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Colorado Increases Criminal Penalties for Violations of Non-Compete Statute

March 2022 • [Rebecca C. Sokol](#)

[Colorado Senate Bill 21-271](#) (SB 21-271) went into effect on March 1, 2022. Under SB 21-271, which overhauled Colorado's sentencing laws for misdemeanors and petty offenses, an employer who executes an improper non-compete agreement may be liable for a class 2 criminal misdemeanor.

Per Colorado's non-compete statute, C.R.S. § 8-2-113, any covenant not to compete that restricts the right of any person to receive compensation for skilled or unskilled labor is void unless the agreement falls into ones of the following categories:

- 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 was employed by the employer for less than two years.
- d. Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel.

SB 21-271 amends the text of C.R.S. § 8-2-113 to include a criminal penalty as a new subsection (4). As of March 1, 2022, the penalty for violating the non-compete statute

is a class 2 misdemeanor punishable by up to 120 days in jail or a fine of up to \$750— or both.

Although SB 21-271 newly includes the misdemeanor penalty as part of C.R.S. § 8-2-113, criminal penalties for violation of the non-compete statute have existed prior to SB 21-271's enactment. Previously, C.R.S. § 8-2-115 provided that a violation of the non-compete statute was criminally punishable by a fine between \$10 and \$250 dollars and/or imprisonment for up to 60 days. SB 21-271 repealed C.R.S. § 8-2-115, increased the applicable penalty, and moved the misdemeanor language into the non-compete statute itself.

Although courts have consistently held that C.R.S. § 8-2-113(2) expresses a strong public policy against covenants not to compete, see *Phoenix Capital, Inc. v. Dowell*, 176 P.3d 835, 840 (Colo. App. 2007), there are no known instances in which violation of the non-compete statute has been prosecuted as a criminal offense. Still, the fact that the Colorado legislature decided to enhance the criminal penalties for non-compete enforcement signals that criminal liability is possible, even if it has not been imposed historically.

Though it is difficult to say how, if at all, SB 21-271 will affect enforcement of the non-compete statute, employers should continue to carefully draft restrictive covenants, including non-compete and non-solicitation agreements, to protect those agreements' legality and enforceability under C.R.S. § 8-2-113(2). Please reach out to us if you need assistance evaluating or revising a non-compete or non-solicitation agreement.

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