A Primer on the Effective Drafting and Use of Non-Competition & Non-Solicitation Agreements

By Steve Phillips

Some businesses use non-competition or non-solicitation agreements as a way to limit the adverse impact when sales personnel or employees with knowledge of confidential or proprietary information depart for a competitor or depart and compete. Oftentimes, however, little thought is given to the terms of the agreement. Instead, a standard form is used, or facts and circumstances specific to the involved business are not considered. Years later, when the business seeks to enforce the agreement, they learn that the contract is not as enforceable as hoped. What follows is a short primer on some of the ways in which businesses in Minnesota can draft restrictive covenants so as to make it more likely they can and will be enforced.

1. **Require the employee to sign the agreement at the outset of employment**. Like any other contract, non-compete and non-solicitation agreements must be supported by adequate consideration in order for them to be valid. Minnesota courts have held that where a restrictive covenant is entered into prior to the inception of the employment relationship no independent consideration is required. In view of this, employers should make clear to potential employees that they will be required to sign a non-compete or non-solicitation agreement, and should provide a copy to the potential employee before an employment offer is accepted. Then, the contract containing the restrictive covenant should be signed at or prior to the commencement of the employment relationship. If the agreement is signed after the commencement of employment, some additional consideration should be provided (e.g., a raise, a cash payment that was not otherwise part of the compensation package, etc.).
2. **Less is more**. Although an employer might like to have a non-compete or non-solicitation agreement apply for a lengthy term, it is unlikely a court would enforce such an agreement. Courts generally limit the agreement to the length of time necessary for a replacement employee to learn the business and obtain any required licenses, or to the amount of time it would take to

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eliminate – in the mind of the customer – the association between the employer and the departed employee. In Minnesota, courts will generally enforce restrictive covenants with a one-year duration and sometimes up to two years, but durations longer than two years are unlikely to be enforced unless the non-compete agreement was signed in connection with the sale of the business. So, in all but exceptional circumstances, use a restrictive covenant of somewhere between one and two years in length.

3. **Avoid overbreadth.** Because restrictive covenants in employment contracts operate as partial restraints of trade, Minnesota courts carefully scrutinize them and typically will only enforce them to the extent they are reasonable in scope. Where language is challenged as overly broad or unreasonable, the employer bears the burden of proof. Further, Minnesota courts will carefully review the relevant facts and circumstances and can "blue pencil" or re-write the language to make it reasonable. In view of this, care should be taken to make the agreement no broader in scope (e.g., geographical reach, description of involved products or customers, etc.) than reasonably necessary to protect the employer's legitimate business interests.
4. **Make it understandable.** Use language that will be understandable to the involved employee given their background, education and similar factors. Define important terms (e.g., what does "solicit" mean to you?). Keep it as short and as simple as will accomplish your objectives. Provide a cover letter that explains that the agreement the employee is being asked to sign contains a non-competition or non-solicitation provision, and specify that the employee may wish to consult with an attorney before signing the agreement.
5. **Make it clear that the restrictive covenant survives the termination of the employment relationship.** Where an employment agreement containing a restrictive covenant contains an expiration date (e.g., a two-year employment contract), make explicit that the non-compete or non-solicitation agreement survives the expiration of the contract term or the termination of the employment relationship. Failure to do so may invalidate the restrictive covenant upon expiration of the employment term.
6. **Confidentiality agreements.** If you include a provision obligating the employee to maintain the confidentiality of certain types of documents or information, then take reasonable steps to actually maintain the confidentiality of the documents or information. While a court may not require absolute secrecy, evidence that the employer took reasonable steps to limit access to the confidential information (e.g., via password protection, limiting access to those with a "need to know," etc.) will aid the court in arriving at a determination to enforce the confidentiality provision.
7. **Choice of law.** Include a provision that Minnesota law applies to the contract and that disputes arising under the contract will be resolved in a Minnesota court. When parties to a contract choose the law to be applied to it and the jurisdiction in which the contract will be enforced, there is a much greater likelihood that the court will give those agreements effect unless doing so would be manifestly unfair or unreasonable.
8. **Attorneys' fees provisions.** Do include a provision that requires the employee to reimburse the employer for the reasonable attorneys' fees and costs incurred by the employer in enforcing or seeking to enforce the agreement. Absent such a provision, Minnesota courts generally will not award attorneys' fees to a prevailing employer unless, for example, there is a specific statute that has also been implicated (e.g., Minnesota Uniform Trade Secrets Act) which has a provision allowing for recovery of attorneys' fees.
9. **Remind the employee of their obligations upon termination.** When an employee subject to a restrictive employment covenant terminates employment, provide the employee with a short letter reminding them of their post-employment restrictions and include a copy of the agreement. Doing so will make it easier to prove, should you need to seek the assistance of the court to enforce the agreement, that the former employee was on notice of the restrictions in issue. In appropriate circumstances, consider whether to provide a copy of the agreement also to the former employee's new employer.

In sum, thoughtful consideration of these and other factors relevant to restrictive covenants at the outset will go a long ways toward ensuring that the covenants will be enforceable in the event of a breach by a former employee.