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Federal Trade Commission Proposed Non-Compete Ban

On January 5, 2023, the Federal Trade Commission proposed a rule that would largely ban non-compete agreements nationally between employers and employees. If enacted, it would be an "unfair method of competition" for an employer "to enter into or attempt to enter into," "maintain" or "represent to a worker that the worker is subject to a non-compete clause."

The FTC based its rulemaking authority on Section 5 of the Federal Trade Commission Act, which provides: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . .. from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[i]

SUMMARY OF THE PROPOSED RULE

The proposed rule, which would supersede all contrary state laws, is expansive in its approach to "non-compete clauses" that would be covered by the ban.

The ban would extend to any contractual provisions that have the "effect" of prohibiting workers from seeking or accepting employment or operating a business after the end of the worker's current employment. Consequently, the ban potentially could include broad customer non-solicit agreements that prohibit contacting or accepting business from former customers, broadly drafted non-disclosure agreements where use or disclosure of the company's confidential information may be implicated by the new employment, contracts with onerous training reimbursement provisions, or other provisions that limit future employment.

More specifically, the FTC's supplementary materials state that "the definition of non-compete clause would generally not include other types of restrictive covenants—such as non-disclosure agreements ('NDAs') and client or customer non-solicitation agreements—because these covenants generally do not prevent a worker from seeking or accepting employment with a person operating a business after the conclusion of the worker's employment with the employer." However, under the definition of "non-compete clause," the proposed rule provides: "such covenants *would* be considered non-compete clauses where they are so *unusually* broad in scope that they function as such." (Emphasis added.)

The supplementary materials also mention "no-business agreements" (prohibiting a worker from doing business with former clients or customers of the employer), "no-recruit agreements" (prohibiting the worker from hiring or recruiting the employer's workers), and "liquidated damages provisions" (requiring the worker to pay the employer a sum of money if the worker engages in certain conduct) as other types of agreements that "can sometimes" be broad enough in scope to fall within the proposed rule's definition of non-compete clause.

The proposed ban is not merely a passive rule that invalidates existing agreements. It would also place upon employers an obligation to affirmatively rescind non-compete provisions. Notwithstanding that, other provisions in a contract containing a rescinded non-compete provision would remain valid. In other words, if a non-compete exists in a severance agreement, the non-compete would be rescinded,

but the severance obligations (which had been tied to that now-void non-compete) would be valid.

The FTC's second example of a "*de facto* non-compete clause," concerning the repayment of training costs, creates further uncertainty over the variety of contractual provisions and executive compensation that employers use to retain employees (many of which employers regard as carrots, rather than sticks). Examples include retention bonuses, equity grants, and other forms of incentive compensation that would be forfeited if an employee separates from the employer within a specified period of time.

The proposed ban does include an exception for non-competes agreed to in connection with the sale of a business, but that exception is more narrow than existing state laws. The exception would apply only to individuals with at least a 25 percent ownership stake in the newly formed business.

The proposed ban applies to employees, independent contractors, interns, and volunteers alike. It also applies to independent contractors who are engaged through their own business entity if the individual is a sole proprietor of the entity through which they are engaged.

Although the proposed rule is broad, its application will be more narrow. Only the FTC will have the power to enforce it, and only through injunctive relief. Thus, it would not create a private right of action with the attendant threat of damages, or of equitable monetary relief such as restitution or disgorgement. Aggrieved "workers" would still need to enforce their rights under the Sherman Act and the Clayton Act, where courts generally apply the rigorous rule of reason test to non-compete agreements, or simply defer to state regulation entirely.

POTENTIAL LEGAL CHALLENGES TO THE PROPOSED RULE

Last year, the Supreme Court invalidated certain regulations issued by the EPA and OSHA under the Major Questions Doctrine. That Doctrine is a principle of statutory interpretation in United States administrative law which states that courts will presume that Congress does not delegate to executive agencies issues of major political or economic significance.

Challenges to the Proposed Rule likely will make this argument. Non-compete agreements have existed for centuries and have traditionally been governed by non-federal law. Many state governments have addressed non-compete reform in recent years. Congress recently and repeatedly has tried to enact non-compete reform, but has failed to do so. So if Congress wanted to invalidate non-competes, it knew how to do so and could have done so. Similarly, if Congress wanted to delegate authority to an agency to invalidate non-competes, it could have done so.

