Between The Lines

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Be Wary of Broad Non-Compete Agreements in Colorado

Walter Winslow
wwinslow@cp2law.com

Recently, Colorado's employers have been testing new grounds to expand non-compete agreements or provisions. Non-compete agreements or provisions in employment or buy-sell agreements for the sale of a business are quite common, though not always valid or enforceable. Colorado statute on non-competes (C.R.S. 8-2-113) provides the framework to determine whether a non-compete agreement is in compliance with Colorado law. C.R.S. 8-2-113 (2) provides in relevant part:

(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.

As noted in the statute, covenants not to compete are void except in four narrow circumstances.

Colorado courts uniformly recognize that non-competes are disfavored and void unless specifically allowed under the statute. DBA Enters., Inc. v. Findlay, 923 P.2d 298, 302 (Colo. App. 1996). However, employers can carefully use the exceptions to craft a non-compete language that is enforceable.

For example, most businesses are very protective of their trade secrets and can use a covenant not to compete to protect such trade secrets. For purposes of the statute, a "trade secret" is not expressly defined and what constitutes a trade secret is a question of fact for the trial court. Porter Industries, Inc. v. Higgins, 680 P.2d 1339 (Colo. App. 1984). However, courts often refer to the Colorado Uniform Trade Secrets Act, which did define "trade secret". C.R.S. 7-74-102(4). Further, the business "must have taken measures to prevent the secret from becoming available to persons other than those selected by the [business] to have access thereto for limited purposes." C.R.S. 7-74-102(4).

Colorado courts have identified certain factors to be considered in what is a trade secret, such as "the amount of effort or money expended in obtaining and developing the information and the amount of time and expense it would take for others to acquire and duplicate the information." Porter Industries, 680 P.2d at 1341 (quotation omitted). In effect, a business may enforce a non-compete with its vendors, contractors and employees to protect their trade secrets and courts will uphold such efforts, provided that the non-compete is reasonably limited in scope to protect the trade secrets.

However, it seems to be a recent trend to try to use the C.R.S. 8-2-113(2)(b) exception for "executive and management personnel and officers and employees who constitute professional staff to executive and management personnel" to enforce non-compete provisions. Some may

Coan, Payton & Payne, LLC Promotes Carol S. Raznick to Equity Member

Carol S. Raznick
craznick@cp2law.com

Ms. Raznick's legal practice focuses on all aspects of commercial real estate, homebuilding, financing, mergers and acquisitions and general business. She assists her clients with all their transactional needs, including negotiating and drafting contracts and other documents regarding acquisitions, warranties, indemnities, dispositions, purchase and sale options, debt, as well as entity formations and restructuring.

"Carol is a terrific attorney and a terrific colleague," said founding member, G. Brent Coan. "She has a proven commitment to serving clients with utmost professionalism and competency. We are very pleased that Carol is taking this professional step with us."

try to shoe horn employees into this category, such as defining an employee's job title or duties in an attempt to fit this category. However, such attempts should be avoided unless there is merit in defining an employee's job title or duties in such a manner.

Courts have held that "executive and management personnel" applies to employees who are "in charge" and act in an unsupervised capacity. Reed Mill & Lumber Co., Inc. v. Jensen, 165 P.3d 733, 738 (Colo. App. 2006), as modified on denial of reh'g (Feb. 15, 2007) (citation omitted). However, the expanded use of this exception primarily focuses on those who "constitute professional staff to executive and management personnel" since this is a much broader category of employees. The Colorado General Assembly did not define this term so courts have grappled to determine what type of employee it should apply to.

Courts have used Webster's Dictionary to define "professional" as "engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency ...: characterized by or conforming to the technical or ethical standards of a profession or an occupation: manifesting fine artistry or workmanship based on sound knowledge and conscientiousness: reflecting the results of education, training, and experience". Webster's Third New International Dictionary (1986) at 1811.

