

Minnesota Has Banned Most Non-compete Agreements; It Could Have Been Worse

by Ryan E. Mick and Briana Al Taqatqa

On May 16 the Minnesota Legislature passed a bill (go to Article 6, page 66) that will ban new non-competition agreements between employers and employees, as well as independent contractors. Governor Walz is expected to sign the bill imminently. The provision was embedded in a comprehensive Jobs, Labor & Employment bill and will take effect on July 1, 2023, and will apply to agreements entered into on or after that date. The new ban *does not* apply to existing non-compete agreements.

Unlike recent laws in some other states, Minnesota's forthcoming ban applies to all employees (and independent contractors), not just lower-wage earners. It applies to any agreement that would "restrict the employee, after termination of the employment, from performing (1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee's work for the employer that is a party to the agreement." The only exceptions to this categorical ban on non-competes are for non-competition provisions that are "agreed upon during the sale of a business" or "agreed upon in anticipation of the dissolution of a business."

The forthcoming law also prohibits employers from using choice-of-law or choice-of-venue provisions that would apply another state's law, or allow litigation outside of Minnesota, in a non-competition agreement with a Minnesota employee or independent contractor.

Fortunately, the law broadly carves out customer and employee non-solicitation provisions, as well as non-disclosure provisions. Minnesota employers may continue to use those provisions to protect their legitimate business interests. The law also excludes any "agreement designed to protect trade secrets or confidential information" from the ban. The meaning and effect of that exclusion will remain to be seen.

Although many Minnesota employers will be frustrated at this new constraint on their ability to protect their legitimate business interests, it could have been worse. Early

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versions of the bill *did not* exclude non-solicitation or non-disclosure provisions from the scope of the ban, and purported to prohibit non-Minnesota choice-of-law or choice-of-venue provisions in *any* contracts between an employer and a Minnesota employee or independent contractor, including contracts unrelated to a prohibited non-competition agreement. However, through the efforts of employer organizations like the Minnesota Employment Law Council, these common sense fixes ultimately were included in the final bill.

That employers avoided a worse outcome will be cold comfort to those who have traditionally used non-competition provisions as part of their strategy to protect their confidential information, trade secrets, customer relationships, and business reputations and goodwill. Going forward, *Minnesota employers must structure new employment-related contracts and independent contractor agreements to eliminate new non-competition provisions.*

Instead, employers should refocus on comprehensive non-disclosure provisions as well as carefully tailored customer and employee non-solicitation agreements. Caution is warranted however. Minnesota employers should not merely rely on confidentiality policies; non-disclosure agreements with clear post-employment restrictions are important. Further, in drafting those provisions, employers must be mindful of legal constraints, such as carve-outs for whistleblowers, concerted action protections under the National Labor Relations Act, and in accordance with the federal Defend Trade Secrets Act.

Likewise, if Minnesota employers use customer or employee non-solicitation provisions going forward, they must remain mindful of not overreaching. Employers may still be at risk of a court determining that a non-solicitation provision is overbroad if, for example, it prohibits solicitation of all of the company's customers or prospective customers, without careful definitions and consideration of whether the employee's duties and responsibilities warrant such broad restrictions. In the same vein, carefully drafted "blue pencil" provisions, which authorize a court to reform overbroad restrictive covenants to make them enforceable, remain important.

In certain circumstances, some employers might also consider forfeiture provisions, which allow an employee to accept certain benefits (i.e., equity or cash compensation) in exchange for a voluntary limitation on competitive activities, or to choose to compete and forego such benefits. Some judicial decisions have correctly recognized that such provisions are not true non-competes. Likewise, an argument may be made that such provisions do not "restrict" the employee's competitive activities for purposes of the new Minnesota law, if an employee always retains the right to choose to compete. Whether carefully drafted forfeiture provisions will be viable under the new Minnesota law will certainly require case law development.

Further, with future non-competition provisions no longer available to protect legitimate business interests, Minnesota employers who must protect substantial trade secrets should revisit their policies and procedures to ensure they can rely on state and federal statutory protections. Although federal and state law provides statutory protections

against misappropriation of trade secrets, employers must be able to demonstrate that they have taken reasonable measures to keep such information secret. Having appropriate policies, and even strong non-disclosure agreements, may not be enough. Employers should be prepared to demonstrate other active measures to preserve the secrecy of their trade secrets, including but not limited to proper designation of trade secret materials; heightened protections over and above standard confidential information; limiting access to appropriate personnel; training; keeping trade secret materials off personal devices; physical locks, password protections or other measures to effectively prohibit access to non-authorized persons; appropriate protocols to address separating employees; and appropriate measures to recover trade secret materials in the event of accidental or other disclosures.