It also seems likely the Proposed Rule will be challenged under the Non-Delegation Doctrine as an impermissible delegation of congressional authority. Under longstanding Supreme Court precedent, Congress may not transfer to another branch powers that are strictly and exclusively legislative. While Congress can confer discretion on agencies to implement and enforce laws, it must provide an intelligible principle to which the agency is directed to conform. The ambiguous reference to "unfair methods of competition" in the FTC Act's Section 5 could be argued to be too broad.

One State's Recent Example: Minnesota Non-Compete Ban

The Minnesota legislature recently enacted a bill that bans non-competes in Minnesota, as well as provisions selecting non-Minnesota law or venue to govern non-compete disputes. These changes follow many other states that have limited restrictive covenants statutorily but are separate from the FTC's proposed ban (which remains pending).

The new law does the following—

The bill bans non-competes for employees and independent contractors. The bill defines "employees" to include contractors, and defines a contractor as "any individual whose employment is governed by a contract and whose compensation is not reported to the Internal Revenue Service on a W-2 form. For purposes of this section, independent contractor also includes any corporation, limited liability corporation, partnership, or other corporate entity when an employer requires an individual to form such an organization for purposes of entering into a contract for services as a condition of receiving compensation under an independent contractor agreement."

The bill bans any covenant not to compete, which the bill defines as "an agreement between an employee and employer that restricts the employee, after termination of the 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 bill excludes from the non-compete ban "a nondisclosure agreement, or agreement designed to protect trade secrets or confidential information," and also excludes "a nonsolicitation agreement, or agreement restricting the ability to use client or contact lists, or solicit customers of the employer." The bill also includes exceptions for the sale or dissolution of a business.

The bill does not just apply to contracts governing employment. The non-compete ban would include *any* contract—including agreements governing employment, contractor status, intellectual property rights, equity, separation, severance, and anything else.

The bill makes voidable non-Minnesota choice-of-law and choice-of-venue provisions for non-competes, but only those in employment agreements. Case law from states that have passed similar "voidable" provisions (versus "void" provisions) may offer guidance on what an employee must affirmatively do to void a provision.

The bill gives employees and contractors the right to void unlawful provisions, with their attorneys' fees paid by the company.

Finally, the bill impacts only new agreements, not existing agreements containing non-competes or non-Minnesota law and venue provisions. Because the proposed ban is not retroactive, we could continue to see litigation over legacy non-compete contracts for years to come, but the public policy for enforcement might be diminished.

All Eyes on Non-Solicitation Agreements

Contracts prohibiting solicitation of customers by departing employees have been utilized for

many decades in Minnesota, often in conjunction with a non-compete provision. Legislation pending in the Minnesota senate at the time these materials were prepared would explicitly ***not*** ban non-solicitation agreements. If or when pure non-competes are banned in Minnesota, non-solicit clauses will therefore ascend in importance to become the primary means of protecting customer goodwill.

In a sense, this is not a tectonic shift. Historically, pure non-competes were only enforceable to the extent they were necessary to protect a legitimate business interest. Courts in Minnesota have largely limited the scope of "legitimate business interest" to (A) customer goodwill and (B) confidential and proprietary information.[ii] A non-solicit paired with a non-disclosure should, therefore, offer almost as much protection as a blanket non-compete.

The non-compete previously held allure, however, because the former employer could attempt to enjoin the former employee from working at all. If successful, the former employer would avoid facing the challenging task of proving actual damages in the form of lost profits. Because courts in Minnesota have become less inclined to grant injunctions over the past decade or so, practitioners have become less likely to seek injunctive relief. That means we have already started the transition away from injunction battles and toward showing actual harm from diversion of customers or other business. (To be clear, injunctive relief to enforce a non-solicit is a viable option, but it does not keep the employee from working for a competitor.)

Under Minnesota law, a non-solicitation-of-customers agreement is enforceable if it is supported by consideration, it protects a legitimate employer interest, and it is reasonable in scope.[iii] In *Dynamic Air*, the Minnesota Court of Appeals held that a territorial limitation is irrelevant with regard to a non-solicitation covenant because the restriction to former clients is sufficiently narrow.

