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Enforcement of Non-Compete Agreements In Today's Economy

by Elisa M. Hatlevig

A major source of business tort litigation stem from non-compete agreements. During the current dark days of economic recession and lay-offs, Minnesota courts have seen an increase in litigation over non-compete agreements.[1]

Enforcing a non-compete agreement, an employer can restrict a former employee's potential future employment in an effort to protect itself and its clients. In Minnesota, courts strictly enforce non-compete agreements that contain appropriate restrictions on scope, location, time and provide proper consideration.

Minnesota courts look at non-compete agreements or agreements in partial restraint of trade with "disfavor, cautiously considered, are carefully scrutinized." *Bennett v. Stortz*, 270 Minn. 525, 134 N.W.2d 892 (1965). However, where restraint is for a just and honest purpose, for the production of a legitimate interest, reasonable between the parties and not injurious, Minnesota courts will uphold non-compete agreements. *See, e.g., Minnesota Mining and Manufacturing Company v. Kirkevold*, 87 F.R.D. 324, 332 (D. Minn. 1980); infra.

What Information Is Protected

Generally, when a person comes in direct contact with customers that are likely to go with the employee, that party has legitimate non-compete. *See Mentor v. Brock*, 147 Minn. 407, 180 N.W. 553 (1920). In addition, non-compete agreements which serve to protect confidential information are also generally considered valid. *See Porous Media Corp. v. Midland Brake, Inc.*, 220 F.3d 954 (8th Cir. 2000).

Components of Non-Compete Agreements

One main consideration of a court in considering the validity of a non-compete agreement is the temporal scope. The absence of any time restriction under the covenant not to compete makes the covenant illegal. *See Harris v. Bolin*, 310 Minn. 391, 395, 247 N.W.2d 600, 603 (Minn. 1976); *Bess v. Bothman*, 257 N.W.2d 791, 794 (Minn. 1977); *Bellboy Seafood Corporation v. Nathanson*, 410 N.W.2d 349, 352 (Minn. Ct. App. 1987). Restrictions up to one year of time and length are typically found to be reasonable restraints. *See Thermorama, Inc. v. Buckwold*, 267 Minn. 551, 125 N.W.2d 844 (Minn. 1964); *Chicago Ave. Floral Company, Inc. v. Traxler*, 284 Minn. 28, 29, 169 N.W.2d 220, 221 (Minn. 1969).

The court will also consider the geographic scope of a non-compete agreement. The validity of a geographic limitation will depend on the nature of an employer's business, the area in which the employee worked, and whether the restrictions would cause the employee undue hardship. The absence of any geographic restriction or suitable alternative is not per se unreasonable in Minnesota. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993).

There is also a requirement that a valid non-compete agreement must have consideration. *See Daves and Daves Agency, Inc. v. Daves*, 298 N.W.2d 127, 130-31 (Minn. 1980). In *National Recruiters*, employees were told of an employer's compensation provision and pension before beginning work and they agreed to accept employment based on that information. After commencing employment, the employees were presented with a non-compete agreement and

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Wellness Programs in Your Government Workplace

by Jessica E. Schwie

By statute, governmental employers may establish and conduct employee wellness programs. A wellness program is one that is organized by the employer to assist and support employees in establishing healthier lifestyles and may include, for example, seminars and policies aimed at increasing physical activity, eliminating tobacco use, and/or improving diet.

Wellness programs initially arose out of a need to reduce costs related to employee health benefits. Insurers, thus, began offering discounts and other incentives to those employers who organized a wellness program. Implementation of a wellness program typically has additional benefits to the employer in the form of improved productivity, reduced absenteeism, reduced on-the-job injuries and associated workers' compensation costs, and reduced disability-management costs.

The cost of an employee wellness program may vary. Many employers begin with a very basic program at first that is limited only to staff time for organizing the activities that are conducted off-site, such as a walking program where employees log their own walking hours. Some employers who have found that the wellness program is extremely poplar and beneficial to their work invest much more money, even as much as $60,000.00 per year. In those cases, the employer often reminds the employees that the employee wellness program is a benefit and conducts annual survey to reaffirm this idea by asking employees to rank what is most important from the salaries to their benefits.

If you are considering a workplace wellness program you may be wondering what issues to consider. The first issue is what type of program may be operated. Minnesota governmental entities "may provide necessary staff, equipment, and facilities and may expend funds as necessary to achieve the objectives of the program." Minn. Stat. § 15.46. In order to comply with statute, any governmental employer considering the establishment of an employee wellness program should first define the objectives of its proposed wellness program prior to appropriating funds in furtherance of the program. This might be best done through the formation of a Wellness Program Committee.

