

## NON-COMPETITION AND NON-SOLICITATION AGREEMENTS

### Non-compete clauses and agreements:

When you hire an employee or set up a business relationship with someone, there is always the risk that once that relationship ends, they will use their knowledge of your business to start a competing business or work for a competitor. Non-compete clauses and agreements protect you from this.

Massachusetts currently possesses no general non-compete agreement laws. However, it can be said that Massachusetts courts generally disfavor non-compete agreements and will err on the side of caution in favor of employees when disputes arise due to the fact that employer has a stronger bargaining position when entering into an agreement and the courts do not want to deprive an employee's ability to earn a living.

When deciding whether a non-compete or non-solicit agreement are enforceable, the courts will look to determine the extent that they are necessary to protect the employer's legitimate interests while not interfering with ordinary competition and only if "reasonably limited in time and space, and consistent with public interest." As such, a covenant not to compete and other restrictive covenants must not be more restrictive than necessary to achieve its purpose.

If you have a non-compete agreement or employment agreement that restricts your opportunities, it is important to understand your rights and obligations. We advise executives and other employees on the full range of employment documents. These include non-compete, non-solicitation, non-disclosure, confidentiality and proprietary information agreements. We assist individuals in negotiating their agreements, including employment and severance agreements.

Many companies use non-compete agreements (also known as non-competition agreements) to protect the company's interests if the employee would ever leave the company. Non-compete agreements often protect trade secrets, client lists, business practices, and other confidential information • Non-compete and non-solicitation agreements are contracts, and courts have wide latitude in deciding whether or not a non-compete provision is enforceable. In deciding whether or not to enforce a restrictive covenant such as a non-compete provision, courts will balance an employee's right to work in their chosen field against an employer's legitimate business need to prevent or restrict the employee from work.

### Terms of Non-Compete Agreements

Non-compete agreements typically contain three material restrictions on an employee's ability to work and earn a living after separation from their current employer:

- **Length of time** for which they cannot work in a competing position;
- **Type of job or field** encompassed by the restriction; and
- **Geographic scope** of the non-compete territory

To be valid, the employee must receive something in exchange, called consideration, for agreeing to these restrictions. If an employer requires an employee to sign a non-compete agreement after he or she has started employment, continued employment is not enough, and the employer must provide something more.

### **Enforceability of Non-Compete Agreements :**

Non-competes can prevent people from earning an income, and in Minnesota, courts can narrow or void non-compete agreements that unnecessarily prevent a person from pursuing a livelihood. In narrowing a non-compete, courts consider the reasonableness of the terms, including whether or not the restraint is necessary for the protection of the business or good will of the employer, and if so, whether the stipulation has imposed upon the employee any greater restraint than is reasonably necessary to protect the employer's business. Factors courts consider include:

- The scope of the employer's business;
- The nature of the employee's work during employment;
- The time for which the restriction is imposed; and
- The territorial extent of the locality to which the prohibition extends

If a court determines the restrictions are too broad, it could, for example, narrow a nation-wide non-compete restriction to a metro area, or reduce a restriction against working at a medical device company to limiting the employee's work to exclude a particular type of medical device. Perhaps most common, a two-year period could be cut down to a shorter time period.

In some fields, especially for executives and sales employees, non-competition agreements can prohibit employment for a significant period of time. In these situations, it is critically important that the employee is compensated for the interruption to their career at the time of negotiating the agreement