Courts have sometimes expressed a preference for non-solicits over non-competes because they are less burdensome and more precise. In *Thermorama, Inc. v. Buckwold*, the Court noted that if the former employee had not breached the terms of his agreement, he would "suffer little detriment by the issuance of the injunction," but on the other hand, if the employee breached, then "the former employer may well lose a number of customers for whom it has not had a fair opportunity to compete, and may forfeit as well future benefits which are difficult to evaluate."[iv]

In *Softchoice, Inc. v. Schmidt*, the Minnesota Court of Appeals held that a promotion was sufficient consideration to support a non-solicitation agreement, suggesting that the strict consideration requirements for non-solicits are the same as for non-competes.[v]

Minnesota courts have applied the "blue pencil doctrine" to limit non-solicits to certain customers.[vi]

WHAT IS "SOLICITATION"?

Whether "solicitation" must be an active outreach to the customer is often a debate. The employee sometimes claims that they did not solicit the customer but, rather, the customer approached them and they merely provided services. This begs the question of what the term "solicit" actually means. Minnesota appellate courts have not squarely addressed this question but have danced around it for 100 years.[vii]

In *Al's Cabinets, Inc. v. Thurk*, Al's Cabinets sued its former employee, Jack Thurk, and his new employer, alleging that the former employee had violated a non-solicitation agreement. While working for his new employer, Thurk accepted two orders from clients at his former employment. Both clients called and initiated the contact, one of which Thurk claimed, "occurred without his knowledge or participation."[viii]

The district court found that while there was no direct showing that Thurk had solicited his former customer, his preparation of a bid containing pricing and delivery guarantees were "designed to induce the customer to enter into a contract . . . ." The appeals court affirmed the lower court's decision stating:

> [T]he nonsolicitation provision does not just prohibit endeavors to 'divert or entice away' business from respondents; it also expressly prohibits Thurk from 'attempt[ing] to sell or market any products to' respondents' customers. Product pricing is an important aspect of inducing a customer to enter into a contract. Therefore, regardless of who initiates the contact, it would be unreasonable to construe the preparation of a bid for a potential customer in connection with a specific project as anything other than an 'attempt to sell' a product.'

The court concluded that the district court did not err in holding that Thurk violated the non-solicitation agreement.[ix]

In 2013 however, a federal court in Minnesota distinguished the holding in *Al's Cabinets*. In *Honeywell International v. Stacey*, Honeywell sued a former employee whom it alleged had breached a noncompete agreement.[x] New Jersey law governed the agreement. The non-solicitation agreement prohibited Stacey from directly or indirectly soliciting, or attempting or assisting to solicit, Honeywell's customers. Stacey's defense was that "so long as the customer first contacts [him], and [he] does not first contact the customer, [he] has not 'solicited' the customer in violation of his agreement with Honeywell." Honeywell argued Stacey anticipatorily violated the agreement by expressing his belief that working with his new employer's preexisting customers was permitted, even if they were also Honeywell's customers.[xi]

The court found that New Jersey precedent supported Stacey's position that former employees who did not initiate contact with former clients, and merely accepted the business, did not violate their non-solicitation agreements. The court distinguished the cases advanced by Honeywell because they "involve[d] broader contractual language."[xii] The court also categorized *Al's Cabinets* as a non-solicitation agreement which used broad contractual language because it prohibited the former employee from "'attempt[ing] to sell or market any products' to former clients." The case that most clearly supported Honeywell's argument, the court noted, did not hold "that accepting business from a former client constitutes solicitation; instead, it holds that, under the facts of that case, the defendant's activities constituted more than merely 'accepting business.'"[xiii]

The *Honeywell* decision highlights the importance of including broad language in non-solicits. Covenants not to "do business with" clients may be attractive to employers if Minnesota bans non-competes because they avoid the question of whether "solicitation" occurred. In *Rosewood Mortgage Corp. v. Hefty*, the Minnesota Court of Appeals reversed a temporary injunction based on a clause that

stated, "In the event of termination of employment of Hefty, Hefty agrees not to service or transact business with any clients or institutions [with] whom Hefty had contact while with [Rosewood] during the period of his employment, for a period of two (2) years from said date of termination."[xiv] It will need to be determined if these broader provisions violate Minnesota's possible ban on non-competes or if they are considered a species of non-solicitation.

