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When an employee leaves to work for a competitor, many businesses have legitimate concerns about unfair competition. The former employee may give his new employer information that took years and significant resources to develop, or share sensitive information that will jump-start the competitor in the market. One way to mitigate such a risk is by having employees sign noncompete agreements, which restrict post-employment activities. Businesses often require employees to sign such agreements as a condition of employment. But sometimes, employers ask existing employees to sign noncompetes.

In 2009, a panel of the Colorado Court of Appeals held that an employer could not enforce a noncompete signed by an existing employee unless the employee received consideration beyond continued employment. This was bad news for those who wanted to enforce noncompetes, as they are already viewed with disfavor under Colorado law and they are enforceable in limited circumstances. Thankfully, and much to the delight of employers who want to enforce a noncompete, the Colorado Supreme Court recently held in *Lucht's Concrete Plumbing, Inc. v. Horner* that continued employment *does* constitute sufficient consideration to support a noncompete agreement.

In its unanimous decision, the Court reasoned that, because an employer may terminate an at-will employee at any time during the employment relationship, "its forbearance from terminating that employee is the forbearance of a legal right." It went on to explain that, "such forbearance constituted adequate consideration to support a noncompetition agreement with an existing at-will employee."

Although this case is a big win for those who want to enforce a noncompete agreement signed by an existing employee, the Supreme Court did leave an opening for employees. As the Court explained, all noncompete agreements must be assessed for their reasonableness. In addition, the Court warned that to the extent an employer enters into a noncompete agreement with an employee with the intention of terminating the employee immediately afterwards, then the agreement may fail for lack of consideration.

The bottom line: Employers do not need to provide additional consideration beyond continued employment to current employees asked to sign noncompete agreements, but employers should nonetheless tread with caution. Colorado law disfavors noncompete agreements and courts will still review them to make a reasonableness determination, which includes a determination of whether an employer acts in bad faith if it

terminated the employee shortly after execution of the noncompetition covenant. As a result, employers may want to give additional consideration to current employees in exchange for signing of a noncompete agreement, even though such additional consideration is not technically required. Similarly, before hiring an employee who signed a noncompete, analyze the agreement carefully or your company might end up in a lawsuit, along with the employee.

For more information about noncompete agreements or other employment issues, please contact Alyssa K. Yatsko at akyatsko@hollandhart.com.

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