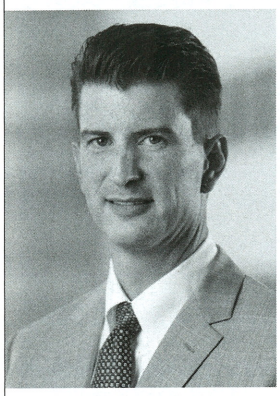
Successfully Fending Off Employer Non-Compete Litigation



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Introduction

The rushed and recently enacted Federal tax "reform" law indirectly underscores the importance of vigorously defending employees against employer-sponsored litigation of non-compete agreements. Much like the tax "reform" law, non-compete agreements generally illustrate and will ultimately exacerbate the inequality of leverage and resources for individuals, on the one hand, and for companies, on the other hand. Without effective advocacy by employee counsel, then, employers could run roughshod over an employee's right to provide for his or her family in a sustainable way. The discussion below outlines key caselaw and corresponding arguments employee counsel should consider when seeking to defeat employer claims asserted in relation to non-compete agreements.

I. Minnesota Courts Do Not Readily Enforce Non-Compete Agreements Because Those "Agreements" Often Interfere With An Employee's Ability To Make A Living

Settled Minnesota Supreme Court authority holds that "employment noncompete agreements 'are looked upon with disfavor, cautiously considered, and carefully scrutinized.'"[1] Indeed, according to the Minnesota Supreme Court, non-compete restrictions may essentially amount to "industrial peonage ***without redeeming virtue in the American enterprise system.***"[2]

Thus, skills learned by an employee as a result of employment typically do not support a valid non-compete agreement.[3] Given the practical realities of the employer/employee relationship, moreover, clearly established precedent also rejects non-compete agreements foisted on mid- or low-level employees:

> It is trite and naive to suggest that low to mid-level employees freely agree to restrictive covenants. ***Disparities in resources, bargaining power, and access to information*** undercut that overly simplistic notion – except for senior managers and top-dog executives where the shoe is on the other foot and different agency concerns arise. The employer is a repeat player with strong incentives to invest in legal services, to devise an advantageous non-compete, and to insist that employees sign. ***For the employer, the marginal costs of imposing a non-compete are***

low. For a low- to mid-level employee, the calculus is different.[4]

Consequently, the governing law makes clear that any non-compete agreement must be scrutinized to preserve "the employee's right to earn a livelihood."[5]

II. Non-Compete Agreements Must Be Modified Or Even Stricken When They Do Not Actually Serve A Legitimate Business Purpose, Lack True Consideration, Have An Unreasonable Scope, Or Are Overly Vague

Minnesota courts refuse to enforce non-compete agreements when those agreements do not materially advance the employer's actual business interests "because restrictive covenants are agreements in ***restraint of trade...***"[6] Therefore, Minnesota courts have expressly invalidated non-compete agreements based on the lack of a legitimate business interest.[7]

The Minnesota Supreme Court also has plainly ruled that an employer must, in fact, provide concrete value to an employee before a non-compete agreement may be enforceable.[8] In other words, for non-compete restrictions to be valid, "the agreement ***must be bargained for and provide the employee with real advantages.***"[9] Accordingly, the Minnesota Court of Appeals recently ruled that a non-compete agreement executed by an existing employee was unenforceable because the employee did not receive independent consideration for signing the agreement – despite "the ***significant growth*** in compensation and ***dramatic expansion*** of duties [for the employee], in addition to benefits first mentioned in the context of the noncompete clause."[10] The Court of Appeals reasoned that the enhancements in compensation, profile, and benefits for the employee during employment were to be expected and, thus, not sufficient to make the non-compete agreement enforceable for an existing employee.[11]

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[1]*Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998) (quoting *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898 (1965)); *see also Freeman v. Duluth Clinic, Inc.*, 334 N.W.2d 626, 630 (Minn. 1983) (same); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982) (same).

[2]*Eutectic Welding Alloys Corp. v. West*, 160 N.W.2d 566, 571 (Minn. 1968) (discussing Minnesota Supreme Court precedent) (emphasis added).