In another case, the Minnesota Court of Appeals upheld a restrictive covenant against soliciting customers. In *Webb Publishing v. Fosshage*, after terminating an employee from his position as an account executive, the employer brought an action for damages and injunction to enforce the restrictive covenant agreement.[xv] The former employee signed the agreement, which provided that:

> For a period of 18 months from termination of employment, I shall not, directly or indirectly, engage in or solicit or have any interest in any person, firm, corporation, or business that engages in or solicits, the publication or marketing of any custom publication, promotion piece, catalog, calendar, or any other printed material for any customer that has done business with the custom publishing division of Webb within the period of one year immediately prior to my termination of employment.

The court held that the evidence in the case sufficiently supported the district court's inference of irreparable harm. The court explained its reasoning that the former employee worked closely with the employer's clients, considered them friends, and at least one client considered him part of "a winning team." The court further explained that the employee's success in soliciting their business demonstrated the "personal hold" he had on them, that loss of these customers would cost the employer 45 percent of its custom publishing revenue, and the damage to its business reputation in that area would be substantial and not easily measured. While the court also explained that the record did not show why the former employee was unable to transfer his experience into soliciting clients who were not from his former employer or that there was an absence of potential clients for custom publishing, the court concluded that the trial court's finding that irreparable injury to the employer outweighed potential injury to the former employee was not clearly erroneous.[xvi]

When a non-solicitation agreement does not explicitly forbid acceptance of unsolicited business, many courts around the country have interpreted such agreements in favor of the former employee.[xvii] Conversely, courts have enforced less ambiguous non-solicitation agreements which prohibit former employees from accepting business from former clients.[xviii]

PRE-EXISTING CUSTOMERS

New York law has developed a doctrine that disallows employers from restricting former employees from soliciting business from customers or client relationships that they had prior to employment. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 690 N.Y.S.2d 854 (1999). Minnesota has not expressly adopted this concept. In fact, in one Minnesota federal court decision, the court affirmatively enforced a restrictive covenant that applied to a group of employees' pre-existing customers. In *Merrill Corp. v. R.R. Donnelley & Sons Co.*, when a group of employees resigned from their employer (Merrill), to work for a competitor, and began contacting some of the former employer's customers, the former

employer sued to enforce its non-solicitation and confidentiality agreements. The court observed that the restrictive covenants prohibit the individual defendants from soliciting "existing or potential Merrill client[s]" and make no exception for pre-existing clients brought to the company by the individual defendants. The court held that once the individual defendants began working for the company and once their pre-existing clients became clients of the company, that those clients became "existing" clients and are protected by the restrictive covenants.[xix]

The Minnesota Court of Appeals reached a contradictory result, however, in *Sysdyne Corp v. Rousslang*.[xx] In *Sysdyne*, the former employer sued its former employee for breaching non-solicitation provisions of a restrictive covenant agreement, and new employer for tortious interference with contractual relations and prospective business relationships. The non-solicitation provision provided that the employee may not "in any manner contact, solicit or cause to be solicited, customers or former or prospective customers" of the former employer located in the seven-county metro area. The Minnesota district court "blue-penciled" the employment agreement to exclude the employee's pre-existing customers from the restrictive covenant agreement. The district court concluded that in regard to pre-existing customers the former employer was "not seeking to prevent [the employee] from appropriating [the employer's] relationships as his own; rather, [the employer] was seeking to appropriate the employee's relationships as its own." The district court further explained that "guarding against appropriation is a legitimate business interest, appropriation is not." The Minnesota Court of Appeals upheld the district court's application of the blue pencil doctrine and found that the district court did not abuse its discretion by modifying the non-solicitation provision to exclude the employee's pre-existing customers.[xxi]

As non-solicits rise to the fore in the face of a possible ban on non-competes, legal advisors should pay careful attention to drafting language that is as broad as possible without running afoul of a non-compete ban. Litigators should keep in mind that a common law breach of duty-of-loyalty claim can be asserted against an employee who solicits customers for himself or a competitor prior to the last day of employment.

