



Colorado Noncompetition Law

The Enforceability And Advisability Of Noncompetition, Nonsolicitation And Confidentiality Agreements
Chris Ottele and Emma Savory

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Topics

Overview

Defense of Trade Secrets Act

Colorado's Four Exceptions

Reasonableness: Duration and Scope

Consideration

Nonsolicits and Confidentiality

Drafting

Multistate Issues

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What is a Noncompetition Agreement



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Balance of Concerns



Legitimate
Business
Interests



Employee's
Right to Make
a Living

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Defend Trade Secrets Act

One Hundred Fourteenth Congress
of the
United States of America

AT THE SECOND SESSION

*Began and held at the City of Washington on Monday,
the fourth day of January, two thousand and sixteen*

An Act

To amend chapter 90 of title 18, United States Code, to provide Federal jurisdiction for the theft of trade secrets, and for other purposes.
Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.
This Act may be cited as the "Defend Trade Secrets Act of 2016".

Access to Federal Courts

Employee Protections

Ex Parte Order

Mandatory Language

States Still Have a Say

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First Exception: Sale of Business



Greater
Deference

Must Still Be
Reasonable

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Second Exception: Trade Secrets



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Third Exception: Education and Training



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Fourth Exception: Executive and Management

Executive and management personnel and officers

Employees who constitute professional staff to executive and management personnel



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Physicians



Noncompetes Prohibited

Liquidated Damages

Unless reasonably related to the injury suffered

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Duration & Scope = Must Be Reasonable

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Duration

What is reasonable?

- Necessary to safeguard the plaintiff's business.
- 6 months to perpetuity

Colorado federal district court once described a noncompete with a maximum term of 18 months as "well within the terms approved by Colorado courts."

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Scope

Location the employer actually does business.



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Consideration

Noncompetition covenants require consideration.



Forbearance of terminating an at-will employee at any time constitutes adequate consideration.

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Nonsolicitation Agreements

Coworkers: Limited to prohibiting active solicitation

Customers: Analyzed like a noncompetition agreement

- Must fall into one of the exceptions:
 - Purchase of a business
 - Protect trade secrets
 - Recover for education and training expenses
 - Executive or management personnel

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Confidentiality Agreements

Enforceable to the extent the information is acquired during employment.

General information is not confidential.

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Drafting



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Interstate Issues



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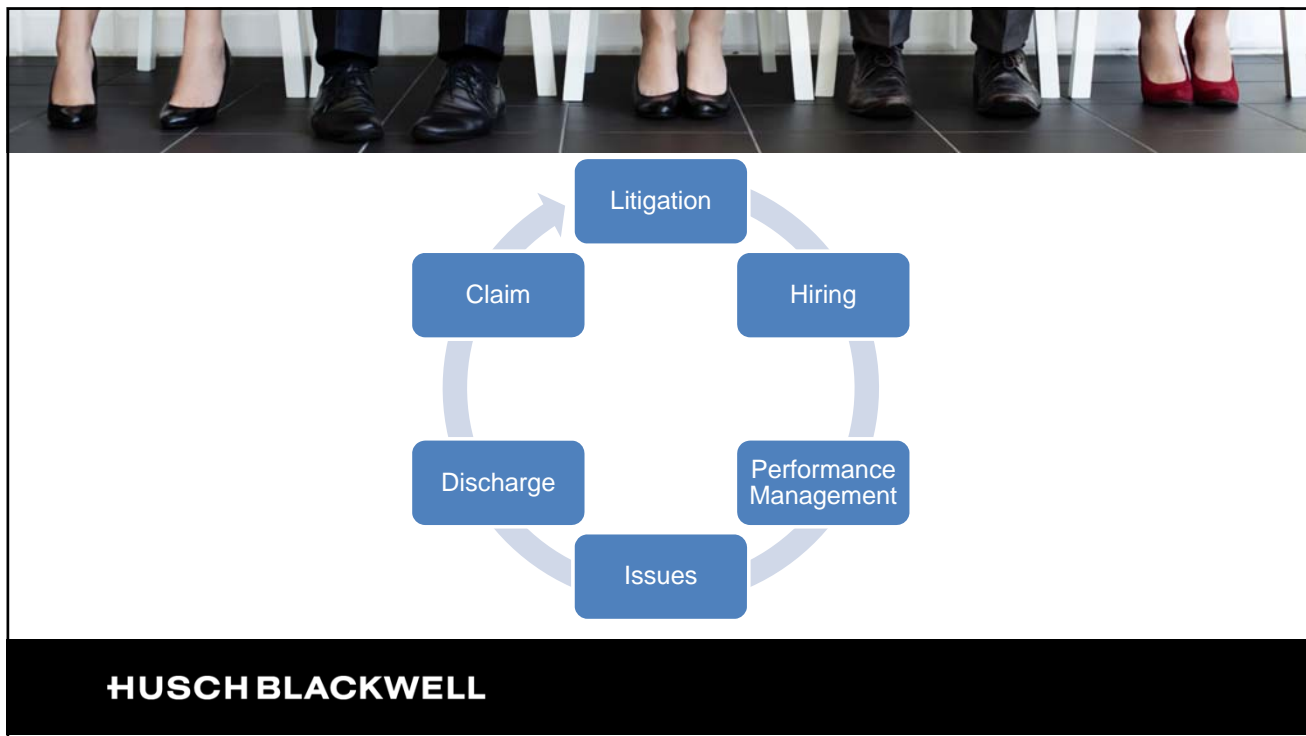
Life Cycle of an Employment Claim

