Colorado Year End Legal Review 2022

I. Legislative Update:

A. Colorado Enacted the Colorado False Claims Act

The "Colorado False Claims Act," Colo. Rev. Stat. §24-31-1201 *et seq*, became effective on August 10, 2022. Under the Act, a person is liable to the applicable state or political subdivision ("Government") for any[1] of the following:

a) Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval;

b) Knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim;

c) Having possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivering, or causing to be delivered, less than all of the money or property;

d) Authorizing the making or delivery of a document certifying receipt of property used, or to be used, by the Government and, with the intent to defraud the Government, making or delivering the receipt without completely knowing that the information on the receipt is true;

e) Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government. [2]

The civil penalty for a violation of the Act is "not less than eleven thousand eight hundred dollars and not more than twenty-three thousand six hundred dollars per violation, plus three times the amount of damages that the state sustains because of the act of that person . . . ."[3] The violator also may be liable for the Government's reasonable attorney fees and costs incurred

[1] Items not relevant to the construction industry are omitted.
[2] Colo. Rev. Stat. § 24-31-1203(1)(a).
[3] Colo. Rev. Stat. § 24-31-1203(1).

in enforcing the Act.[4] Courts, however, may reduce these penalties if the violator furnishes all information known to him to the investigating authority and fully cooperates with the investigation.[5]

The Act authorizes the attorney general to investigate potential false claims.[6] The Act, however, also includes a whistleblower provision, which allows private parties to assist the Government in identifying and pursing fraudulent conduct and to share in any recovery and protects whistleblowers who bring these violations and failures from retaliation.[7] The Government may intercede in civil actions brought by a whistleblower.[8]

Under the whistleblower provision, anyone may bring a civil action for a violation of the False Claims Act on behalf of himself or herself and for the Government.[9] In the event of a successful claim by the whistleblower, they are entitled to fifteen to twenty-five percent of the proceeds received from the action or settlement.[10] If the Government does not intercede, the whistleblower is entitled to twenty-five to thirty percent.[11]

On the other hand, if the defendant wins, it can recover its attorney fees and expenses from the whistleblower only if the claim was frivolous, clearly vexatious, or primarily for harassment.[12] The whistleblower, however, cannot be discharged, demoted, suspended, threatened, harassed, intimidated, sued, defamed, blacklisted, or in any other manner retaliated against or discriminated against.[13] The Act includes a three-year statute of limitations and a six-year statute of repose.[14]

B. Colorado Statute Requires New Climate-Friendly Construction Codes

The Colorado Building Greenhouse Gas Emissions Act, Colo. Rev. Stat. §24-38.5-401 *et seq*, became effective on June 2, 2022 ("Act"). The Act requires Cities and counties across Colorado to update their building energy codes to increase efficiency and reduce climate pollution in both new commercial and residential construction.[15]

The Colorado energy office must create three sets of model building codes applicable to residential and commercial buildings. These include: (1) a model electric and solar ready code by

[4] Colo. Rev. Stat. § 24-31-1203(4).
[5] Colo. Rev. Stat. § 24-31-1203(2)(a).
[6] *See* Colo. Rev. Stat. § 24-31-1207.
[7] Colo. Rev. Stat. § 24-31-1204(3).
[8] Colo. Rev. Stat. § 24-31-1205(2).
[9] Colo. Rev. Stat. § 24-31-1204(3)(a).
[10] Colo. Rev. Stat. § 24-31-1204(5)(a)(I).
[11] Colo. Rev. Stat. § 24-31-1204(5)(b).
[12] Colo. Rev. Stat. § 24-31-1204(5)(d).
[13] Colo. Rev. Stat. § 24-31-1204(8)(b).
[14] Colo. Rev. Stat. § 24-31-1205.
[15] Colo. Rev. Stat. § 24-38.5-401.

