Effectively Defending Against Employer Non-Compete Lawsuits

JUSTIN D. CUMMINS, a partner at Miller O'Brien Cummins, PLLP, is past Chair of the MSBA's Labor & Employment Law Section as well as a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. Justin has taught courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.

Introduction

With the ongoing economic turbulence, employers have increasingly insisted that employees enter into non-compete agreements and then have taken legal action against departing employees based on those agreements. Departing employees generally fare better in negotiations and litigation around alleged violations of non-compete agreements when the new employers of the departing employees support those employees. For economic, legal, and even strategic reasons, however, new employers may decline to back the departing employees. Under such circumstances, employee counsel must be especially well versed in the governing law and litigation tactics that will maximize the ability to defeat employer non-compete claims in any event.

I. Employee Counsel Should Emphasize That The Minnesota Supreme Court Has Consistently Disfavored Non-Compete Agreements And, Moreover, Has Long Protected Employees' Right To Make A Living In The Face Of Such Agreements

Although the recent trend in decisions by Minnesota district courts and by the Minnesota Court of Appeals has tended to favor employers in non-compete cases, employees can still use settled Minnesota Supreme Court precedent to frame employer non-compete claims as improper overreaching. According to the Minnesota Supreme Court, for example, "employment noncompete agreements 'are ***looked upon with disfavor, cautiously considered, and carefully scrutinized.***'"[1]

Employees should also highlight the Minnesota Supreme Court's directive that Minnesota courts, when carefully scrutinizing non-compete agreements, must safeguard "the employee's right to earn a livelihood."[2] In that regard, the Minnesota Supreme Court has declared that non-compete restrictions may essentially amount to "industrial peonage ***without redeeming virtue in the American enterprise system.***"[3]

II. Employee Counsel Should Seek To Show That Non-Compete Agreements Do Not Actually Serve A Legitimate Business Purpose, Lack Real Consideration, Or Have An Unreasonable Temporal Or Geographic Scope

Minnesota courts decline to enforce non-compete agreements when those agreements do not materially advance the employer's honest business interests "because restrictive covenants are agreements in restraint of trade. . . ."[4] Accordingly, Minnesota courts have expressly invalidated non-compete agreements based on the lack of a legitimate business interest.[5]

The Minnesota Supreme Court also has clearly established that an employer must, in fact, provide concrete value to an employee before a non-compete agreement may be enforceable when signed after employment begins.[6] In other words, for non-compete restrictions to be valid, "the agreement ***must be bargained for and provide the employee with real advantages.***"[7]

In addition, non-compete agreements may not be enforceable when unreasonable in scope, whether geographically or temporally.[8] For example, Minnesota courts have affirmed that restrictions for more than one year or beyond a metropolitan area are unreasonable.[9] Regarding temporal restrictions in particular, Minnesota courts generally 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.[10]

Short of striking down a non-compete agreement, Minnesota courts may narrow the scope of the restrictions pursuant to the "blue pencil" doctrine.[11] The liability for employees can be significantly reduced, if not eliminated, in this fashion, so employee counsel should consider invoking the "blue pencil" doctrine in the alternative.

III. Employee Counsel Should Identify And Attack The Employer's Vulnerabilities Under The Dahlberg Analysis

Employers typically commence litigation of non-compete claims in the context of pursuing a temporary restraining order ("TRO") and temporary injunction ("TI"). Although those enjoining procedures do not result in a decision on the merits, they provide employee counsel with the opportunity to frame the issues and educate the court about the meritless nature of the employer's non-compete claims.

To obtain a TRO and TI, an employer must prove that the relief is warranted in view of the five factors set forth in Dahlberg Bros., Inc. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965): (1) the relationship between the parties before the dispute giving rise to the request for the restraint; (2) the harm to the employer if the restraint is denied as compared to the harm to the employee if the restraint is imposed; (3) the likelihood that one party or the other will prevail on the merits at trial; (4) the public policy considerations; and (5) the burdens involved in judicial supervision of the restraint.

Long-standing Minnesota Supreme Court precedent holds that the extraordinary remedy of a TRO and TI may be granted only when clear that the plaintiff's rights will be irreparably harmed before a trial on the merits. In that regard, the threatened injury must be real and substantial.[13] Consequently, employee counsel may be able to defeat the employer's claims by offering "evidence that the former employee has no hold on the good will of the business or its clientele."[14] Moreover, employee counsel should recite case law wherein Minnesota courts have refused to enjoin an employee because the employee did not pose an actual competitive risk to the employer.[15]

In practice, litigation around the potential harm to the employer under the Dahlberg analysis often goes a long way toward shaping the court's view of the employer's underlying non-compete lawsuit. With the right approach, then, employee counsel can use the motion for a TRO to attack the employer's overarching non-compete claims as improper overreaching "in restraint of trade. . . ."[16]

Conclusion

Despite the recent pro-employer pattern in lower court decisions, employee counsel still have an arsenal of Minnesota Supreme Court precedent that may be deployed to attack the validity of a given non-compete agreement. Even when courts decline to strike down non-compete agreements, employee counsel may still be able to reduce or even eliminate liability for employees via the "blue pencil" doctrine. Given that employer's typically pursue non-compete cases in the TRO and TI context, employee counsel usually have the chance at the outset of non-compete litigation to show the court why the employer's claims will fail on the merits – potentially short-circuiting protracted and costly litigation.

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

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

[4]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); Medronic, 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).

[5]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. . . .").

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

[7]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)).

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

[9]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).

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

[11]See, e.g., id.

[12]See generally Miller v. Foley, 317 N.W.2d 710 (Minn. 1982); Pacific Equip. & Irr., Inc. v. Toro Co., 519 N.W.2d 911 (Minn. Ct. App. 1994).

[13]See generally Ind. Sch. Dist. No. 35 v. Engelstad, 144 N.W.2d 245 (Minn. 1966); AMF Pinspotters, Inc. v. Harkins Bowling, Inc., 110 N.W.2d 348 (Minn. 1961).

[14]Webb, 426 N.W.2d at 448 (citations omitted) (emphasis added).

[15]See, e.g., Ultra Lube, Inc. v. Dave Peterson Monticello Ford-Mercury, Inc., 2002 WL 31302981, *6-*7 (Minn. Ct. App. 2002); see also Alpine Glass, 2002 WL 31819910 at *1.

[16]Webb, 426 N.W.2d at 450.