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Wyoming Legislature Takes a Bite Out of Covenants Not to Compete

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Governor Gordon signed a bill this week to significantly narrow the enforceability of covenants not to compete under Wyoming law. While the new law leaves Wyoming businesses with a few options to continue to use those covenants, employers need to move quickly in advance of the new law's effective date.

New Covenants Not to Compete Are Void, With Some Exceptions. The new law, known in the Legislature as Senate File 107, prohibits contractual restrictions on a person's ability to work: “Any covenant not to compete that restricts the right of any person to receive compensation for performance of skilled or unskilled labor shall be void.” This language is broad enough to invalidate all such covenants, whether contained in an employment contract, an independent contractor agreement, or some other contract.

The law includes some exceptions. Most importantly, the law applies only to contracts entered into after July 1, 2025, and specifically states that nothing in the bill alters, amends or impairs any contract or agreement entered into before that date. Employers will have some breathing room to get new covenants in place before the law goes into effect, and to consider how to draft future agreements to take advantage of the options that may remain after the law becomes effective. Also, employers should consider how to amend, not replace, current agreements that include covenants not to compete to avoid creating new covenants after July 1 that could be invalidated by this law.

Second, the law includes potentially broad exceptions for covenants with “executive and management personnel” and officers, and covenants with “professional staff” to executive and management personnel. These terms are not defined in the bill, but because the bill uses the same language as a former Colorado statute, we can get some hints from how courts have interpreted the Colorado statute. To decide if a person is in an executive position, courts considered whether the employee was in charge or supervised a business; whether the employee acted in an unsupervised capacity; whether the employee was paid based on production; and, whether the employee had hiring or firing authority. Similarly, Colorado courts considered various factors relating to an employee's scope of authority to determine if the employee was a manager. Professional staff was generally defined as those who serve as key members of a manager's or executive's staff in the implementation of managerial or executive functions. Whether Wyoming courts will follow those definitions remains to be seen.

Also, the new law permits covenants not to compete "to the extent the covenant provides for the protection of trade secrets." The law adopts a definition of trade secret broader than the definition in the Uniform Trade Secrets Act, which should allow employers to maximize the protection of secret information that may not qualify as a trade secret under that act. Information will qualify as a trade secret that can be protected by a covenant not to compete if the information provides the business an advantage or opportunity to obtain an advantage over those who do not know or use the information, and the employer takes measures to prevent the secret information from becoming known outside those selected by the employer.

Finally, the new law does not invalidate covenants not to compete when contained in a contract for the purchase and sale of a business or the assets of a business. Such covenants are common in transactions where the purchaser wants to prevent the seller from competing after the purchaser has paid to acquire the goodwill of the seller's business.

Contractual Provisions for the Recovery of Expenses. The new law also takes aim at contractual terms that create financial obligations for employees if they leave their jobs before a specified time frame. Employers in certain fields are often willing to pay relocation expenses, offset a candidate's educational loans or licensing expenses, or pay for additional training for an employee, provided the employee agrees to repay those expenses if the employment relationship is terminated. The new law invalidates any provision for the recovery of expenses paid by the employer for "relocating, educating and training" an employee unless the recovery is capped 100% of the expense if the employee works for less than two years; 66% of the expense for an employee who works for the employer for between two and three years; and, not more than 33% of recovery for an employee who has worked for the employer between three and less than four years. The law implies that it voids contracts which allow any recovery when an employee leaves after more than four years of employment.

Doctors Get Special Treatment. The new law also voids any covenant not to compete in an employment, partnership or corporate agreement "between physicians" that restricts the right of a physician to practice medicine. This language suggests that the law intends to invalidate covenants not to compete entered into between physicians who are members of or employed by a medical practice owned by physicians, and not those contracts with hospitals or other types of entities. Notably, this subparagraph of the law does not include and is not limited by the exceptions discussed above for trade secrets or executives, managers, officers or professional staff, but it does apply only prospectively to contracts entered into after July 1, 2025.

All the Old Rules Still Apply. Employers should keep in mind that, even if you fall into one of the exceptions provided by the new law, employers still have an uphill battle to enforce a covenant not to compete in court. In short, employers must prove the covenant not to compete is justified by a special business interest, such as the protection of trade secrets, and the covenant is reasonable in geographic scope and duration considering the

nature of the business interest. And, since a 2022 Wyoming Supreme Court decision, Wyoming courts are no longer authorized to revise an unreasonable covenant to make it reasonable. This new statute adds new hurdles to what was already a difficult case for employers.

Act Now! Wyoming employers have some time to prepare for this new law. If you are contemplating getting covenants not to compete signed with employees, obviously do so before July 1 so those agreements will not be subject to the new law. Also, if you ask your current employees to sign a covenant not to compete when they did not have such a covenant before, you must provide additional consideration beyond just continued employment.

Second, if you already have covenants not to compete in place, consider whether those agreements have terms that permit you to renew or amend the agreements without entering into an entirely new agreement. The new law applies only to contracts “entered into” after July 1. It should not invalidate existing contracts that are renewed or amended after that date when the covenant not to compete was in the agreement before that date.

Third, review your trade secrets and what you do to protect the secrecy of that information. To rely on the trade secret exception in the new law, employers will need to demonstrate not only that they have a trade secret, but that they have taken steps to protect the secret from disclosure to anyone other than selected employees. And, just saying something is a trade secret is not enough to satisfy the requirements to enforce a covenant not to compete, now or after the new statute is effective.

Finally, evaluate whether the covenants not to compete you have in place are necessary. Wyoming law has turned against covenants not to compete in recent years largely because some employers overreached and attempted to enforce covenants in situations where the covenants just didn't fit well. For example, the primary sponsor of the new law explained its justification by pointing to a Wyoming case where a home health agency used a covenant not to compete to keep a home health aide from continuing to care for a patient she had been taking care of for more than a decade. Covenants not to compete are not valid if the only reason for the covenant is to prevent competition!

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seek the advice of your legal counsel.