June 1, 2023; (2) a model low energy and carbon code by June 1, 2025; and (3) a model green code by July 1, 2024.[16] The Act also creates two grant programs for (1) building electrification for public buildings and (2) high-efficiency electric heating and appliances.[17]

The grant program to electrify public buildings is limited to public owners. It "provide[s] grants to higher education institutions, local governments, school districts, state agencies, and special districts for the installation of high-efficiency electric heating equipment."[18] This grant program seeks to make public buildings in Colorado more energy-efficient and climate-friendly.[19]

The grant program for high-efficiency electric heating and appliances, on the other hand, "provide[s] grants to institutions of higher education, local governments, utilities, nonprofit organizations, businesses and other entities as determined by the Colorado energy office, and housing developers for the installation of high-efficiency electric heating equipment in multiple structures within a neighborhood."[20] Grant money can be used in a wide range of ways to reduce energy use in eligible multi-unit building or multi-building neighborhood.[21]

The Act establishes the clean air building investment fund to fund the two grant programs.[22] Funding for the Act includes a $3 million for grants and provide training related to the 2021 international energy code; $10 million for the building electrification for public buildings grant program; and $11 million for the creation, implementation, and administration of the high-efficiency energy heating and appliances grant program.[23]

C. New Law Further Restricts Employers from Imposing Non-Compete Agreements in Colorado

The Restrictive Employment Agreement Act, Colo. Rev. Stat. §8-2-113, became effective August 10, 2022. It amends Section 113 to further limit the enforceability of non-competes and other restrictive covenants for employees working or living in Colorado.

What does this mean for employers? While many non-competes were already void in Colorado, the amendment removes several previously permissible exceptions that would permit some non-compete agreements. Specifically, individuals classified as "highly compensated workers" for purposes of protecting an employer's trade secrets may be restricted by a non-compete so long as the agreement's protection is "no broader than

[16] Colo. Rev. Stat. § 24-38.5-402(5), (6); Colo. Rev. Stat. § 24-38.5-402.
[17] Colo. Rev. Stat. § 24-38.5-404.
[18] Colo. Rev. Stat. § 24-38.5-404(2).
[19] *See* Colo. Rev. Stat. § 24-38.5-404.
[20] Colo. Rev. Stat. § 24-38.5-405(2).
[21] *See* Colo. Rev. Stat. § 24-38.5-405(3); *See also* Colo. Rev. Stat. § 24-38.5-403 (providing a provision for assistance in seeking grants under the Act).
[22] Colo. Rev. Stat. § 24-38.5-406.
[23] Colo. Rev. Stat. § 24-38.5-406(3).

reasonably necessary to protect the employer's legitimate interest in protecting the trade secret."[24] To be classified as a "highly compensated worker," an employee must currently earn an annual compensation of no less than $101,250.00.[25] In addition, the new law also allows non-compete agreements related to the non-solicitation of customers, provided that the employee "earns an amount of annualized cash compensation equivalent to, or greater than, sixty percent of the threshold amount for highly compensated workers" ($60,750.00) and "the non-solicitation covenant is no broader than reasonably necessary to protect the employer's legitimate interest in protecting trade secrets." In other words, restrictions to protect trade secrets and prevent solicitation may still be allowed. All other employment restrictions are void.

Further, the new law clarifies that the following categories of agreements are not prohibited:

- **Recovery of Training Expenses.** Provisions that provide for an employer's recovery of the expense of educating and training a worker if distinct from "normal on-the job training."

- **Confidentiality Agreements.** Reasonable confidentiality provisions relating to an employer's business; however, employers may not limit the disclosure of information arising from an employee's general "training, knowledge, skill or experience whether gained on the job or otherwise, information that is readily ascertainable to the public, or information that a worker otherwise has a right to disclose as legally protected."

- **Sale of a Business.** Covenants related to the purchase and sale of a business or its assets.

- **Apprenticeship Scholarship.** Provisions requiring repayment of a scholarship provided to an individual working in an apprenticeship.

Even compliant agreements can be stricken if notice is not provided. The amendment requires that written notice be provided to prospective employees prior to acceptance of an offer of employment as well as to current employees at least fourteen (14) days prior to the covenant becoming effective or any effective change in the employee's condition of employment (i.e., a promotion or transition into a new role). The employer must provide the notice to the employee along with a copy of the agreement containing the covenant not to compete, identify the non-compete agreement by name, state that the agreement contains a covenant not to compete and direct the employee to the specific section

[24] The Colorado Uniform Trade Secrets Act defines a "trade secret" as "the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business, or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes." CO Rev Stat § 7-74-102 (2016).
[25] This figure is set by the Colorado Department of Labor on an annualized basis.

or paragraph of the agreement containing the non-compete covenant. The employee must then sign the notice.

