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Non-Competes

Minnesota Bans Non-Competition Agreements

Legal Update

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Governor Walz is expected to sign into law the highly anticipated bill that bans virtually all non-competition agreements in Minnesota, apart from those relating to the sale or dissolution of a business. Minnesota will become only the fourth state in the nation to restrict employers' ability to enter into and enforce covenants not to compete with their employees. However, it is critical to note at the outset that the law *does not* impact customer non-solicitation agreements, employee non-solicitation agreements, non-disclosure, confidentiality or trade secret agreements.

The new law is short but packs a punch.

Beginning July 1, 2023, employers will no longer be permitted to enter into agreements with their employees or independent contractors restricting them from doing any of the following after their separation from employment:

- Working for another employer within a certain time period;
- Working in a certain geographic region; or
- Working for another employer in a similar capacity.

In short, the new law makes clear that employees and independent contractors get to work when and where they want, and any agreements that restrict employees or independent contractors from doing so are void and unenforceable.

The law also contains two measures designed to discourage employers who might be inclined to find workarounds with the new prohibitions.

First, the law provides that, in most instances, Minnesota-based employees and independent contractors are entitled to the protections of Minnesota law and Minnesota courts. Specifically, employers cannot require employees or independent contractors who primarily reside and work in Minnesota to agree to choice of law or venue provisions that would require them to bring their Minnesota-based claims in other states or that would apply the laws of another state to the non-competition provisions. Even if an employee or independent contractor agrees to such a provision, they can subsequently request that the provision be voided. The matter would thereafter be litigated or arbitrated in Minnesota, and Minnesota law would apply. Why is this important? Because out-of-state employers will often use choice of law or venue provisions incorporating the laws or jurisdiction of *their* home state to

get around employee-friendly laws of the *employee's* home state.

Second, courts are allowed to award attorney's fees to any employee or independent contractor "who is enforcing rights" under the new law. In other words, if an employee or independent contractor seeks to void an unenforceable non-compete provision in their agreement, the employee or independent contractor now has the right to seek their attorney's fees associated with the litigation.

Although the law is clear about what employers cannot do, it does not leave employers completely without protection. Employers can still protect their business interests with non-disclosure agreements, agreements protecting their trade secrets and/or confidential information, and agreements restricting the solicitation of customers and employees or the use of client or contact lists. The law is also subject to familiar non-competition exceptions for agreements that are entered into when selling or dissolving a business.

Of significant note for employers, however, is that this law does not apply retroactively. Rather, the new law will apply only to agreements that contain non-competition provisions entered into on or after July 1, 2023.

Employers should use the next six weeks to evaluate their standard agreements and work through any changes needed to ensure compliance with the law, including removing non-competition provisions from all agreements with Minnesota-based employees and independent contractors, reviewing confidentiality policies, considering other methods of protecting confidential information, trade secrets and restricted information, and reviewing non-solicitation agreements to ensure they are not *de facto* non-competition agreements. While the language of Minnesota's new law does not address the notion of "de facto" non-competition agreements created by exceedingly broad non-solicitation agreements, we envision this being an area of serious contention in the courts in the months to come.