

## **Noncompetes have teeth in Minnesota**

But employers must be careful not to make them overbroad.

By Dan Heilman | May 7, 2007  
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In a Ramsey County District Court judge's recent ruling that the St. Paul Pioneer Press be allowed to search computers owned or used by Star Tribune employees amid claims that the computers contained confidential advertising information, somewhat overshadowed was the fate of Jennifer Parratt.

Parratt, whom new Star Tribune publisher Par Ridder had brought with him from the Pioneer Press as his new director of niche publications, was temporarily suspended from her job on orders of the judge, who said Parratt had broken a noncompete agreement when she took the new post at the Star Tribune.

Employment attorneys around Minnesota agreed that the ruling, and the high profile of the dispute between the two newspapers, will serve as a valuable wake-up call to both employees and employers about the value and potential hazards of noncompete agreements.

"I thought it was a well-written order," said Minneapolis attorney Lee Watson. "It demonstrated that there is a duty of loyalty with respect to trade secrets. You can't simply take them and walk away with them."

As Parratt's predicament showed, noncompete agreements are often an effective way to prevent former employees from working for competitors within a certain period of time. But mishandled, they can also bring injunctions and lawsuits to a worker's new employer when he or she switches jobs.

### **General guidelines**

Terms of noncompete agreements — also called no-compete or restrictive covenants — vary by company, but most follow general guidelines. Typically, noncompetes ask employees to agree that they won't work for a competitor of their former employer for a prescribed period of time, usually no more than two years. Some noncompete agreements list competitors by name, but many are careful to depict such lists as merely examples of companies that could be considered competitors, as a way of hedging against the possibility of competitors that don't yet exist.

Noncompete agreements have traditionally been the province of industries where ideas are the stock in trade — technology and publishing, to name two. Along with the two daily newspapers, many locally based magazine publishers (including the publishers of Minnesota Monthly and Mpls-St.Paul magazines) ask most of their editorial and

managerial staff to sign them. And high-tech companies such as Medtronic routinely use them to keep valuable information from wandering away.

But over the years, their reach has also extended to relationship-driven businesses as well.

“They’re common wherever confidential information or customer relationships are important,” said Minneapolis employment attorney Wayne Moskowitz. “There doesn’t necessarily have to be a lot of intellectual property at stake. If a provider of janitorial supplies has a salesperson leave for another company in the cleaning industry, it’s reasonable for them to fear that the relationships they’ve developed with their customers could be compromised.”

Noncompete agreements are also becoming more common in industries such as medicine, and among smaller companies for whom profit margins are smaller and the loss of a trade secret can be fatal. Small businesses also use them as a way to discourage former employees from recruiting current ones.

“They’re becoming more common among smaller companies,” said St. Louis Park attorney Gerald T. Laurie. “The nature of the modern economy means companies have to be service-oriented and idea-oriented, and many smaller companies are seeing the need to protect those ideas any way they can.”

## **Minnesota’s reputation**

According to Watson, Minnesota companies have earned a national reputation for imposing noncompete agreements, and Minnesota courts a reputation for enforcing them. That might have to do with the fact that one of Minnesota’s most renowned corporations was among the first to use them.

“3M was one of the first in the area,” said Laurie. “I started practicing 40 years ago, and I heard about them then. Many noncompete agreements in Minnesota are patterned after theirs. 3M was one of the first companies to be extremely cognizant of its need to protect its intellectual property rights.”

But not all states take such a hard line on keeping employees from moving to competitors. Laws in such states as North Dakota and Texas don’t recognize the enforceability of such covenants, and California has a right-to-work statute that effectively bans them.

“Some people say [the California ban] was part of the reason for the explosive success of Silicon Valley,” said Laurie. “People were free to come and go and exchange ideas.”

In fact, California courts have even refused to recognize the validity of noncompete agreements in other states. In a 2002 case, a former Medtronic employee who was planning on going to work for a competitive California company filed suit against Medtronic as a pre-emptive way of voiding his noncompete. The case went to the California Supreme Court, which ruled that California courts couldn't keep courts in other states from hearing noncompete cases governed by their own laws, but it didn't change California's policy about noncompete agreements within the state.

Scenarios such as the one in California are exceptional across most of the United States, however, according to Moskowitz.

“Minnesota follows the majority of states in how it enforces them,” he said. “If it's reasonable and protects a legitimate business interest, it's enforceable. Different states have different formulations of what constitutes protectable interests.”

Not only do noncompete agreements have relatively more muscle in Minnesota than in other states, but companies here can even impose them retroactively in some cases, thanks to the state's Uniform Trade Secret Act, which provides that confidential business information is protectable as long as the information can be shown to be classified as a trade secret.

“Often, an employer without a noncompete agreement in place will turn to the trade secret law for protection,” said Laurie. “It's a way to back-door a certain level of protection that would've otherwise been in place with a noncompete.”

### **Key people**

Employers are encouraged to require noncompete agreements when they feel they have trade secrets that could be legitimately damaging in the wrong hands.

“If you have a business where a key salesperson or engineer could pose a real threat to you by leaving, you need to consider it,” said Laurie.

But trying to make such covenants too broad can backfire, according to Rochester attorney Deanna J. Schleusner.

“They should be narrow enough to protect what needs protecting,” Schleusner said. “You're weighing the balance between legitimate interests and an employee's right to work.”