The new law carries over language already found in existing C.R.S. § 8-2-113(1) in that any use of force, threat, or intimidation to prevent an individual from engaging "in any lawful occupation at any place the person sees fit" is unlawful but the amendment makes any such violation of this sub-section a Class 2 Misdemeanor. Furthermore, employers that violate *any provision* within the new law are subject to a $5,000 penalty per employee or prospective employee, along with potential actual damages, attorney's fees, and reasonable costs for private actions. Any adjudication as to the enforceability of the covenant will be in Colorado.

Employers should also be aware that the new law is not retroactive, meaning that existing non-compete agreements executed before August 10 will not be impacted by the amendment. However, moving forward, employers should consult with legal counsel to determine whether modifications should be made to their current non-compete agreements to ensure compliance following August 10.

II. Case Law Update:

A. Limitations of Liability are not Exculpatory Clauses and are Enforceable

The Colorado Court of Appeals, on September 23, 2021, in a matter of first impression, held that limitation of liability provisions are not exculpatory in nature and are therefore enforceable even if ambiguous.[26]

The dispute arose out of the construction of an apartment building in Denver, Colorado (the "Project"). The plaintiff, architect Johnson Nathan Strohe, P.C. ("Strohe"), retained the defendant, MEP Engineering, Inc. ("MEP"), to perform mechanical, electrical, and plumbing engineering for the Project.[27] During the Project's construction, the Project owner ("Owner") discovered errors in MEP's work which led to a dispute between Strohe and the Owner.[28] The parties resolved the dispute through arbitration.[29] The arbitrator awarded the Owner $1.2 million for damages resulting from MEP's work.[30]

Strohe then sued MEP in Colorado state court seeking reimbursement of the $1.2 million damages award for which it was responsible to Owner. MEP asserted that its liability was capped by a limitation of liability clause contained in its design contract with Strohe (the "MEP Contract"). The provision stated in full:

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[26] *Strohe v. MEP Eng'g, Inc.*, 501 P.3d 826, 828 (Colo. App. 2021).
[27] *Strohe*, 501 P.3d 826, 828.
[28] *Strohe*, 501 P.3d 826, 828.
[29] *Strohe*, 501 P.3d 826, 828.
[30] *Strohe*, 501 P.3d 826, 828.

> Limitation of Liability: In light of the limited ability of the Engineer to affect the Project, the risks inherent in the Project, and of the disparity between the Engineer's fees and the potential liability exposure for problems or alleged problems with the Project, the Client agrees that if the Engineer should be found liable for loss or damage due to a failure on the part of MEP-ENGINEERING, INC. such liability shall be limited to the sum of two thousand dollars ($2,000 or twice The Engineer's fee whichever is greater) as consequential damages and not as penalty, and that is liability exclusive.[31] (sic)

Strohe moved for a determination of law under C.R.C.P 56(h), arguing the clause was exculpatory and must be strictly construed.[32] Strohe further argued it was too vague, confusing, and ambiguous to be enforceable.[33] The trial court disagreed, finding the clause unambiguous and enforceable.[34] MEP then moved for dismissal with prejudice, which was granted, and Strohe appealed.[35]

On appeal, the Colorado Court of Appeals held the trial court erred in finding the clause unambiguous.[36] Specifically, the Court found it could be read broadly as a limitation on all liability under the MEP Contract or more narrowly as a limitation only on a party's right to claim consequential damages and was therefore ambiguous.[37] However, the Court, found this ambiguity did not make the provision wholly unenforceable.[38] The Court noted that while exculpatory provisions are unenforceable if they are not clear and unambiguous, the same is not true of limitations of liability.[39] The Court of Appeals reasoned that limitations of liability clauses are not exculpatory in nature because they are not full waivers of liability.[40] Instead, a limitation of liability clause represents the parties' "bargained-for level of liability . . . ."[41] Because the Court of Appeals deemed the clause in *Strohe* was a limitation of liability and not an exculpatory provision, the Court of Appeals held its ambiguity did not prevent it from being enforced.[42]

