

THE NEW FRONTIER IN POST-EMPLOYMENT DISPUTES



Pete McElligott

Every year, Anthony Ostlund hosts an all-day seminar called Lying, Cheating, and Stealing to bring together top legal minds in Minnesota to share innovative approaches and strategies for handling legal issues involving liars, cheaters, and stealers. There will always be instances of lying, cheating, and stealing in the post-employment context when employees move from one employer to another. Since Minnesota enacted its ban on non-competes in 2023, I have represented employers and former employees in an increasing number of cases involving claims for breach of non-solicitation provisions and misappropriation of trade secrets. So, at this year's seminar, I presented with my colleague, Will Paterson, on the new frontier in post-employment disputes.

The low-hanging fruit for post-employment disputes used to be enforcement of non-competes. While non-competes had to be reasonable in scope in terms of duration and geography, Minnesota courts often enforced non-competes when the employer had a legitimate business interest to protect. Pursuant to Minnesota Statute § 181.988, Minnesota banned non-competes entered into after July 1, 2023 to all employees regardless of position or compensation. Non-compete provisions entered into before July 1, 2023 may still be enforced. There are also limited exceptions for non-compete provisions entered into after July 1, 2023 in connection with the sale of a business or in anticipation of the dissolution of a business.

As employers seek to protect their interests without non-competes, the battle in post-employment disputes has shifted to fights over other types of restrictive covenants such as non-solicitation provisions. Non-solicitation provisions may come in a few different forms such as prohibitions on a former employee from soliciting customers or employees of the former employer. Courts analyze the reasonableness of those non-solicitation provisions in a similar way to non-compete provisions, scrutinizing the duration and geographic scope of the provisions as well as the legitimate business interest being protected. However, enforcing non-solicitation provisions is not as simple as enforcing non-compete provisions because it requires more than showing the former employee went to work for a competitor in violation of the non-compete. If a former employer wants to seek a temporary restraining order and/or injunction, the former employer must demonstrate that the former employer actually solicited customers or other employees. Without access to external emails of the former employee, it can be harder to prove likelihood of success on the merits for breach of non-solicitation.

Another major area in the new frontier of post-employment disputes is misappropriation of confidential and trade secret information. Unlike non-solicitation cases, former employers may have evidence of misappropriation in their own systems. Indeed, forensic review of electronic evidence has become a critical tool in post-employment disputes. When an employee leaves to work for a competitor, former employers regularly conduct forensic analysis of the former employee's electronic devices and activity. This analysis often includes searches of:

- work emails and attachments sent to personal email accounts;
- files and data recently accessed or downloaded by the former employee;
- evidence of data/information transferred to external hard drives or thumb drives;
- out of the ordinary google searches by the former employee; and
- print activity.

When this forensic analysis shows a former employee may have taken information to a new employer, the former employer may bring claims for breach of contractual confidentiality provisions. Alternatively, if the confidential information rises to the level of a trade secret, the former employer may assert a claim for misappropriation of trade secrets under the Minnesota Uniform Trade Secrets Act (Minn. Stat. § 325C) or, if the trade secret is related to a product or service use in interstate commerce, the Defend Trade Secrets Act (18 U.S.C. § 1836). A "trade secret" generally means information (i) derives independent economic value and (ii) is subject to reasonable efforts reasonable to maintain its secrecy. Minn. Stat. § 325C.01. Broadly speaking, "misappropriation" of a trade secret requires acquisition of the trade secret by improper means or disclosure/use of the trade secret through improper means. *Id.* Damages for misappropriation of trade secrets include actual loss caused by the misappropriation, unjust enrichment, or a reasonable royalty. Minn. Stat. § 325C.03. Damages may also include exemplary damages up to twice the amount of compensatory damages and attorneys' fees if the misappropriation was willful and malicious.

The phase out of non-competes in Minnesota does not mean the end of lying, cheating, and stealing in the post-employment context. Employees should be on notice that their digital footprint is susceptible to forensic review. At the same time, employers should be aware of the steps necessary to prevent bad actors from taking their goods/services to the next trading post in this new frontier.

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