NON-SOLICITATION OF EMPLOYEES

Provisions barring solicitation of other employees have become extremely common in Minnesota but there are not many court decisions interpreting their use. These restrictions have not attracted as much public or legislative attention as non-competes have. Inasmuch as they are intended to prevent employee mobility, it is possible we will see increased scrutiny of these provisions in the future. The same question arises as to whether "solicitation" of employees must be "direct" arises as it does with customers.[xxii]

No Minnesota appellate court has squarely addressed the enforceability of non-solicitation-of-employees covenants in a reported decision. It is generally assumed, however, that post-employment restrictions on recruiting employees are lawful in Minnesota and should be analyzed under the same legal framework as any other restrictive covenant. In order to be enforceable, therefore, the employer would have to demonstrate that it has a legitimate protectable interest, that the restriction is reasonably necessary to protect that interest, and the employee received adequate consideration, among other factors.[xxiii]

In *Schwan's Consumer Brands North America, Inc. v. Home Run Inn, Inc.*, a judge in the U.S. District Court for the District of Minnesota denied a motion for an injunction by a plaintiff alleging, in part, breach of a 12-month non-solicitation provision by two former employees.[xxiv] The court found that the agreements did not appear to be supported by adequate consideration under Minnesota law, essentially applying the same analysis used for non-compete agreements. (In *Schwan's* the defendant company apparently voluntarily agreed at oral argument that it would not hire any further Schwan's employees for a period of 12 months.) In *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, the Eighth Circuit Court of Appeals appeared to assume that an "anti-raiding" agreement was enforceable under Minnesota law and observed that the non-solicitation clause "did not prohibit the parties from merely hiring an employee of the other without solicitation."[xxv]

The Minnesota Court of Appeals denied injunctive relief to enforce an employee non-solicit in *ReliaStar Life Insurance Co. v. KMG America Corp*.[xxvi] In *ReliaStar*, two executives resigned from ReliaStar. After their resignation, they solicited and made offers to eight other ReliaStar employees to join KMG, and successfully hired seven. The original two executives were subject to a prohibition on soliciting "employees, agents, and customers" for a period of 12 months. The trial court denied ReliaStar's motion for an injunction and ReliaStar appealed. The Court of Appeals affirmed, noting:

> ReliaStar sought to enjoin KMG . . . from continuing to employ anyone employed by ReliaStar on December 14, 2004. . . As the district court emphasized, these employees (with the sole possible exception of Gibb) were not subject to non-competition agreements. A broad injunction whereby . . . the sales representatives who formerly worked for ReliaStar would all lose their jobs would have substantially harmed the employees and KMG.

In another employee solicitation dispute, this time involving the freight-brokerage industry, a court in Hennepin County, Minnesota, issued an injunction prohibiting "all" employees who used to work at one company (XPO) and who were still subject to a two-year non-solicitation provision with their former company (C.H. Robinson) "from soliciting or initiating contact regarding employment with any C.H. Robinson employee for the period of their non-solicitation agreement."[xxvii] To be clear, the court did not prevent anyone who had already been solicited from continuing their employment. The court in *C.H. Robinson* emphasized the protected interest at stake, noting, "Plaintiff's . . . [a]greements are properly read as preventing former employees from leveraging their relationships with current employees, whom they were exposed to as a result of their employment with Plaintiff, in an effort to misappropriate the goodwill that Plaintiff's employees have developed with Plaintiff's customers."[xxviii]

If a plaintiff does not seek injunctive relief, or if it is not available, Minnesota courts have provided little guidance as to the measure of damages in the case of a breach of a non-solicitation agreement. Lost damages might include cost of recruiting and training a replacement, and possibly something more.[xxix]

The solicitation of employees may also be unlawful in Minnesota if an executive solicits colleagues before she resigns her previous employment in violation of her common law duty of loyalty. In *Sorin Group USA, Inc. v. St. Jude Medical, S.C.*, Sorin Group sued St. Jude Medical for, *inter alia*, aiding and abetting a former sales manager to breach her duty of loyalty by soliciting a sales representative to move

with her to St. Jude. The district court declined to dismiss the claim on summary judgment.[xxx]

In *Central States Indus. Supply, Inc. v. McCullough*, a federal court in Iowa, analyzing an allegation of breach of fiduciary duty under Iowa law, described the "Pied Piper" rule as the "principle that, before he terminates his employment, a top managerial employee may not solicit the departure of employees to work for a competitor[.] The rule is most clearly applicable if the supervisor-manager, as a corporate pied-piper, leads all of his employer's employees away, thus destroying the employer's entire business."[xxxi]

In *The Manitowoc Company v. Lanning*, the Wisconsin Court of Appeals held that provisions purporting to restrict solicitation of employees are governed by Wis. Stat. § 103.465 because they are a type of "covenant . . . not to compete."[xxxii] In a fairly scathing decision, the court went on to hold that the provision was unenforceable under Wisconsin law because it was over-broad.

