

# Is the Future Uncertain for Non-Compete Agreements?

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In November 2019, Minnesota Attorney General Keith Ellison joined officials from about 20 other states in requesting that the Federal Trade Commission (“FTC”) adopt a new rule that would render non-compete agreements illegal for low-wage workers and where they were not specifically negotiated.

The request by many states for a rule restricting non-compete agreements represented a reaction to perceived employer overuse of non-compete agreements, such as with low-wage employees. An example is the Jimmy John’s sandwich chain, which drew negative publicity over its practice of asking its employees to sign non-compete agreements.

As of September 1, 2020, the FTC has yet to release notice of any proposed rule restricting the enforceability of non-compete agreements.

## Efforts to Modify Existing Non-Compete Law in Minnesota

Another effort to limit the enforceability of non-compete agreements recently played out at the Minnesota Legislature. DFL legislators proposed a bill to limit Minnesota non-compete law by prohibiting the use of these agreements for physicians. While the bill progressed in the DFL-majority House, it did not receive a hearing in the GOP-controlled Senate, and has not become law.

## Varying Approaches Among the States

States have adopted widely-differing approaches to enforcing non-compete agreements. Some states, such as California and North Dakota, prohibit non-compete agreements or strictly limit their enforcement. In other states, including Minnesota, courts will often enforce non-compete agreements if they are reasonable in scope and duration and necessary to protect a legitimate interest of the original employer that seeks to enforce the restriction. Broadly, the trend across the country is toward restricting enforcement of non-compete agreements. In recent years, at least six states have moved in this direction.

## Challenges in Enforcing Non-Compete Agreements Under Minnesota Law

While neither the FTC nor Minnesota's Legislature has expressly forbidden non-compete agreements, recent court decisions in Minnesota illustrate the challenges that an employer can face in seeking to enforce these types of contracts.

- In one case, the court refused to enforce a non-compete agreement signed by an employee on his second day on the job because the employer had not mentioned the restriction to the employee before he accepted the job offer and the employer failed to provide the employee with "independent consideration" for signing the restriction.
- Another court denied an employer's request for an injunction to enforce a non-compete covenant because of a lack of evidence that the employer had a legitimate interest that was genuinely threatened by its former employee's work for a competitor. The court was unconvinced that there was a genuine threat simply because the employee worked in sales jobs with both companies.
- In another recent decision, the court denied an employer's attempt to enforce a non-compete agreement that was drafted to apply to "prospective" customers of the employer. The prospective nature of the relationships in question caused the court to conclude that there was an insufficient threat of harm to justify enforcing that type of restriction.
- In a ruling in which the court did enforce a customer non-solicitation provision through a temporary injunction, the court also held that the former employee subject to the injunction was entitled to know the names of all "off-limits" customers, information which the former employer had been reluctant to provide.

## Conclusion

Recent developments reflect the competing policy interests implicated by non-compete agreements. On one hand, employers have a legitimate interest in protecting their confidential information and customer relationships. On the other hand, employees naturally expect to be able to maximize their earnings, which may mean taking their experience and skills to a competitor. There is also a broader societal interest in favoring robust business competition.

Given the changing landscape of non-compete law, it is important to work with a qualified attorney when drafting or seeking to enforce non-compete agreements or other contracts containing restrictive covenants. Moss & Barnett attorneys work frequently with clients in navigating these issues. Please contact your Moss & Barnett attorney if we can assist you.

## Attorneys

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