§ 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


Case Notes:

ANNOTATION


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).


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

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
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

"Sale of business" and "management personnel" exceptions applied to covenant required as part of property

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.

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

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

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.

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.

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.
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).


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).


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