Barbara Grandjean and Mary Stuart

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HIRING

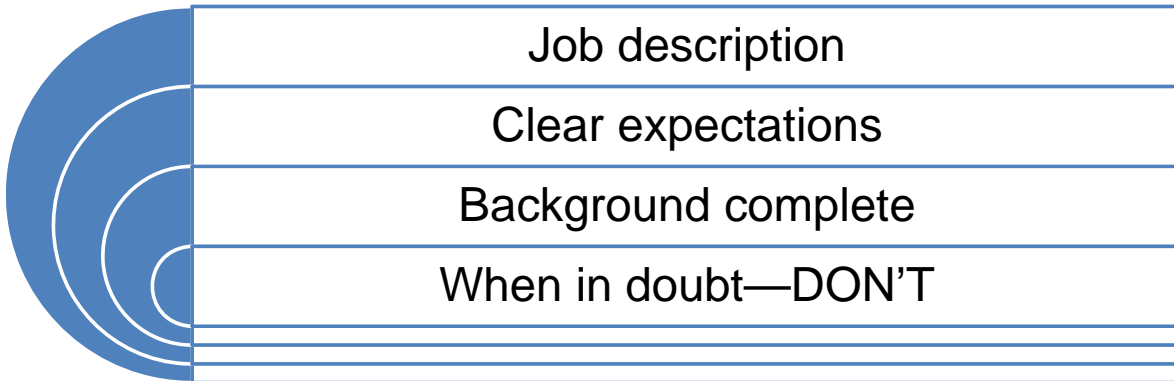
IT'S A GOOD DAY TO BE HAPPY

The slide features the word "HIRING" in large, grey, sans-serif capital letters at the top left. Below it is a light beige rectangular box containing the text "IT'S A GOOD DAY TO BE HAPPY" in a teal, sans-serif font, with "HAPPY" in a larger, yellow, sans-serif font. To the right of the text is a photograph of two women in business suits standing on a balcony, engaged in conversation. The woman on the left is holding a laptop. The background shows a modern building with glass windows.

