance brokers are among the types of business most likely to be affected by the laws.

Numerous brokers have sued former employees who joined rivals in the past several years. In August, for instance, Marsh LLC filed a poaching lawsuit against Lockton Cos. LLC and the official who led its special purpose acquisition company group, charging violation of noncompete agreements and solicitation of Marsh clients.

Other industries most affected by the laws include health care organizations, financial advisers and data-oriented companies.

“It’s always a difficult balance, with employers seeking to protect their business, trade secrets and goodwill on the one hand, and on the other the employee’s right to work freely wherever they choose,” said Amber Gonzales, a litigator with Crowell & Moring LLP in Denver.

States updating their restrictive covenant laws often do not want to eliminate noncompetes but also want to avoid having individuals railroaded by them, said Eric Barton, a partner with Seyfarth Shaw LLP in Atlanta.

Pointing to the salary restrictions, Bennett Pine, a shareholder with Anderson Kill in New York, said, “It’s one thing to restrict an executive making $500,000. It’s another thing to prevent a file clerk making $35,000 a year from going to a competitor.”

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## Employers must examine, track agreements

Colorado employers should review their noncompete agreements in light of the law that went into effect last month, experts say.

And, with several other states having enacted their own noncompete laws, multistate employers should ensure they meet the legal provisions of each state in which they operate.

The Colorado law “shines a hard light” on what is and is not a trade secret, said Mary L. Will, deputy counsel with Faegre Drinker Biddle & Reath LLP in Denver.

“Many employers think they have trade secrets, and sometimes they may not,” she said. They are “going to have to have their ducks in a row in terms of what they want to protect.”

Multistate employers should introduce tracking mechanisms to ensure they’re familiar with each relevant state law and what to do in response, said David C. Roth, an associate with Fisher Phillips LLP in Denver.

Ms. Will noted, for instance, that a March ruling by the 5th U.S. Circuit Court of Appeals in New Orleans in *Rouse Enterprises LLC v. James B. Clapp II* said employers cannot have candidates sign noncompete agreements before they are actually employed.

But the new law in Colorado, which is not in the 5th Circuit’s jurisdiction, calls for agreements to be signed before candidates start work.

"Employers need to get creative about how to impose restrictions to protect themselves against individuals" in whom they have made significant investments, or who have been allowed access to trade secrets, to protect themselves against such employees leaving, said Maxwell N. Shaffer, a partner with Holland & Knight LLP in Denver.

Some noncompete agreements he has reviewed are "lazy and generic," Mr. Shaffer said.

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