

Colorado Courts Further Restrict Use of Restrictive Covenants

by Steve Bell and Marina Lyons

Refusing to enforce a non-solicitation provision that violated public policy, the Colorado Court of Appeals held that parties to a non-solicitation agreement cannot contractually obligate the court to “blue pencil” the agreement to conform it to Colorado law.

Employer 23 LTD sued former employee Tracy Herman for breach of non-compete and non-solicitation provisions in her employment agreement. A jury concluded that Herman did not breach the non-compete provision and returned a verdict in favor of 23 LTD on the non-solicitation claim, awarding 23 LTD damages of one dollar. The trial court set aside that verdict and entered judgment in favor of Herman on both claims, holding that the non-solicitation provision violated Colorado law and refusing to narrow the unenforceable provision to render it enforceable. 23 LTD appealed the trial court’s findings.

The appellate court affirmed and rejected 23 LTD’s argument that the severability provision in the parties’ contract obligated the court to “blue pencil” the non-solicitation provision. The court clarified that it is not the function of the courts to rewrite a contract for parties to allow enforcement of contracts that, as written, violate public policy.

This case follows the trend of numerous states that have adopted laws restricting the use of non-competition and non-solicitation agreements. In Washington, for example, a new law contains a penalty provision that requires employers to reimburse the employee for attorneys’ fees, damages, or a statutory penalty of \$5,000 if a court rewrites, modifies, or partially enforces a non-compete clause.

Previously, an employer had little reason to draft a narrowly tailored restrictive covenant. It could largely accomplish what it wanted by including an overly broad provision and expecting a court to rewrite it and enforce the modified version. Pursuant to this case, however, as well as new laws across numerous jurisdictions, employers should cease using such employer-friendly boilerplate clauses. Employers should instead carefully review existing employment agreements and restrict the scope of non-competition and

Related People

- Steve Bell
- Marina Lyons

Related Capabilities

- Labor & Employment
- Labor & Employment Guides

non-solicitation provisions that may be considered overly broad by courts.