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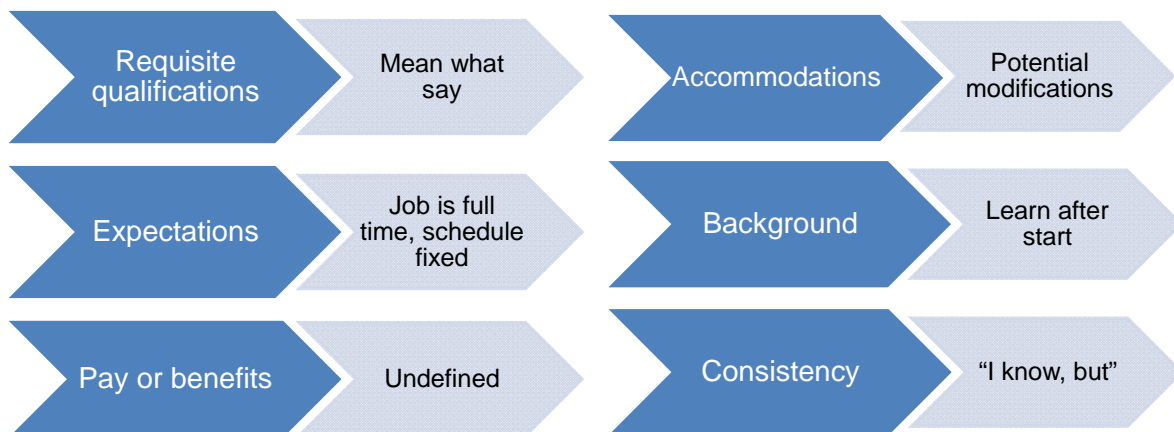


The Basics: Hire Well



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Where we see problems



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Performance



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Hold Employee Accountable

Deal with and document

- Does not need to be formal


Annual reviews

- Honest and specific

Juries believe what is in writing

- "Meets expectations" does not justify firing

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It's a two-way street

Policies Apply non-discriminatorily	Notice Consider PIP	Fairness Never <i>promise</i> , always <i>practice</i>
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Where we see problems

Employee "surprise"	No warning	Due process	No chance to tell his side
ADA	No interactive process	Favoritism	No consistency
FMLA	No "empathy"	Complaints	No response

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Discharge



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Only one chance to do it right


Complete investigation first

- Collect documents
- Review computer files

Give due process

- No matter how clear cut
- Have two people in meeting

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Discharge meeting

Professional and direct	<ul style="list-style-type: none">• Manager plus one• Prepare ahead, stick to script
After the meeting	<ul style="list-style-type: none">• Packing belongings• IT and property access
Communications to others	<ul style="list-style-type: none">• Co-workers• References

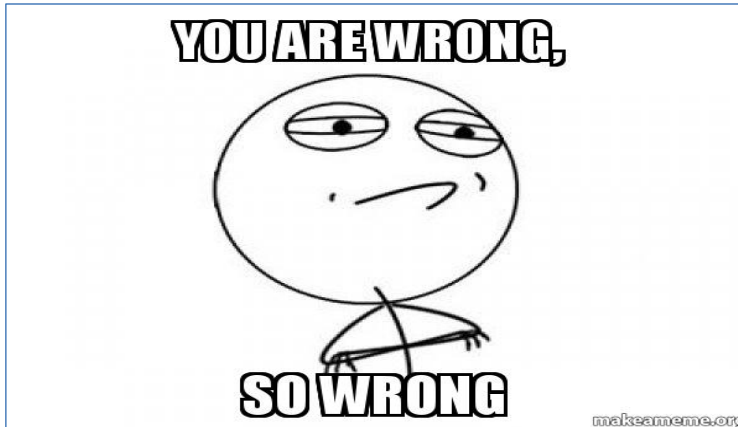
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Where we see problems

Contradictions	Engaging in arguments	Consistency	Others did the same thing
Lack of honesty	Job restructuring	“Humiliation”	Is security escort necessary
Adding reasons	Sounds like pretext	Retaliation	Difficulty finding future employment