The Wellness Program Committee should be charged with the duty to conduct an employee survey, and, from that survey, develop specific objectives for the wellness program. The committee should then identify the means by which it intends to meet the objectives, implement those means, and then monitor the program for achievement of the established objectives. For example, it might be identified that employees are most interested in discontinuing smoking as opposed to losing weight. The program and expenses for the program then may be more appropriately expended on activities aimed at smoking cessation such as seminars, posters, or other recommended activity.

The types of activities that may be afforded under the umbrella of a wellness program vary greatly. Some employers have implemented programs that pay for the health club fees, flu shots, smoking cessation, cardiopulmonary resuscitation (CPR) courses, or health fairs. Others have tried programs such as offering 15-minute seated massages twice a month, daily distribution of free fruit and other healthy foods, nutritional counseling, smoking cessation, participation in Weight Watchers, body-fat assessment, strength training, or an in-house exercise room with weights and showers.

For further guidance on the establishment of a Wellness Program Committee and its functions, we recommend that you visit a website created by the North Carolina Health and Wellness Trust Fund. The Trust Fund has created an excellent website which sets forth a detailed ten-step process toward the establishment of a wellness program, including the creation of a committee and tasks to be undertaken, and/or considered, by the committee. *See* www.fittogethernc.org/Steps.aspx. The League of Minnesota Cities also has useful information at: www.lmnc.org/page/1/safety-workshop08-materials.jsp.

Most wellness programs incorporate exercise; and, thus, the concern over injuries arises. The Minnesota's Workers Compensation act specifically excludes claims by employees who suffer an injury while participating in a wellness program if the employee was not required to participate. Because such claims are not covered by the workers compensation act, employees might seek remedy in the form of a civil tort claim against the employer (e.g. claimed negligent maintenance of equipment). Minnesota, however, affords some protection to government employers who provide recreational services and equipment in the form of statutory recreational immunity. Minn. Stat. §§ 3.736, subd. 3h, 466.03, subd. 6e. Any injury claims not barred by the foregoing statutes may further be limited or eliminated by the use of a waiver and release form. Therefore, we recommend the use of such waiver and releases.

When preparing the waiver and release to be used, we recommend that you work with your legal counsel. Any employee who wishes to participate in a wellness program should be required to execute the waiver and release prior to participation. The release should include an acknowledgment by the employee that he/she understands that (1) his/her participation is voluntary and that he/she is aware that there is no penalty for not participating in the program; (2) he/she has been directed to consult with a physician prior to undertaking any physical activity; (3) he/she is engaging in a recreational activity; and (4) he/she is holding the employer harmless and releasing the employer from any claim of injury that may result from participation in the program. Special consideration and language will have to be utilized for those employees under the age of 18. Finally, the executed release should be retained by the employer.

If the employer plans to provide the facilities in which the wellness program takes place, consideration should be given to creating a reasonably safe, and accessible, environment. For example, exercise rooms and equipment should be reviewed for compliance with OSHA and ADA regulations. Maintenance and cleaning policies should be established as well as proper etiquette policies. A good example of an etiquette policy can be found at http://your.kingcounty.gov/employees/activity_center/default.aspx#codeconduct. A review of the facility should also be made with regard to emergency situations. For example, the availability of the following emergency aid items should be considered: telephone, first aid kit, external defibrillator,

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Firm News

The Firm welcomes **Nancy M. Aboyan** as the most recent addition to our team of associates. Ms. Aboyan's practice focuses on litigation, assisting clients in the areas of construction, personal injury, and general negligence issues. Prior to joining Jardine, Logan & O'Brien, P.L.L.P. Ms. Aboyan practiced law in Maryland and the District of Columbia for eight years. She has significant experience representing clients in various stages of personal injury litigation, including medical malpractice defense. •

Congratulations to Jessica E. Schwie and **Lawrence M. Rocheford** who obtained a reversal of a trial court's denial of summary judgment in *Goetz v. Independent School District No. 625, St. Paul Schools*, A08-0254 (Minn.Ct.App. 2009). In *Goetz*, the Minnesota Court of Appeals found that the school district was entitled to recreational use immunity and all claims against the school district, arising from a community-educational gymnastics accident, must be dismissed with prejudice pursuant to the recreational use immunity statute. •

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persons trained in CPR, etc.

