SAINT PAUL LEGAL LEDGER
MINNESOTA LAWYER
MINNLAWYER.COM Part of the BridgeTower Media network MONDAY | FEBRUARY 12, 2024

THE NEW IMPORTANCE OF NON-SOLICITATION AGREEMENTS

By Art Boylan

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Over the past two decades, a significant portion of litigation has centered around the enforceability of non-compete agreements. However, since Minnesota's ban on non-competes, the spotlight has shifted to non-solicitation cases, drawing increased attention and legal scrutiny.

Due to the previous emphasis on non-compete agreements, there is a relative scarcity of case law interpreting non-solicit provisions. It is reasonable to anticipate that non-solicit agreements will undergo similar scrutiny to their non-compete counterparts. Courts have held that "[t]he reasonableness of a restrictive covenant clause is a question of fact." *Dean Van Horn Consulting Assocs., Inc. v. Wold*, 395 N.W.2d 405, 406 (Minn. Ct. App. 1986). A non-solicitation agreement is enforceable so long as it is "reasonably necessary to protect the interests of the employer." *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993).

In Minnesota, courts have not directly addressed the reasonable scope of employee non-solicitation agreements. But most courts view non-solicitation provisions much more favorably than non-competes. Indeed, "[a] covenant not to solicit employees is 'inherently more reasonable and less restrictive' than a covenant not to compete." *Genesee Valley Tr. Co. v. Waterford Grp., LLC*, 14 N.Y.S.3d 605, 609 (N.Y. App. Div. 2015) (quoting *OTG Mgt., LLC v. Konstantinidis*, 967 N.Y.S.2d 823, 826 (2013)); *Automated Concepts Inc. v. Weaver*, 2000 WL 1134541, at *4 (N.D. Ill. Aug. 9, 2000) ("Unlike a covenant not to compete, which has the potential of threatening a person's livelihood, a covenant not to solicit employees merely prohibits a person from pirating employees of the former employer and inducing them to work for another entity.").

As a result of this, many of the same litigation strategies and pressure points will be present in the non-solicit context. The urgency of these issues and the potential for irreparable harm will often necessitate prompt action by legal counsel; if not more so than before. During the era of non-competes, temporary injunctive relief could be sought when an employee transitioned to a competitor, and it was possible to stop the proverbial wrecking ball. By contrast, in the context of enforcing a non-solicit agreement to prevent irreparable harm, the timeframe for a former employer to take action may be much shorter and the wrongful conduct less obvious. After all, once the act of solicitation occurs, it will be harder to convince a court that injunctive relief is needed to prevent future harm – the harm arising from the solicitation may have already occurred. For this reason, former employers will need to be vigilant and take swift action to mitigate potential damages.

We can expect that employers and employees alike will need to consider the evolving legal landscape. Although the teachings from non-compete decisions will be useful, that body of case law will not be able to answer all questions posed by a non-solicit case. For example, what counts as solicitation? What if the former employee is contacted by customers – and not the other way around? Same thing with solicitation of employees; especially where employees are now connected to each other on many different platforms. These issues – along with the holdovers from the non-compete era – will likely dominate the early cases that are focused on the enforceability of a non-solicitation agreement. Pursuing a successful case to enforce a non-solicit agreement will require careful attention to detail, some strong facts, taking into account the specific needs and circumstances of each business relationship. Employers who sleep on their rights or consider every contact "solicitation" are likely to find themselves without a remedy in court.

As litigation over non-solicit agreements continues to unfold in Minnesota, staying abreast of legal developments and emerging trends is essential. The transition from non-compete to non-solicit disputes reflects a broader shift in the legal landscape surrounding post-employment restrictions, highlighting the need for clarity, balance, and fairness in employment relationships.

The ban on non-compete agreements in Minnesota has reshaped the legal landscape, placing non-solicitation clauses at the forefront of post-employment disputes. But the ban did not give a free pass to former employees to blow off their contractual agreements, so we can expect litigation to continue.

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