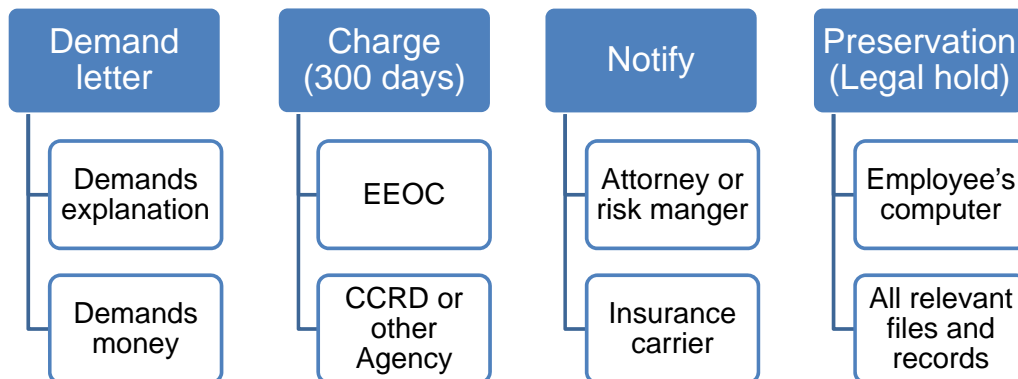
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The Claim




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What comes next



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Responding to Demand


Investigate claims
Respond appropriately
Wage Act time limits
Decide if want to negotiate

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Where we see problems

Don't consider what said	Would two months of COBRA resolve issue	Disparaging employee	Inflames passion
Failure to respond	Didn't take seriously	Challenging attorney	"Bring it on"
Incorrect response	Too much and not enough	Lack of empathy	Acknowledge job loss is difficult

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Responding to EEOC or CCRD

Mediation

- Consider pros and cons
- Is attorney involved
- Do you know employee
- Assessment by a third party

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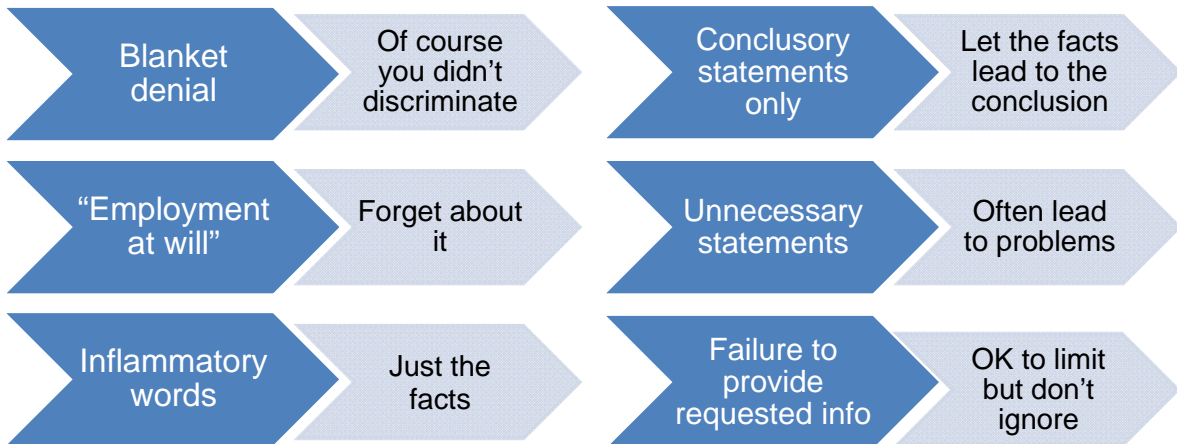
Responding to EEOC or CCRD

Position statement

- Take very seriously
 - Recent EEOC guidance
- Tell a good story
 - Must be accurate
- Memories fade, employees leave
 - Get statements
- Collect all documents
 - Don't screen for "relevance"
- Include attorney on all communications
 - Don't create new evidence

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Where we see problems



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Timing of Administrative Process

EEOC has no time limit

- Can be years

CCRD is supposed to resolve in 270 days

- May ask for extension

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Results of EEOC Process

Probable cause

- Will seek conciliation
- If fails, EEOC lawsuit (no time limit) or right to sue (90 days)

Right to sue at CP's request

- CP must file lawsuit in 90 days

No basis and right to sue

- CP must file lawsuit in 90 days

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Results of CCRD Process

Finds no probable cause

- Usually writes decision and issues right to sue
- CP can appeal or file lawsuit in 90 days