[3]*Jim W. Miller Constr., Inc. v. Schaefer*, 298 N.W.2d 455, 459 (Minn. 1980); *see also Ultra Lube, Inc. v. Dave Peterson Monticello Ford-Mercury, Inc.*, 2002 WL 31302981, *6-7 (Minn. Ct. App. 2002).

[4]*Delaware Elevator, Inc. v. Williams*, 2011 WL 1005181, *11 (Del. Ch. 2011) (emphasis added).

[5]*Kallok*, 573 N.W.2d at 361 (citing Minnesota Supreme Court precedent) (emphasis added); *see also Rehabilitation Specialists, Inc. v. Koering*, 404 N.W.2d 301, 304 (Minn. Ct. App. 1987).

[6]*Webb Pub. Co. v. Fosshage*, 426 N.W.2d 445, 450 (Minn. Ct. App. 1998) (citing *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 899-900 (Minn. 1965)); *see also Kallok*, 573 N.W.2d at 361; *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898-900 (Minn. 1965); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 456 (Minn. Ct. App. 2001); *Overholt Crop Ins. Service Co., Inc. v. Bredeson*, 437 N.W.2d 698, 703 (Minn. Ct. App. 1989).

[7]*See, e.g., Alpine Glass, Inc. v. Adams*, 2002 WL 31819910, *1 (Minn. Ct. App. 2002) (affirming the district court's grant of summary judgment for the employee "[b]ecause the noncompete agreement at issue serves no legitimate business interest and is unenforceable. . . .").

[8]*See, e.g., Freeman*, 334 N.W.2d at 630.

[9]*Satellite Indus., Inc. v. Keeling*, 396 N.W.2d 635, 639 (Minn. Ct. App. 1986) (citing *Freeman v. Duluth Clinic, Inc*, 334 N.W.2d 626, 630 (Minn. 1983)).

[10]*Autoplink Technologies, Inc. v. Janson*, 2017 WL 5985458, *5 (Minn. Ct. App. 2017) (emphasis added).

[11]*Id.*

[12]*See, e.g., Bennett*, 134 N.W.2d at 898.

[13]*Dean Van Horn Consulting Associates, Inc. v. Wold*, 395 N.W.2d 405, 408-09 (Minn. Ct. App. 1986); *Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85, 88 (Minn. Ct. App. 1985).

[14]*See, e.g., Wold*, 395 N.W.2d at 408-09.

[15]*Boston Scientific Corp. v. Sprenger*, 2012 WL 5462681 (D. Minn. 2012); *see also Sempris, LLC v. Watson*, 2012 WL 5199582 (D. Minn. 2012) (denying the employer's motion for injunctive relief and reiterating that Minnesota law disfavors non-compete agreements); *DENTSPLY Int'l, Inc. v. Rene*, 2013 WL 828824 (D. Minn. 2013) (same).

[16]*See, e.g., Wold*, 395 N.W.2d at 408-09.

In addition, non-compete agreements may not be enforceable when unreasonable in duration or geographic coverage.[12] For example, Minnesota courts have affirmed that restrictions of more than one year or beyond a metropolitan area are unreasonable and, thus, unenforceable.[13] Regarding temporal restrictions in particular, Minnesota courts ordinarily will not enforce a non-compete agreement if it exceeds the time necessary to eliminate the identification of the employee with the employer for the employer's customers or the time necessary for an employee's replacement to learn the job and obtain the necessary credentials.[14]

Minnesota courts have struck down non-compete agreements, furthermore, for being vague.[15] Short of striking down a non-compete agreement, Minnesota courts may narrow the scope of the restrictions pursuant to the "blue pencil" doctrine.[16]

Conclusion

Although employers normally have more resources and marketplace power, employee counsel can overcome those obstacles through careful preparation and savvy advocacy. Disputes over non-compete agreements exemplify this reality. Drawing on the precedent and arguments summarized above, employee counsel should be successful in challenging overreaching non-compete agreements and in defending against overly aggressive applications of even valid non-compete agreements.