The Wisconsin Court of Appeals found that:

> The NSE provision also extends to contacts that seem loosely connected, if at all, to Manitowoc's competitive interests. It restricts Lanning from encouraging a Manitowoc friend to take a job with a noncompetitive employer simply because that employer happens to be a Manitowoc customer. This provision would seemingly prohibit Lanning from serving as a job reference for a former colleague who applies to work for a competitor, supplier, or customer of Manitowoc, or maybe who seeks to change industries altogether. The restriction even prohibits Lanning from encouraging a former colleague and friend to retire ("terminate their employment with Manitowoc") to spend more time with his family. . . . Manitowoc's stated interest—protecting itself from Lanning's specialized knowledge of its talent base and his relationships with employees—does not justify the broad ban on the solicitation, inducement, or encouragement of any employee. Manitowoc is a large company with two divisions. Lanning worked in the crane division; his expertise and connections would not extend to all of Manitowoc's employees. With respect to at least some of Manitowoc's employees, Lanning posed no greater threat to Manitowoc than any other competitor or employer. To meet its burden, Manitowoc would also need to show that the provision serves some legitimate and unique competitive interest by prohibiting the encouragement, solicitation, or inducement of any employee to accept employment not only with competitors, but also customers or suppliers. Starbucks, for example, is one of its customers. Lanning's non-solicitation provision would be violated if he encouraged a young former colleague to leave Manitowoc and work part time as a barista at Starbucks to pursue graduate studies. Manitowoc must show how such a provision is reasonably necessary for its protection.

The State of Missouri has a specific statute regarding any "covenant in writing promising not to solicit, recruit, hire or otherwise interfere the employment of one or more employees."[xxxiii] Interestingly,

the Missouri statute prohibits restrictions against "employees who provide only secretarial or clerical services."[xxxiv]

TRADE SECRETS, NON-DISCLOSURE AGREEMENTS, AND OTHER PROTECTIONS FOR EMPLOYERS

In order to protect both its customer goodwill and its proprietary and confidential business information in light of a potential ban on non-competes in Minnesota, employers are well advised to implement non-disclosure provisions with their employees along with non-solicit provisions.[xxxv] Employers should not rely on statutory protection alone, however, for two reasons. First, the definition of "trade secret" is very strict but contractual definitions of confidential information can be more encompassing. Second, the use of confidentiality agreements is one of the most important ways to demonstrate that the company has taken steps to maintain the confidentiality of its trade secrets in order to bring a claim under the state or federal statute. So contractual provisions go hand-in-glove with the state and federal trade secrets acts.

Note: It is important to remember that a non-disclosure agreement must be supported by consideration under Minnesota law like any other restrictive covenant.[xxxvi] That means a non-disclosure should be signed before the first day of employment and presented with the offer of employment. Companies sometimes rely on statements in handbooks regarding confidential information. But often these handbooks include a contract disclaimer that would make enforcement as a contract problematic.

Non-disparagement clauses are another common provision in employment agreements and separation agreements in Minnesota but, as with non-solicitation of employee provisions, there is very little case law in Minnesota regarding these types of clauses. The National Labor Relations Board has recently taken the position that they can be unlawful under the National Labor Relations Act for non-executive positions.[xxxvii]

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[i] 15 U.S.C. § 45(2).

[ii] *Oberfoell v. Kyte*, A17-0575, 2018 WL 492629 (Minn. Ct. App. Jan. 22, 2018).

[iii] *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993).

[iv] *Thermorama, Inc. v. Buckwold*, 125 N.W.2d 844 (Minn. 1964).

[v] *Softchoice, Inc. v. Schmidt*, 763 N.W.2d 660 (Minn. Ct. App. 2009).

[vi] *See, e.g., Management Recruiters Int'l v. Professional Placement Servs.*, No. C6-91-2055, 1992 WL 61542, at *1 (Minn. Ct. App. March. 31, 1992) (narrowing non-solicitation provisions applicable to recruiter by prohibiting him from having contact with five specific telecommunication companies); *Yonak et al. v. Hawker Well Works Inc. et al.*, No. A14-1221, 2015 WL 1514166, at *1 (Minn. Ct. App. Apr. 6, 2015) (upholding the district court's narrowing of a non-solicitation provision "to the employees, lenders, suppliers and customers of the Defendants that existed on or before" a specific date).

