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## Minnesota's Non-Compete Ban Becomes Effective July 1, 2023

By John P. Barry, Rebecca Sivitz,  
and Brett Bonfanti\*

MINN. STAT. § 181.988 takes effect July 1, 2023 and essentially bans new employee non-competes and the use of foreign (i.e., non-Minnesota) choice of law and forum selection clauses in such agreements between employers and employees or independent contractors. Unlike similar statutes in other states, the Minnesota statute voids such covenants regardless of how much an employee or independent contractor is paid. Importantly, the statute expressly exempts from its coverage: (i) non-competes entered into with the sellers of a business; (ii) non-competes entered into with partners, members, or shareholders in anticipation of the dissolution of a partnership, LLC, or corporation; (iii) most client and employee non-solicitation agreements; and (iv) nondisclosure agreements.

A summary of the key provisions of the law is below.

### The Law's Non-Compete Implications

The new law renders void and unenforceable “covenants not to compete” between an employer and any employee or independent contractor. The law defines a “covenant not to compete” broadly to include any agreement that restricts an employee or independent contractor, after termination of employment, from performing “(1) work for another employer for a specified period of time; (2) work in a specified geographical area; or (3) work for another employer in a capacity that is similar to the employee’s work for the employer that is party to the agreement.”

The statute allows for an unenforceable covenant not to compete to be severed from a contract, so only the covenant not to compete itself is affected. Courts have discretion to award reasonable attorney’s fees to employees enforcing their rights under the statute.

### Exceptions:

The following are specifically not void under the statute:

- *Non-Disclosure Agreements.* The law does not cover non-disclosure agreements, including agreements prohibiting disclosure of trade secrets and prohibiting disclosure of confidential and proprietary information.
- *Non-Solicitation Agreements.* The law does not cover non-solicitation agreements, including agreements restricting the ability to use client or contact lists, or solicit customers of the employer.

\*Summer associate Jon Greenstein assisted with the preparation of this alert

- **Sale of Business Non-Competes.** A buyer and a seller may agree on a “temporary and geographically restricted covenant not to compete that will prohibit the seller of the business from carrying on a similar business within a reasonable geographic area and for a reasonable length of time.” It remains to be seen if existing Minnesota case law would be accepted as defining these terms.
- **Partners, Member and Shareholders.** Under the law, the partners, members, or shareholders, upon or in anticipation of a dissolution of a partnership, limited liability company, or corporation may agree to non-competes. Note, the statute refers specifically to dissolution, unlike a corresponding exception under California law that refers to dissolution *or* disassociation of a partner. This suggests that, subject to further interpretive guidance, the Minnesota law does not currently appear to have a blanket exception for partners, members, or shareholders.

The types of agreements exempted from the new law will still need to be drafted narrowly to protect an employer’s legitimate business interests in order to satisfy Minnesota’s existing common law rules relating to the enforceability of restrictive covenants.

### The Law’s Choice of Law and Forum Selection Clause Implications

The Minnesota legislature was careful to ensure that employers could not make an end-run around its ban on non-competes via the use of choice of law and forum selection clauses. To that end, the statute permits employees and independent contractors who “primarily reside and work” in Minnesota to void a provision in a contract that an employer requires the individual sign “as a condition of employment” that would “(1) require the employee to adjudicate outside of Minnesota a claim arising in Minnesota; or (2) deprive the employee of the substantive protection of Minnesota law with respect to a controversy arising in Minnesota.” This provision would seem to allow an employee or independent contractor to void any forum selection clause that selects a state other than Minnesota as the *exclusive* venue for disputes. A

clause that would have an employee or independent contractor merely consent to jurisdiction in the courts of other states may be permissible because it does not “require” a dispute be adjudicated outside of Minnesota.

This limitation on forum selection and choice of law clauses applies only to contracts containing covenants not to compete. If voided, the matter will be adjudicated in Minnesota under Minnesota law. Under the statute, employees and independent contractors could seek injunctive relief to invalidate an unenforceable choice of law or forum selection clause. In the event of such litigation, the statute gives courts the discretion to award reasonable attorney’s fees to employees seeking to enforce their rights under the statute.

Left open for interpretation is under what circumstances such clauses are a “condition of employment.” For instance, if an employer offers an employee an equity grant, bonus, or other form of incentive compensation in exchange for a covenant not-to-compete, but the employee would face no adverse employment consequences for turning down such an offer, is such a clause truly a “condition of employment?” That question also remains to be answered.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation practice, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

**Editors:**

John P. Barry  
Partner, Practice Group Leader  
New York  
+1 212 310 8150  
[john.barry@weil.com](mailto:john.barry@weil.com)

Celine Chan  
Counsel  
New York  
+1 212 310 8045  
[celine.chan@weil.com](mailto:celine.chan@weil.com)

Justin DiGennaro  
Counsel  
New York  
+1 212 310 8219  
[justin.digennaro@weil.com](mailto:justin.digennaro@weil.com)

Rebecca Sivitz  
Counsel  
Boston  
+1 617 772 8339  
[rebecca.sivitz@weil.com](mailto:rebecca.sivitz@weil.com)

Gary D. Friedman  
Partner  
New York  
+1 212 310 8963  
[gary.friedman@weil.com](mailto:gary.friedman@weil.com)

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