The Court of Appeals remanded the case to the trial court for a determination of the meaning of the ambiguous clause.[43]

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[31] *Strohe*, 501 P.3d 826, 828.
[32] *See Strohe*, 501 P.3d 826, 828.
[33] *Strohe*, 501 P.3d 826, 828 (quoting Strohe's motion).
[34] *Strohe*, 501 P.3d 826, 828.
[35] *See Strohe*, 501 P.3d 826, 829.
[36] *Strohe*, 501 P.3d 826, 830.
[37] *See Strohe*, 501 P.3d 826, 830.
[38] *Strohe*, 501 P.3d 826, 830.
[39] *Strohe*, 501 P.3d 826, 831.
[40] *See Strohe*, 501 P.3d 826, 831.
[41] *Strohe*, 501 P.3d 826, 831.
[42] *Strohe*, 501 P.3d 826, 833.
[43] *Strohe*, 501 P.3d 826, 833; *see also Johnson Nathan Strohe, P.C. v. MEP Eng'g, Inc.*, No. 21SC802, 2022 Colo. LEXIS 688, at *1 (July 25, 2022) (denying writ of certiorari).

B. The Colorado Open Records Act is Available to Litigants

On December 15, 2022, the Colorado Court of Appeals affirmed that the procedures established in Colorado Open Records Act are "a distinct procedure from the production of documents as part of discovery, to request the record."[44]

In *Roane v. Archuleta*, 2022 COA 143, Roane filed a declaratory judgment action against the Archuleta County Board of County Commissioners for alleged violations of the Colorado open meetings statute.[45] The underlying declaratory judgment action was subject to the simplified procedures found in C.R.C.P § 16.1, which allows the parties to make disclosures and request limited discovery.[46] Neither party disclosed any documents nor propounded any discovery requests.[47] Instead, the parties filed cross-motions for summary judgment. While the motions were pending, Roane submitted a request pursuant to the Colorado Open Records Act ("CORA") to Kristy Archuleta as the Clerk and Recorder of Archuleta County.[48]

Archuleta denied the Open Records request asserting that the record was not open to inspection because the request violated the "otherwise provided by law" exception to the Open Records Act as interpreted by *Martinelli v. Dist. Court of Denver*, 612 P.2d 1083, 1087 (Colo. 1980).[49] Archuleta based her rejection on Roane's failure to disclose documents timely or propound discovery as part of the litigation. Thus, Archuleta reasoned, the "law" otherwise provided to preempt the CORA request was the Colorado Rules of Civil Procedure.[50]

Both the trial court and the Court of Appeals sided with Roane, affirming that the Open Records laws are separate from the Colorado Rules of Civil Procedure and no "statute, rule or court order prevented [Roane] from making" the CORA request.[51]

The Colorado Supreme Court mentioned but did not address the validity of the Colorado Attorney General's opinion that plaintiffs cannot use the Open Records act to exceed "a limit on discovery imposed by the court or under the rules of civil procedure. . . ."[52] This dicta was interesting, as Rule 16.1 almost certainly included a case management order and the Colorado Supreme Court must not have interpreted the time limitation as "a limit on discovery imposed by the court." Therefore, while litigants can use the Open Records Act during, or after, discovery in the litigation, it is advisable to retain unused discovery requests in case otherwise time-barred requests under CORA become necessary.

The parties' time to appeal this decision is still open.

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[44] Roane v. Archuleta, 2022 COA 143, ¶63 (CO Ct. App. 2022)
[45] *Id*. at ¶1,2 and 3 (CO Ct. App. 2022)
[46] *Id*. at ¶3 (CO Ct. App. 2022)
[47] *Id*. at ¶3 (CO Ct. App. 2022)
[48] *Id*. at ¶1 and 4 (CO Ct. App. 2022)
[49] *Id*. at ¶7 (CO Ct. App. 2022)
[50] *Id*. at ¶9 (CO Ct. App. 2022)
[51] *Id*. at ¶9 (CO Ct. App. 2022)
[52] *Id*. at ¶38 (CO Ct. App. 2022)