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The Colorado Court of Appeals recently issued a decision addressing the enforceability of noncompete agreements. The case is significant because for the first time, a Colorado court addresses the sufficiency of consideration for noncompete agreements signed after employment begins. The Colorado Court of Appeals has now made it clear that continued at-will employment alone is not sufficient consideration to support a noncompete agreement. In order to obtain an enforceable noncompete from an existing employee , you have to give something to the employee in exchange for the employee's promise not to compete.

Employee Reneges on Promise Not to Compete

In 2001, Tracy Horner began working for Lucht's Concrete Pumping (LCP) as the company's mountain division manager. LCP viewed Horner's position of mountain division manager as key to the success or failure of its mountain division, in part because of the relationships the manager was expected to develop with customers in the region. Two years after beginning work, LCP asked Horner to sign a noncompete agreement, which Horner did. Under the agreement, Horner promised that he would not compete against LCP for 12 months following his separation from employment with company. Horner, who was an at-will employee, did not receive any pay increase, promotion, or additional benefits from LCP in exchange for his promise not to compete.

Approximately a year after signing the noncompete agreement, Horner resigned from LCP, and three days later, he began working for one of LCP's competitors. LCP claimed that its mountain division customers followed Horner to his new employer, and as a result, LCP had to close its business in the region.

LCP then sued Horner for, among other things, breach of the noncompete agreement. However, the trial court ruled for Horner, finding that the noncompete was unenforceable because of a lack of consideration. In order to have enforceable contract, the law requires that "consideration" be given by the parties to the contract. "Consideration" is something of value given in exchange for getting something from another person. In the context of a noncompete agreement, in order for an employer to obtain an enforceable promise from its employee to refrain from competing against the employer after the employee separates from employment, the employer must give the employee something of value in exchange for the employee's promise. In this case, the trial court found LCP gave Horner nothing in exchange for Horner's promise not to compete; therefore,

Horner's promise lacked consideration and the noncompete agreement was unenforceable.

Continued At-Will Employment Not Enough to Support a Noncompete

LCP appealed the trial court's decision to the Colorado Court of Appeals, arguing that LCP's continued employment of Horner as an at-will employee was sufficient consideration to support the noncompete. In other words, LCP's forbearance of its right to fire Horner at any time during his employment was sufficiently valuable to support the noncompete agreement. While acknowledging that courts in other states have held that continued at-will employment is sufficient consideration to support a noncompete, the Colorado Court of Appeals declined to follow those court decisions. The Court stated that while an employer may agree to continue an at-will employee's employment if the employee agrees to sign the covenant, nothing prevents the employer from discharging the employee at any future date." Thus, the employer's promise requires nothing more than what it already promised when the employer originally agreed to hire the employee on an at-will employment basis. In other words, a promise of continued employment at-will is not really a promise at all, since the employer's promise to employ the employee on an at-will basis is entirely optional.

In reaching its decision, the Court of Appeals distinguishes prior cases holding that continued at-will employment is sufficient consideration to support changes to employment policies and procedures. Those cases typically addressed changes in employee handbooks. It is common that such changes are not accompanied by additional compensation or any other form of consideration, yet they are enforced. The Court distinguished those situations on several grounds, including that such modifications deal with a grant of benefits to the employee, rather than restrictions on the employee, as is the case with a noncompete; the policy and procedure changes in those cases were offered to a group of employees, rather than addressed to an individual; and it is the employee seeking to enforce the employer's promise in those cases, rather than the employer seeking to enforce their own policy or procedure. *Lucht's Concrete Pumping, Inc. v. Horner,* Case No. 08CA0936 (Colo. App. June 11, 2009).

Lessons Learned

Unless this decision is reversed by the Colorado Supreme Court, Colorado employers must now provide employees with some sort of additional consideration whenever an employee is asked to sign a noncompete agreement after the commencement of employment. Such consideration can be in the form of additional pay, a bonus, a promotion, additional duties and responsibilities, or another form of compensation. The key is to ensure that the consideration is viewed by the employee as extraordinary – in other words, something the employee would not have received without signing the noncompete.

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