

## **THE ESSENTIALS OF A NON-COMPETE AGREEMENT: IS IT ENFORCEABLE?**

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There are two situations where a company typically encounters a non-compete: (1) when it has a valuable employee, information or contacts it wants to keep within the organization; and (2) when a new potential hire arrives with a non-compete that may restrict his/her ability to work for the company. In either case it is important to understand the fundamentals of how to use a non-compete agreement and when to avoid a potential employee who has one.

The first principle to keep in mind is that in Minnesota, non-competes can and often are enforced by the Courts. There is a common misconception with many companies that non-competes are not enforceable and not worth the effort to put in place. The reality is that Minnesota courts are more aggressive in enforcing non-competes than many jurisdictions. A well crafted non-compete that is appropriate under the circumstances for a particular employee will be enforced by the courts.

How do you make your non-compete enforceable and effective? Courts will look at three primary factors: (1) duration; (2) geographic scope; and (3) what the employer is trying to protect. Generally a one year non-compete is considered acceptable by the Courts. A longer one may be acceptable if it is connected by special consideration such as the sale of a business. The geographic reach should be consistent with the geographic area the employee worked in. A better approach can be to limit the reach to customers or prospective customers with which the employee had a relationship. The most important factor is to be able to articulate what the employer is trying to protect. If the non-compete is simply designed to restrict the employee's future employment choices so that it is more likely the employee will stay with the company, the Courts will not be inclined to enforce the agreement. There has to be a legitimate employer interest that is being protected, like client relationships or specialized industry contacts or skills that the company has paid to develop. A non-compete for a salesperson will often be enforced because of the important client contacts a salesperson will develop with the company's customers. A non-compete for a maintenance person likely won't because those skills may be easily replaced by the company and there is no specialized knowledge in the position unique to the company.

The reality of non-compete enforcement is that the threat of enforcement is often sufficient to make the employee avoid competing employment. Most employees simply cannot afford the attorney's fees involved in contesting a non-compete. A strongly crafted non-compete will also contain an attorney's fees provision that increases the risk of also paying the company's attorney's fees if the employee should lose.

For a company looking to hire someone with a non-compete, the downside can be substantial if a court decides to enforce the agreement. Under Minnesota law, a company that hires someone in violation of a non-compete can be found liable for the attorney's fees of the company seeking enforcement. In addition, any profits either lost by the enforcing company or made by the hiring company can be a form of damage. Courts will often extend a non-compete for a time equal to any period during which the non-compete was being violated.

If you are considering hiring a person with a non-compete, it is important to recognize the potential downside and, if possible, craft the hiring in a way to avoid a violation. If there is a customer restriction, make sure they stay away from any of those customers and make sure you can prove it. Be prepared to negotiate with your competitor if you get an angry lawyer's letter

demanding to cease and desist. Because of the misconception that these agreements are not enforceable, companies will often negotiate to a lesser restriction to avoid the potential that the agreement will not be enforced. At the end of the day, however, you should operate with the assumption that a properly constructed non-compete agreement can and may be enforced.