

## **So, you've got a non-compete. Tips for dealing with covenants not to compete.**

By John F. Reha

**DISCLAIMER/NOTE: The author is not giving any legal advice to the reader of this article. The reader is advised to seek advice from counsel competent in the areas of competition restrictions before taking any action. No attorney-client relationship exists between the author and the reader unless and until the reader formally retains the author as counsel.**

Agreements not to compete have become increasingly common. Many employees execute covenants not to compete as a condition of employment. Although increasingly commonplace, a number of issues arise under Colorado's Non-Compete Statute making non-competes more difficult to enforce in Colorado than in other states. This article provides tips for the employee who has executed such an agreement.

**1. The Default Rule of Invalidity.** The Non-Compete Statute starts by declaring all non-competes "void." Void means completely invalid and unenforceable.

**2. Exceptions.** The Non-Compete Statute then goes on to create three exceptions where non-competes will be enforced. They are:

**a. Sale of business.** If the covenant not to compete arises out of the sale of a business it will be enforced, *at least as to those persons who are involved in the sale itself such as stockholders, owners, etc.* Enforcement under this exception does not extend to employees who have no meaningful ownership position in the business.

**b. Professional staff.** Non-competes entered into with "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel" are also enforceable. Whether an employee is an executive or management employee will depend upon that employee's duties. The Colorado courts have stated that actual management responsibilities such as supervising other employees is necessary for an employee to be a manager or executive. Further, "professional staff to executive or management personnel" has been limited to those employees who are both (1) employed as "professionals," and (2) engage in their profession as part of the employer's key management team. Thus, the professional staff portion of this exception reaches only a few employees.

**c. Trade secrecy.** Non-competes are also enforced to the extent they protect legitimate trade secrets. What qualifies as a legitimate trade secret is often a major point of contention that centers around the Colorado Uniform Trade Secrets Act and associated case law. Thus, a comprehensive understanding of the law is essential to navigating through this fluid concept. The trade secrecy exception will not support a complete bar to any post-termination competition, but only the use of a trade secret in such competition.

**3. Reasonableness.** If a non-compete satisfies the Non-Compete Statute, it must still be reasonable as to time, geography and scope. In a number of states, this "reasonableness" rule is the only limitation to enforcement of non-competes. While the Non-Compete Statute renders

this untrue in Colorado, to be enforceable the competition restriction must still meet all reasonableness considerations, even assuming it falls into one of the three exceptions noted above.

**4. What to do.** If you are party to a covenant not to compete and are concerned as to its validity or enforceability, you should confer with counsel having expertise as to non-competes. Doing this will increase the chances of a favorable resolution.

John F. Reha is an attorney practicing in Littleton, Colorado. His practice focuses heavily on non-compete, trade secrecy, non-disclosure and other competition issues. He has been repeatedly recognized as an expert in these areas and has repeatedly been named to lists of outstanding attorneys practicing in Colorado.