Schleusner said time and geography should be considered when drafting a noncompete agreement. If a former employee's sales territory was in southwest Minnesota, for instance, it's probably asking for trouble to extend his noncompete agreement to Wisconsin and the Dakotas. Also, a noncompete agreement is more likely to be invalidated if it covers an unreasonable amount of time.

“They should be written in an appropriate manner in terms of the time they cover,” said Schleusner. “In technology, what needs protecting in 10 years might be completely different from what needs protecting now.”

She added that if a noncompete agreement is too broad, a court can blue-line it, or edit it to make it more reasonable.

When putting together a noncompete, employers should work to establish proper boundaries: If trade information is generally known outside the confines of the business, or if it can't be proven valuable to competitors, then a noncompete might not be needed. And if a company's trade secrets are known to only certain employees, then it doesn't make sense to require all workers to sign one.

“Every employer has different interests, and so every employer's noncompete agreement should have different terms,” Schleusner said. “One size doesn't fit all.”

### **Tread carefully**

Employees need to tread carefully when it comes to noncompete agreements. If they're found to be in violation of their agreement, their former employer can seek an injunction that keeps them from accepting a new job, and possibly make them liable for their former employer's legal fees in the case. If the employee violates the injunction, he can be found in contempt of court. Even though most cases don't go that far — if a noncompete agreement dispute becomes a legal matter, it's usually heard at an informal hearing rather than a trial — most employees don't have the patience or the resources to defend noncompete agreement-related injunctions.

“Never sign one if you don't have to, even though that's easier said than done,” said Laurie. “If you already have, see if it's subject to revision. A lot of companies insist that all their people sign the same agreement, but it's worth asking.”

In Minnesota, as in most other states, a noncompete agreement must come with some form of consideration, whether monetary or in the form of a promotion or other perks. And according to Moskowitz, a job itself can be seen as consideration, which is why if an employee is asked to sign a noncompete agreement, he's usually asked on his first day of work or before. If he's asked later, and without consideration, the noncompete agreement is likely invalid.

Employees also have to keep in mind that a noncompete agreement lives and dies with the company where it originated, not with the owner or human resources director who drafted it.

“The boss who had you sign it might not be the boss anymore, and the business may have been sold and the noncompete agreement assigned to somebody else,” said Watson. “But it's still enforceable.”

Employees are allowed to review noncompete agreements with an attorney before signing, and it's during that review process that weak spots in the covenant might be found.

"Employees should go over it with a fine-tooth comb, preferably with a lawyer," said Schleusner. "If it's overreaching, that can be shown to be tortious interference."

Employees should also keep in mind how much leverage they're giving up when they sign a noncompete agreement, according to Watson.

"If you're asked to sign one, odds are you've never been stronger in the marketplace than before you sign," he said. "If you can get away without signing one when your co-workers have, that usually indicates some bargaining power. But the people affected most by noncompete agreements are usually lower on the totem pole."

### **New employers**

If anything, a new employer might be put in harm's way by a noncompete agreement to an even greater extent than an employee. If a company hires an employee who is subject to a noncompete agreement, whether the employee has made them aware of the agreement or not, the company could be liable for damages to the former employer. Because those damages can be substantial, most businesses are reluctant to hire an employee still subject to a noncompete agreement. At the very least, the new employer would likely receive a cease-and-desist letter from the old one.

"Employers have a duty to do a reasonable investigation of the contractual obligations a new employee is under," said Moskowitz. "If they hire someone whose noncompete precludes employment, they could be subject to tort liability."

Because of the terms in many noncompete agreements, they can make finding a new job a challenge. Some employees end up moving out of the geographical area of their former employer or finding work in a different industry in an effort to "ride out" the burdens of their noncompete agreements, a situation that many employee advocates see as unfair.

"Some believe it's restraint of trade, and that the employer has to prove need," said Watson. "But the employer is usually a lot better able to wait out the legal process than the employee is."

The fact remains, though, that while noncompete agreements are disfavored as restraints of trade, they can be enforced with relative ease in most states if certain basic requirements are met. With that being the case, most attorneys advise employees to either live with their noncompete agreement or find a way around it.

"Try to negotiate with your employer," said Watson. "Try to get them and your new employer to the table so the old employer can spell out what it is that they're interested in protecting. It's a small world, and people are going to find out anyway."

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### **Noncompete tips for business owners**

- Don't try to write it yourself. You might need to use the agreement in court someday; get an attorney's help in drafting it.
- Don't make it overbroad. Draw up the noncompete so that it only serves to protect legitimate interests that would demonstrably damage your company if they fell into the hands of your competition. And when defining your protectable interests, be specific: List strategies, technology and any proprietary information that you feel needs protecting.
- Mind the chronological and geographic scope of the agreement. A noncompete forbidding former employees from working in a market you don't work in likely can't be enforced; neither can a noncompete whose term is longer than a few years.
- Be careful that any employee who's asked to sign it has received some compensation for doing so. If a noncompete is introduced during the hiring process, the job itself is reasonable compensation, but if it's brought up later, there should be the promise of a raise or promotion.
- Hire with caution. When interviewing job candidates, ask if they're subject to a noncompete, and if so, if you can review it. If it looks like the agreement will create a conflict, encourage the employee to talk with his former employer in an effort to alter the contract to allow for his continued employment. On the other hand, your review of the prospective employee's noncompete might convince you that it's not enforceable.
- Allow for partial enforcement. A noncompete can be drafted so that even if one portion is found invalid, the remainder can be enforced.
- Don't force everybody to sign one. Not all your employees have access to your trade secrets; restrict noncompetes to employees who could truly harm your company if they left for a competitor.