[vii] *See, e.g. Menter Co. v. Brock*, 180 N.W. 553, 555 (Minn. 1920) ("There is no evidence that [the former employee] . . made or threatened to make any effort to secure or attract plaintiff's patrons.").

[viii] *Al's Cabinets, Inc. v. Thurk*, No. C9-02-1348, 2003 WL 891419 (Minn. Ct. App. Mar. 4, 2003).

[ix] *Id*. at *3-4.

[x] *Honeywell Int'l v. Stacey*, No. 13-CV-3056 PJS/JJK, 2013 WL 9851104 (D. Minn. Dec. 11, 2013).

[xi] *Id.* at *8.

[xii] *Id.* (emphasis added) (citing *Esquire Deposition Servs., LLC v. Boutot*, No. 09–1526, 2009 WL 1812411, at *1 n.1 (D.N.J. June 22, 2009) in which a former employee could not "solicit or contact . . . to do business with" former clients or customers); *Platinum Mgmt., Inc. v. Dahms*, 666 A.2d 1028, 1033 (N.J. Super. Ct. Law Div. 1995) where a former employee could not solicit or accept business from former customers).

[xiii] *Id.* (citing *FCE Benefit Adm'rs, Inc. v. George Wash. Univ.*, 209 F. Supp. 2d 232, 239–40 (D.D.C. 2002)).

[xiv] *Rosewood Mortgage Corp. v. Hefty*, 383 N.W.2d 456 (Minn. Ct. App. 1986).

[xv] *Webb Publishing v. Fosshage*, 426 N.W.2d 445 (Minn. Ct. App. 1988).

[xvi] *Id.* at 449.

[xvii] *See, e.g., Mona Elec. Grp., Inc. v. Truland Serv. Corp.*, 56 Fed. Appx. 108, 111 (4th Cir. 2003) (per curiam) (holding that "in order [for former employee] to violate the non-solicitation agreement, [former employee] must initiate contact with [former employer's] customers"); *Slicex, Inc. v. Aeroflex Colo. Springs, Inc.*, No. 04–615, 2006 WL 2088282, at *3 (D. Utah July 25, 2006) (noting that "[a] number of other courts have similarly held that non-solicitation provisions are not violated where former employees are first contacted by clients of their former employers and then form relationships with those clients."); *J.K.R., Inc. v. Triple Check Tax Serv., Inc.*, 736 So. 2d 43, 44 (Fla. Dist. Ct. App. 1999) ("The words 'call upon, solicit, divert or take away' in the parties' agreement forbid appellants from taking proactive steps to obtain Triple Check clients, but do not disallow them from accepting former clients who actively seek their assistance."); *Marcoin, Inc. v. Waldron*, 259 S.E. 2d 433, 434 (Ga. 1979) ("We agree with the trial court that the words 'solicit,' 'divert' and 'take away' require affirmative action on the part of an employee before a restrictive covenant prohibiting such conduct is violated."); *Akron Pest Control v. Radar Exterminating Co.*, 455 S.E. 2d 601, 603 (Ga. Ct. App. 1995) ("Merely accepting business that Sellers was forbidden otherwise to seek out for a period of time does not in any sense constitute a solicitation of that business."); *Kennedy v. Metro. Life Ins. Co.*, 759 So. 2d 362, 366–68 (Miss. 2000) (concluding that an insurance agent did not "divert" former clients who followed him to a new employer notwithstanding his preparation of premium quotations and policy applications, collected premiums, and delivered the policies primarily because the non-solicitation agreement was ambiguous); *Bessemer Trust Co., N.A. v. Branin*, 949 N.E. 2d 462, 468 (N.Y. 2011) (a seller is free to accept business of former clients so long as seller does not actively solicit the business); *Bajan Grp., Inc. v. Consumers Interstate Corp*., 958 N .Y.S.2d 59 (Table), 2010 WL 3341456, at *6 (N.Y. Sup. Ct. Aug. 12, 2010) (explaining that "in order for the non-solicitation clause to be violated, it must be shown that Bajan initiated contact with Kidde regarding direct sales"). An Indiana court in *Enhanced Network Solutions Group, Inc. v. Hypersonic Technologies Corp.*, 961 N.E.2d 265, 268 (Ind. Ct. App. 2011) relied on Black's Law Dictionary to determine no solicitation in breach

of the agreement occurred.