The key is that such professional employee is also staff to executive and professional personnel, which requires more than just reporting to executive and professional personnel. In fact, a professional employee must "primarily serve as key members of the manager's or executive's staff in the implementation of management or executive functions." Phoenix Capital, Inc. v. Dowell, 176 P.3d 835, 842 (Colo. App. 2007). Such an employee must have had the type of access to, or involvement in, management or executive decisions. Id.

In conclusion, while there are many legitimate and legally valid reasons to have an employee or third party sign a non-compete agreement, one must be careful not to over reach and try to force a job description onto an employee for such an agreement. It will not be legal or enforceable and could be costly to attempt to enforce. Thus, having a well versed attorney assist with advising and crafting such language is paramount.

Steve Suneson
ssuneson@cp2law.com

Are you Ready to take Advantage of the Benefits of the New US Tax Act?

Considerations for In-bound Investment into the US

The new United States Tax Cuts and Jobs Act (officially known as "an Act to provide for reconciliation pursuant to Titles II and V of the concurrent resolution on the budget for fiscal year 2018") (the "Tax Act") went into effect January 1, 2018. This article posits that inbound investment into the US is poised to grow significantly as a result of the Tax Act and examines some related cross-border areas that should be carefully considered by foreign companies operating in the US. This discussion is not intended as a detailed tax analysis of the Tax Act for which an experienced cross-border CPA should be consulted.

The US has long relied on its dominant economic power in the world to attract foreign investment. However, its corporate tax rate has lagged behind other industrialized nations. The maximum federal corporate income tax rate until this year (under a progressive tax system) was 35% (plus applicable state income tax). The new Tax Act introduces a flat corporate tax rate of 21% which is not only competitive with, but in some cases lower than, other industrialized nations. The corporate alternative minimum tax (AMT) was also eliminated. In most cases, these changes will result in tax savings on income earned by foreign-owned US businesses. Given its dominant position in the world, and setting aside other

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fluctuating variables which may affect the US economy, it seems likely that foreign investment into the US will grow, perhaps substantially, as a result of the Tax Act.

Nevertheless, a foreign company operating in the US should take a nuanced view of the Tax Act. The Tax Act contains both benefits and potential drawbacks and appropriate business and tax planning is important.

A critical aspect of foreign-US related or affiliate company structure is transfer pricing planning. The Tax Act directly impacts such structuring.

It is common for foreign companies to form US subsidiaries and thereafter enter into transfer pricing agreements between the parent company and the US subsidiary for items such as intercompany administrative services, management services and/or intercompany IP licenses. In the case of start-up US subsidiaries, these agreements are especially necessary because the US subsidiary often has limited expenses (few or no employees, less leasing costs, etc.). Instead, all or most of the back-office services to support US operations are provided by the parent company in the home nation. This results in US revenues which are not accompanied by associated US expenses but which instead are incurred in the home nation. Historically the US tax rate has been significantly higher than most home nation tax rates which generally has incentivized having lower taxable US profits. Transfer pricing agreements are intended to harmonize revenue and expense in the two jurisdictions and, often, reduce US profit in accordance with complicated transfer pricing regulations.

At first blush, the reduction of the US corporate tax rate to 21% eliminates a common reason for transfer pricing planning. Caution is advised, however, because the Tax Act expressly discourages strategies to exploit gaps in tax rules to artificially shift profits to low or no-tax locations ("base erosion"). Not only will transfer pricing agreements remain important to comply with applicable transfer pricing regulations, but the Tax Act introduces a new US tax to discourage base erosion. The base erosion anti-abuse tax (BEAT) generally applies to deductible payments to foreign affiliates (such as those made under transfer pricing agreements) and is in addition to the US corporate income tax. Fortunately, the BEAT has a significant threshold that takes into account substantial annual gross receipts of a taxpayer which means that many lower to middle market companies should not be affected (i.e., gross receipts greater than $500 million). Large companies that would be affected by BEAT may rely on exemptions. A US subsidiary subject to BEAT can generally exempt payments made to foreign affiliates for services provided at cost. Note, however, the foreign affiliate's country of residence may not allow for pricing at cost under its own transfer pricing laws. Transfer pricing agreements will be necessary to document such services (and perhaps to separate cost versus mark-up) with further analysis warranted. Existing transfer pricing agreements should be reviewed and modified as appropriate to account for the changes made by the Tax Act.

