§ 8-2-113. Unlawful to intimidate worker - agreement not to compete.

Colorado Statutes

Title 8. LABOR AND INDUSTRY

LABOR I - DEPARTMENT OF LABOR AND EMPLOYMENT

Labor Relations

Article 2. Labor Relations, Generally

Part 1. GENERAL PROVISIONS

Current through 2013 Legislative Session

§ 8-2-113. Unlawful to intimidate worker - agreement not to compete

(1) It shall be unlawful to use force, threats, or other means of intimidation to prevent any person from engaging in any lawful occupation at any place he sees fit.

(2) Any covenant not to compete which restricts the right of any person to receive compensation for performance of skilled or unskilled labor for any employer shall be void, but this subsection (2) shall not apply to:

(a) Any contract for the purchase and sale of a business or the assets of a business;

(b) Any contract for the protection of trade secrets;

(c) Any contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of less than two years;

(d) Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

(3) Any covenant not to compete provision of an employment, partnership, or corporate agreement between physicians which restricts the right of a physician to practice medicine, as defined in section 12-36-106, C.R.S., upon termination of such agreement, shall be void; except that all other provisions of such an agreement enforceable at law, including provisions which require the payment of damages in an amount that is reasonably related to the injury suffered by reason of termination of the agreement, shall be enforceable. Provisions which require the payment of damages upon termination of the agreement may include, but not be limited to, damages related to competition.

Cite as C.R.S § 8-2-113

History. L. 05: p. 161, § 3. R.S. 08: § 400. C.L. § 4164. CSA: C. 97, § 92. CRS 53: § 80-4-13. C.R.S. 1963: § 80-11-13. L. 73: p. 940, § 1. L. 82: (3) added, p. 232, § 1, effective April 6.

Case Notes:

ANNOTATION

Law reviews. For article, "Noncompetition Covenants in Colorado: A Statutory Solution?", see 52 Den. L.J. 499 (1975). For article discussing remedies available in an employee's breach of a confidential relationship with an employer regarding trade secrets, see 48 U. Colo. L. Rev. 189 (1977). For article, "Protecting Technical Information:

The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "Drafting Noncompete Covenants: Statutory and Common Law Constraints", see 13 Colo. Law. 757 (1984). For article, "Drafting a Noncompetition Clause for the Colorado Contract", see 20 Colo. Law. 703 (1991). For article, "Covenants Not to Compete in the Sale of a Business: Protecting Goodwill", see 26 Colo. Law. 31 (Dec. 1997). For article, "Non-compete by Non-disclosure: The Doctrine of Inevitable Disclosure", see 28 Colo. Law. 73 (September 1999). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado - Part I", see 30 Colo. Law. 7 (April 2001). For article, "The Law of Trade Secrecy and Covenants Not to Compete in Colorado - Part II", see 30 Colo. Law. 5 (May 2001).

This section is directed at what may be termed unlawful picketing. People v. Harris, 104 Colo. 386, 91 P.2d 989 (1939).

This section is intended to protect employees from noncompetition clauses except in carefully defined circumstances. Colo. Accounting Machs., Inc. v. Mergenthaler, 44 Colo. App. 155, 609 P.2d 1125 (1980); Nat'l Graphics Co. v. Dilley, 681 P.2d 546 (Colo. App. 1984).

Covenants not to compete are contrary to the public policy of Colorado and are void, except for some narrow exceptions such as a covenant in a contract for the purchase and sale of a business. DBA Enter., Inc. v. Findlay, 923 P.2d 298 (Colo. App. 1996).

A covenant that fails to meet one of the exceptions defined in this section is facially void rather than voidable. Management Recruiters of Boulder v. Miller, 762 P.2d 763 (Colo. App. 1988); Harvey Barnett, Inc. v. Shidler, 143 F. Supp.2d 1247 (D. Colo. 2001); Phoenix Capital, Inc. v. Dowell, 176 P.3d 835 (Colo. App. 2007).

Even if a noncompetition agreement is not void under this section, to be enforceable, the clause must satisfy an established rule of reasonableness as to both duration and geographic scope. Nat'l Graphics Co. v. Dilley, 681 P.2d 546 (Colo. App. 1984); Electrical Distribs., Inc. v. SFR, Inc., 166 F.3d 1074 (10th Cir. 1999).

And this established rule of reasonableness is recognized in the legislative history of this section. Nat'l Graphics Co. v. Dilley, 681 P.2d 546 (Colo. App. 1984).

Broad language of license agreement that would perpetually limit licensee swimming instructors' ability to train other instructors in the widely-known skill of teaching swimming to infants and young children worldwide is an unenforceable covenant not to compete. Harvey Barnett, Inc. v. Shidler, 143 F. Supp.2d 1247 (D. Colo. 2001).

Noncompetition agreement that is worldwide and perpetual is unduly broad, both as to time and geographic scope, and is thus void. Nutting v. RAM Southwest, Inc., 106 F. Supp.2d 1121 (D. Colo. 2000).

Noncompetition covenant in contract between dentist and professional corporation was void as against public policy, where the contract provided for the dentist's use of the corporation's facilities but stated that the dentist was not an agent or employee of the corporation for any purpose. Smith v. Sellers, 747 P.2d 15 (Colo. App. 1987).

Noncompetition covenant not validated by trade secret provision. A trade secret provision in an employment agreement does not validate an unrelated restrictive covenant whose sole purpose is to prohibit all competition. Colo. Accounting Machs., Inc. v. Mergenthaler, 44 Colo. App. 155, 609 P.2d 1125 (1980); Dresser Industries, Inc. v. Sandvick, 732 F.2d 783 (10th Cir. 1984).