Finally, any documents generated by the wellness program that contain employee specific data should be designated as confidential and retained separate from the employee's personnel file. Particular concern arises of course with regard to those documents containing medical information which are protected under various state and federal laws. •

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told they were required to sign it. *Id.* at 740. The court held that the non-compete agreement was invalid, as it did not have independent consideration. *Id.* The clause was not bargained for and it was not ancillary to the employment agreement. *Id.* Such practice of not telling prospective employees of all the conditions of employment until after the employee has accepted the job takes undue advantage of the parties. *Id. See also, Overholt Crop Ins. Service Co., Inc. v. Bredeson*, 437 N.W.2d 698, 702 (Minn. Ct. App. 1989). As to the signing of a non-compete agreement in midstream of an employment relationship, Minnesota courts have found that the adequacy of consideration for a non-compete clause in ongoing employment depends on the facts of the case. If it is the mere continuation of employment as consideration, it is likely not sufficient; however, if the agreement is bargained for and provides with advantages to the employee, there may be adequate consideration. *Daves*, 298 N.W.2d at 130-131.

Enforcement of Non-Compete Agreements

To enforce a non-compete and obtain injunctive relief, a party must meet the *Dahlberg* requirements for injunctive relief. *See Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-275, 137 N.W.2d 314, 321-322 (1965). One important argument in restrictive covenants is the element of irreparable harm which may be inferred when it can be shown that the person subject to the restrictive covenant is violating it by doing business with former customers. *Thermorama, Inc.*, 267 Minn. at 552, 125 N.W.2d at 845; *Overholt Crop Ins. Service Co.*, 437 N.W.2d at 701. A plaintiff may also be awarded damages for the breach of a covenant if warranted by the facts. *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81, 95 (Minn. 1979). Damages are not presumed and must be proven by a preponderance of the evidence that profits were lost, the loss was directly caused by the breach of the covenant, and the amount was causally related and is capable of calculation with reasonable certainty rather than speculation. *See B&Y Metal Painting, Inc. v. Ball*, 279 N.W.2d 813, 816 (Minn. 1979). Attorney's fees are recoverable for breach of a restrictive covenant if a provision exists in a contract. *See e.g., Young v. Meyer*, 1989 WL 29594 at *3 (Minn. Ct. App. Apr. 4, 1989); *Ecolab, Inc. v. Ford*, 1995 WL 238837 at *2 (Minn. Ct. App. Apr. 25, 1995).

A third-party's interference with a non-compete agreement is a tort for which damages are recoverable. *Kallock v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998).

Recent Minnesota Court of Appeals Decisions

Along with the recent sluggish economy came a rise in litigation over non-compete agreements. In three 2008 decisions, the Minnesota Court of Appeals upheld non-compete agreements, strengthening the law for employers enforcing non-compete agreements.

In *Searke v. Peterson*, 2008 WL 314146 (Minn. Ct. App. 2008), the Court of Appeals found an optometrist who had sold his business violated his non-compete when he opened a new business outside of the region of the non-compete but solicited business via newspaper ads that ran within the restricted area.

In *Witzke v. Mesabi Rehabilitation Services, Inc.*, 2008 WL 314535 (Minn. Ct. App. 2008), the Court of Appeals upheld a non-compete agreement entered into 17 years before, reversing the district court. The Court of Appeals found that continued employment, numerous promotions and increasing salary over that 17-year period was sufficient consideration to uphold the non-compete agreement.

Finally, in *Tenant Construction, Inc. v. Mason*, 2008 WL 314515 (Minn. Ct. App. 2008), the Court of Appeals determined $500 was sufficient consideration to uphold a non-compete agreement entered into during the course of employment, affirming the decision of the lower court.

With the wave of lay-offs throughout the state and businesses working hard to keep their businesses afloat, a continued increase in litigation over non-compete agreements can be expected. As the recent string of appellate court cases illustrate, while Minnesota courts carefully scrutinize non-compete agreements, when the agreements are entered into between parties for a just and honest purpose and for the production of a legitimate interest, courts will uphold non-compete agreements that contain appropriate restrictions on scope, location, time and provide proper consideration. •

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[1] Heilman, Dan, Down Economy Leads to Rise in Non-Compete Agreements, Minnesota Lawyer, Vol. 12, No. 50 (December 15, 2008).

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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