Finds probable cause

- Will seek conciliation
- Could hold hearing or issue right to sue

Issues right to sue at CP's request

- CP must file lawsuit within 90 days

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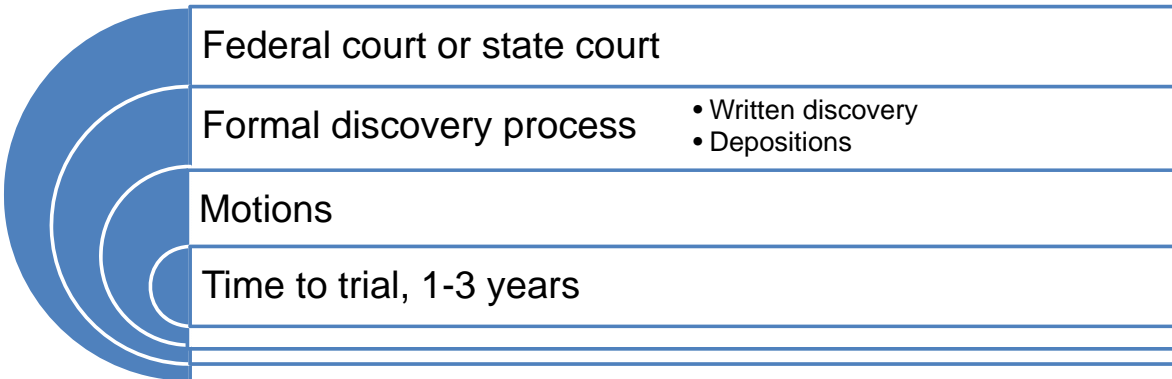
The Lawsuit



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Now what



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What to do

Designate a point person

Update legal hold

Do not discuss without counsel present

Update insurer

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Discovery process

Intensive and time consuming

Much greater burden on employer than employee

Electronically stored information (ESI)

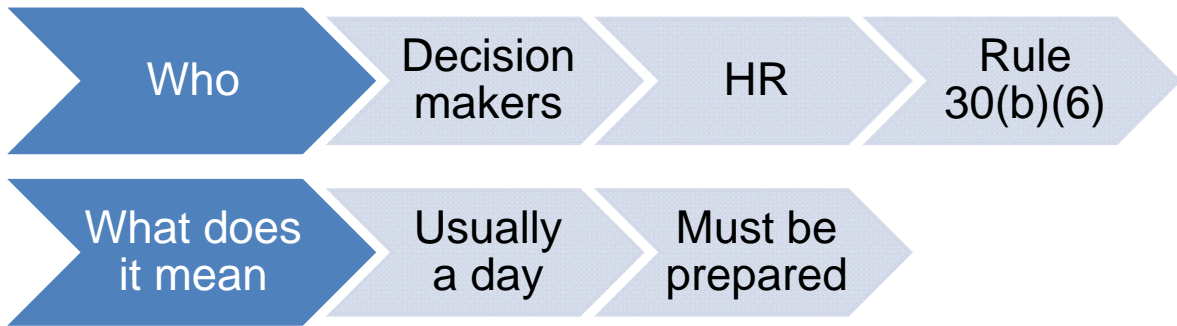
Protocols in place before litigation

Discovery violations can overtake the merits

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Depositions



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Resolution before trial

Settlement

- Offer of judgment (Rule 68)
- Negotiations
- Mediation

Summary judgment

- Facts don't support a legal claim
- Don't count on it

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The Trial

Jurors

Employees themselves and their situations shape their views

Employers negligent if don't document problems

Justice more important than letter of the law

Corporations will lie to win

More likely to believe employee than supervisor

Often find against corporation rather than for employee

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The Trial

Winning Case

Good story

Decisions made by individuals, not a corporation

Manager went above and beyond to help employee

Employee did not take advantage of Manager's efforts

Decision necessary to protect customers, patients, co-workers

Decision-maker seen as honest, credible and likeable

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Regardless of the Result

Life Goes on...

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