

THERE IS AN EXCEPTION TO EVERY RULE (INCLUDING THE NON-COMPETE BAN)



By Art Boylan

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Minnesota will soon be one of a handful of states to enact a ban on non-competes. Unlike other states, Minnesota's ban applies to all employees regardless of compensation level or position at the employer. Specifically, the law prohibits "an agreement between an employee and employer that restricts 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." The ban is not retroactive: it is only effective as to non-competes entered into after July 1, 2023.

But is this truly the end of the road for lawsuits against former employees? No; absolutely

not. The best and most meritorious non-compete cases always included some typically salacious wrongdoing. Although the Minnesota legislature banned non-competes, it did not have the power to enact a law prohibiting greed or stupidity by employees. So, what will live on? Depending on the facts, we can expect Minnesota employers to pursue a variety of similar claims against former employees.

Under the new law, employers will still be allowed to continue using customer and employee non-solicitation provisions. In this regard, little has changed: the best non-compete cases almost universally included an element of customer or employee solicitation. But, because these provisions will be under closer scrutiny, employers would be well served to review, tighten them, and consider whether the restrictions are reasonably tied to the employees' position and responsibilities. Like before, Minnesota employers pursuing former employees will need to be mindful of not overreaching. If history is any guide, before enforcing a non-solicit provision, courts will review for overbreadth or vagueness. Provisions prohibiting contact with all customers or prospective customers will need to be justified.

Similarly, the ban does not apply to any "agreement designed to protect trade secrets or confidential information." Again, the best non-compete cases often included theft of critical business information while the employee was making his or her way to the exit. It is reasonable to assume that this exception will lead to an increase in lawsuits centered on theft of trade secrets under the Minnesota Uniform Trade Secrets Act. Given the prevailing mood, trade secret claims will be subject to very close scrutiny by the Minnesota jurists. To the extent any employer believes they have substantial trade secrets and anticipate relying on the trade secrets act to protect their business interests, they will be well-served to review and update the measures taken to define their trade secrets and keep that information secret. Employers can improve their ability to protect legitimate trade secrets in many different ways.

At a minimum, employers will be expected to have appropriate policies (including non-disclosure agreements) to preserve the secrecy of their trade secrets. Trade secret claims may be a powerful tool to protect an employer's legitimate business interest, but only if the proper steps have been taken long before an employee leaves.

Finally, the new ban allows for the possibility of non-compete provisions prohibiting a seller of a business from competing by carrying on a similar business within a reasonable geographic area and for a reasonable length of time. Imagine the business owner who sells for millions and then joins a competitor just down the road. In this sort of case, fewer sympathies exist for the former employee/business owner. Nevertheless, because this exception carries forward the concept that the non-compete must be "reasonable" in geographic and temporal scope, the non-compete provisions will still be expected to be narrowly tailored to be enforced and disagreements about what is reasonable seem inevitable.

Beyond the specific exceptions to the ban, Minnesota employers will still be able to pursue former employees for breach of duty of loyalty, tortious interference with contracts and a variety of related business torts. For years, these claims have been the ancillary claims asserted to the "main event" non-compete claims. With the ban in effect, it is reasonable to anticipate that these claims will take center stage. The new ban on non-competes will have one of its desired impacts: new pure non-competes will no longer be enforceable in Minnesota. However, for those former employers who were the victim of brazen conduct at the hands of a former employee, the exceptions to the ban and other potential claims allow for ample protections.

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