

IS CONTINUED EMPLOYMENT STILL ENOUGH? GIVEN RECENT AMENDMENTS TO COLORADO NONCOMPETE STATUTE, CONTINUED AT-WILL EMPLOYMENT MAY NO LONGER PROVIDE VALID CONSIDERATION FOR NONCOMPETE WITH EXISTING EMPLOYEE

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In *Lucht's Concrete Pumping, Inc. v. Horner*, 255 P.3d 1058 (Colo. 2011), the Colorado Supreme Court held that continued at-will employment provides sufficient consideration for a noncompetition covenant entered into after the commencement of employment. The 2022 amendments to the Colorado noncompete statute (C.R.S. 8-2-113) now call that holding into question.

As amended by House Bill 22-1317, C.R.S. 8-2-113(1) states the intent of the General Assembly to preserve existing case law regarding (a) what counts as a prohibited covenant not to compete and (b) the extent to which a covenant not to compete must be tailored to be enforceable. Notably, subsection (1) does not indicate a legislative intent to preserve existing case law regarding what constitutes adequate consideration for a noncompete.

And the new subsection (4) suggests that continued at-will employment may no longer be considered adequate consideration. As amended, C.R.S. 8-2-113(4)(i) now requires that an existing employee be given advance notice of a new noncompete at least 14 days before the earlier of (A) "the effective date of the covenant" or (B) "the effective date of any additional compensation or change in the terms of conditions of employment that provides consideration for the covenant." If continued at-will employment still provides adequate consideration for a noncompete with an existing employee, then clause (B) would seem to be superfluous.

Together, subsections (1) and (4) of Colorado's newly-amended noncompete statute suggest that continued at-will employment may no longer provide adequate consideration for a noncompete with an existing employee. Therefore, given the potential liability for attempting to enforce a void noncompete - actual damages, attorney fees and costs, a civil penalty of \$5,000 per employee, and the possibility of prosecution for a misdemeanor - employers should consider offering something more than continued at will employment to an existing employee in Colorado who is asked to sign a noncompete.

If signed into law by Governor Polis, the amendments to C.R.S. 8-2-113 will take effect as to noncompetes entered into on or after the effective date of the legislation, which will be on or about August 10, 2022.

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