



LEGAL UPDATES

Minnesota Non-compete Ban Signed into Law

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On May 24, 2023, Governor Walz signed off on Minnesota legislation prohibiting employers from entering into non-compete agreements with employees or independent contractors. *How will this new law affect your business? What should you be doing to get ready?* We answer those questions in this Lathrop GPM Client Alert.

What Does the New Minnesota Non-Compete Law Provide?

In prohibiting the use of non-compete agreements, Minnesota joins several other states that have recently imposed similar prohibitions. In addition, the Minnesota law also has some aspects that make it unique. Here is a summary of important points to note:

- The Minnesota ban on non-compete agreements is **not retroactive**. The ban applies to agreements that are entered into on or after July 1, 2023, with an individual who resides or works in Minnesota.
- The law prohibits only non-compete agreements – meaning restrictions that prevent employees or contractors from working for a competitor for a specific period of time. The law does not ban non-solicitation agreements, which allow an employee or contractor to work for a competitor but prohibit them from soliciting certain entities or persons for some period of time – such as customers, prospective customers, or other employees. The law also does not ban restrictions on an employee's use or disclosure of an employer's confidential information or trade secrets, and the law does not impact intellectual property assignment agreements. Employers are **still permitted to enter into non-solicitation, confidentiality, and intellectual property assignment agreements** with employees and independent contractors to protect a business's employees, customer relationships, goodwill, confidential information and trade secrets, and intellectual property.
- The Minnesota ban on non-compete agreements applies to employees and independent contractors across the board, **regardless of how much they are paid**.

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Caitlin R. Gehlen

Partner

Minneapolis

612.632.3448

caitlin.gehlen@lathropgpm.com

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- The law carves out **narrow exceptions for permissible non-compete agreements – namely**, non-compete agreements are still permitted when they are made in connection with the **sale of a business** or in anticipation of the dissolution of a business.
- The law also includes a prohibition on employers using a non-Minnesota choice of law or choice of venue provision to try to avoid the impact of the Minnesota law.

What Should Employers Do Now?

Although the new non-compete ban is a significant development, employers can still take steps to protect their business interests. Here are some of the steps you should consider taking before the law takes effect on **July 1**.

- If you are hiring someone to start before July 1 and can meet the pre-July 1, 2023, legal requirements in Minnesota to have a non-compete agreement, your business should secure that agreement before July 1, 2023, with an effective date that precedes July 1. In addition, businesses could seek to have current employees and contractors enter into a non-compete agreement prior to July 1 where justified. Businesses should be mindful, however, that current Minnesota non-compete law requires sufficient new and independent “consideration” beyond the continued current work relationship for a non-compete agreement to be valid (for example, a cash signing bonus).
- You should consider revising any agreements that your organization plans to use on or after July 1 that would otherwise contain non-compete provisions. The Minnesota law provides that including a non-compete agreement in an agreement on or after July 1st won’t invalidate the entire contract, as courts may sever and decline to enforce the invalid non-compete provision. However, it is advisable to remove such provisions from agreements that go into effect on or after July 1 to minimize the risk of legal disputes and potential legal costs associated with disputes.
- In addition to removing non-compete provisions from agreements that you plan to use on or after July 1, this is an opportunity to conduct a **careful review** of those agreements to make sure that your organization’s valuable interests are being properly protected in the ways still permissible under Minnesota law. Because the Minnesota law does not affect non-solicitation provisions, intellectual property assignment provisions, or prohibitions on the use or disclosure of confidential information and trade secrets, it is now more important than ever to make sure that provisions protecting those interests are as strong as possible under Minnesota law.

What About Proposed Bans at the Federal Level?

You may recall that the Federal Trade Commission has proposed a new rule that, if it takes effect, would ban non-compete agreements (and likely non-solicitation agreements as well) nationwide. Unlike the Minnesota law, the FTC rule, should it be adopted, would be retroactive – meaning it would void all existing and new restrictive covenants nationwide, except for a few limited exceptions such as the sale of business context. As we have noted in prior publications, the FTC rule has a number of hurdles to clear before it might go into effect, so we anticipate that it will be at least 2024 before any plans would need to be made to deal with the federal prohibition.

Additionally, the National Labor Relations Board recently indicated that they intend to target non-compete agreements moving forward, as they believe most non-compete agreements infringe on Section 7 rights and employee mobility rights held by non-management employees under the federal National Labor Relations Act. We will continue to monitor both the FTC rule and NLRB’s enforcement of non-compete agreements carefully and publish updates as the situation develops.

The FTC and NLRB developments are reasons to consider a review of the use of non-compete agreements for employees outside of Minnesota to ensure they are narrowly tailored to protect your business’s interests.

Please contact your Lathrop GPM employment counsel to assist with any review of your current non-compete agreements to ensure compliance with the new legislation come July 1, 2023.