As new reporting requirements for BEAT and penalties are introduced, accounting firms familiar with the nuances of the Tax Act and BEAT should be consulted prior to the filing of corporate tax returns for 2018 and beyond.

Seemingly unaffected by the Tax Act should be the

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Mr. Suneson practices in the areas of business law and commercial transactions, commercial contracts, secured transactions, private equity, and corporate structure and governance. Additionally, Mr. Suneson has substantial cross-border and international experience, providing comprehensive and sophisticated United States corporate legal services to Canadian, Swedish and other foreign and international companies and individuals who operate in the U.S. His international transactions practice focuses on technology, software development and licensing, manufacturing, distribution, retail, services, and construction.

prevalent use of C-corporations by foreign owners in the US. Unlike US owners of US businesses who prefer pass-through entities, such as US limited liability companies ("LLCs"), foreign owners often prefer to use C-corporations since it generally avoids the US branch profit tax (which does not affect US owners), allows the parent company to take maximum advantage of any income tax treaty benefits, and because many foreign nations do not recognize the pass-through tax treatment of LLCs. The reduction of the corporate tax rate to 21 percent, coupled with the elimination of the corporate AMT, should further strengthen the C-corporation as the entity of choice for most foreign owners.

In sum, while the Tax Act promises benefits to most foreign companies in the US, each foreign company should conduct a nuanced and customized analysis of the Tax Act. The particular impact will vary depending on numerous factors, including size and industry. Analysis by an experienced cross-border tax professional, in collaboration with a cross-border corporate attorney, is recommended. Taking such action will ensure that US operations are compliant and conducted in the most optimal and cost-efficient manner.

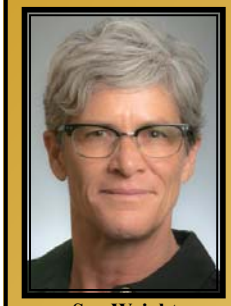
CP2 Welcomes New Hires!

Amanda T. Huston
ahuston@cp2law.com

Amanda Huston, Esq. joins the firm's Fort Collins office after working as a clerk at the Colorado Court of Appeals for the Honorable David M. Furman. Ms. Huston is a member of the Colorado Bar Association, the Denver Bar Association, and the Colorado Women's Bar Association. She focuses her law practice on business law and real estate matters.

Nicole Chapman joins CP2 with over 10 years of experience in legal support including roles as a paralegal, office manager, legal assistant and conflicts analyst. She is accomplished in all phases of litigation, database management, drafting discovery requests and responses, assisting with deposition, arbitration, and trial preparation. Ms. Chapman is primarily working in the firm's Denver office.

Nicole N. Chapman
nchapman@cp2law.com



Sue Wright
swright@cp2law.com

Sue Wright joins CP2 as a legal assistant for the estate planning attorneys in the firm's Fort Collins office. Ms. Wright holds a Bachelor's degree from the University of Northern Colorado and a Master's from Colorado State University. She will graduate with her Paralegal Associates Degree from Front Range in May 2018.

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www.cp2law.com

Fort Collins
103 W. Mountain Ave., Suite 200
Fort Collins, CO 80524
(970) 225-6700

Greeley
5586 W. 19th St., Suite 2000
Greeley, CO 80634
(970) 339-3500

Denver
999 18th St., South Tower, Suite 1500
Denver, CO 80202
(303) 861-8888

Attorneys

K. Michelle AmRhein
R. Clay Bartlett
Willis V. Carpenter
G. Brent Coan
Kay L. Collins
Elizabeth S. Cypers
William F. Garcia
Amanda T. Huston
Daniel W. Jones
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