Employer must establish that a restrictive covenant not to compete is not void under this section before a preliminary injunction will be granted. Porter Industries, Inc. v. Higgins, 680 P.2d 1339 (Colo. App. 1984).

Nothing in the statute itself limits its applicability only to covenants not to compete designed to protect buyers, therefore, given appropriate circumstances, a covenant running in favor of a franchiser is an enforceable covenant under the statute. Keller Corp. v. Kelley, 187 P.3d 1133 (Colo. App. 2008).

Injunctive relief is the most common and generally preferred relief for breach of a covenant not to compete;

however, the conditional language of a bill of sale and covenant not to compete referenced in the promissory note is the equivalent of a liquidated damage provision, which amounts to a penalty and is therefore not enforceable. DBA Enter., Inc. v. Findlay, 923 P.2d 298 (Colo. App. 1996).

Covenant not to compete extinguished when business ceases to exist. If a covenant not to compete which was binding on the seller of the business were enforced by the buyer after the business had ceased to exist, the covenant would constitute a void and unenforceable restraint of trade. Gibson v. Eberle, 762 P.2d 777 (Colo. App. 1988).

The reasonableness of covenants ancillary to the sale of a business depends on whether the restraint on competition provides fair protection to the buyer's purchase of good will, while imposing restrictions no greater than necessary to protect the value of that good will. Reed Mill & Lumber Co. v. Jensen, 165 P.3d 733 (Colo. App. 2006).

A covenant not to compete ancillary to the sale of a business is unreasonable if its restrictions are greater than necessary to protect legitimate business interests. Reed Mill & Lumber Co. v. Jensen, 165 P.3d 733 (Colo. App. 2006).

Evidence established "sale of business" under subsection (2)(a). Boulder Medical Center v. Moore, 651 P.2d 464 (Colo. App. 1982); King v. PA Consulting Group, Inc., 485 F.3d 577 (10th Cir. 2007).

Under "sale of business" exception, where plain language of covenant prohibited "working" for competitors, case was reversed and remanded to determine whether activities beyond merely loaning money or leasing property to a competitor materially breached the covenant. Nat'l Propane Corp. v. Miller, 18 P.3d 782 (Colo. App. 2000).

"Sale of business" and "management personnel" exceptions applied to covenant required as part of property disposition in dissolution of marriage. In re Fischer, 834 P.2d 270 (Colo. App. 1992).

Test for determining whether a covenant fits within the "trade secrets" exception: (1) Is the restrictive covenant justified at all in light of the facts; and (2) are the specific terms reasonable? Management Recruiters of Boulder v. Miller, 762 P.2d 763 (Colo. App. 1988).

For a covenant not to compete to fit within the trade secret exception of subsection (2), the purpose of the covenant must be the protection of trade secrets, and the covenant must be reasonably limited in scope to the protection of those trade secrets. Gold Messenger, Inc. v. McGuay, 937 P.2d 907 (Colo. App. 1997).

Whether a particular group of employees qualifies under the exception of subsection (2)(d) is an issue of fact. Occusafe, Inc. v. EG&G Rocky Flats, Inc., 54 F.3d 618 (10th Cir. 1995).

Whether a nonsolicitation clause in a contract fits within the trade secrets exception in subsection (2) is an issue of fact. Saturn Sys., Inc. v. Militare, 252 P.3d 516 (Colo. App. 2011).

A person who conducts or supervises a business is "management personnel". A person who supervises 50 employees in a division with a ten million dollar budget is "management personnel" and therefore falls under the management personnel exception, which is broader than covering merely a few key personnel. DISH Network Corp. v. Altomari, 224 P.3d 362 (Colo. App. 2009).

Management exception to the statutory limit on noncompetition clauses does not apply when an employee does not manage any other employees and there are three levels of management employees above the employee. Atmel Corp. v. Vitesse Semiconductor Corp., 30 P.3d 789 (Colo. App. 2001).

The "professional staff to executive and management personnel" exception is limited to those persons who, while qualifying as "professionals" and reporting to managers and executives, primarily serve as key members of the manager's or executive's staff in the implementation of management and executive functions. Phoenix Capital, Inc. v. Dowell, 176 P.3d 835 (Colo. App. 2007).

Invalidity of noncompetition agreement also renders invalid an agreement not to solicit customers of former employer. Agreement not to solicit customers is form of agreement not to compete that has effect of restricting former employee from working in same business for another employer. Phoenix Capital, Inc. v. Dowell, 176 P.3d 835 (Colo. App. 2007).

Colorado has not recognized an employer's right to protect good will created by an employee's relationships with the employer's customers. Reed Mill & Lumber Co. v. Jensen, 165 P.3d 733 (Colo. App. 2006).

Whether industrial hygienists constitute "professional staff to executive and management personnel" is an issue of fact. Occusafe, Inc. v. EG&G Rocky Flats Inc., 54 F.3d 618 (10th Cir. 1995).

Section applies to independent contractors as well as employees. Colo. Supply Co., Inc. v. Stewart, 797 P.2d 1303 (Colo. App. 1990).

Noncompetition provision specifying the amount of damages and setting a fee percentage as liquidated damages in a physician's employment contract violated subsection (3). The contract requirement that the plaintiff pay defendant a percentage of his fees for two years provided for damages that were not "reasonably related to the injury suffered" by the defendant by reason of the termination of the contract with plaintiff. Also, the fee percentage set as liquidated damages in the noncompetition provision was disproportionate to any possible loss incurred by the defendant. Wojtowicz v. Greeley Anesthesia Servs., 961 P.2d 520 (Colo. App. 1997).

Applied in Harrison v. Albright, 40 Colo. App. 227, 577 P.2d 302 (1977).

Cross References:

For the "Uniform Trade Secrets Act", see article 74 of title 7.