[xviii] *See, e.g., Curtis 1000, Inc. v. Martin*, 197 F. App'x 412, 423 (6th Cir. 2006) (holding that Tennessee law required enforcement of restrictive covenant prohibiting former employees from "accepting" business from former clients); *Pulse Techs., Inc. v. Dodrill*, No. CV-07-65-ST, 2007 WL 789434, at *12 (D. Or. Mar. 14, 2007) (court ordered preliminary injunction prohibiting former employee from "accepting business from, doing business with" former employer's clients); *Spitz, Sullivan, Wachtel & Falcetta v. Murphy*, No. CV-86-0322422, 1991 WL 112718, at *6 (Conn. Super. Ct. June 13,1991) (restrictive covenant preventing former employee from servicing former clients enforced because former employee "cited no Connecticut precedent which renders such an agreement unenforceable merely because it prohibits a former employee from servicing unsolicited clients of his former employer"); *Env't Servs., Inc. v. Carter*, 9 So. 3d 1258, 1266 (Fla. Dist. Ct. App. 2009) ("[R]egardless of who initiated the contact, the agreements clearly prevent the former employees from "[performing] services for any current, former or prospective customers [] with whom employer had any business-related contact (contact intended to advance the Company's business interests) during his/her employment with the Company."); *McRand, Inc. v. Van Beelen*, 486 N.E.2d 1306, 1315 (111. App. Ct. 1985) (restrictive covenant preventing former employee from servicing plaintiff's customers upheld to the extent that defendant had developed a relationship with customers while employed by plaintiff); *Tuttle v. Riggs-Warfield-Roloson, Inc.*, 246 A.2d 588, 590 (Md. 1968) (the court held that a non-solicitation agreement which stated "that in the event of termination of your employment . . . you will refrain . . . from engaging either directly or indirectly, in any insurance activities with customers of Riggs-Warfield-Roloson, Inc" did not limit former employee's obligation to refrain from soliciting accounts, but it did prevent him from participating in any type of insurance activity with former clients; *Am. Pamcor, Inc. v. Klote*, 438 S.W.2d 287, 291 (Mo. Ct. App. 1969) (injunctive relief granted to prevent former employee from "accept[ing] business" from employer's customers in violation of non-solicitation clause); *Uniform Rental Div., Inc. v. Moreno*, 83 A.D.2d 629 (N.Y. App. Div. 1981) (affirming employer's restrictive covenant that prohibited former employee from servicing former clients directly or indirectly "because of the narrowness and short duration"); *Bates Chevrolet Corp. v. Haven Chevrolet, Inc.*, 13 A.D.2d 27 (N.Y. App. Div. 1961) (injunctive relief granted to enforce restrictive covenant that "forbade [former employee] from soliciting or accepting business from anyone who was or became [former employer's] customer during the period of [former employee's] employment).

[xix] *Merrill Corp. v. R.R. Donnelley & Sons Co.*, 2008 WL 3162490, *1 (D. Minn. Aug. 1, 2008).

[xx] *Sysdyne Corp v. Rousslang*, No. A13-0898, 2014 WL 902713, *1 (Minn. Ct. App. March 10, 2014) (unpublished).

[xxi] *Id.* at *2-4.

[xxii] *Tata Consultancy Servs. v. Sys. Int'l, Inc.*, 31 F.3d 416, 424–25 (6th Cir. 1994) ("There is no testimony in this record from which it can be asserted or inferred that the corporate defendant approached, solicited or induced the breach of contract . . . On the contrary, the approach appears to have been made wholly from the other direction."). *Arthur J. Gallagher & Co. v. Lang*, No. C 14-0909 CW, 2014 WL 2195062, at *4 (N.D. Cal. May 23, 2014) (holding that solicitation requires the active inducement of former colleagues to leave their current employment). *Slicex, Inc. v. Aeroflex Colorado Springs, Inc.*, No. 2:04-CV-615, 2006 WL 2088282, at *3 (D. Utah, July 25, 2006) (breach of non-solicitation covenant requires "Defendant to take

specific, directed action to hire away one of Plaintiff's employees."); *see also Wolverine, Proctor & Schwatrz, Inc. v. Aeroglide, Corp*., 402 F. Supp. 2d 365, 371 (D. Mass. 2005) (when allegedly solicited employee makes initial contact, through a friend, and defendant "merely responded" to this contact, "there is no direct, or indirect solicitation."); *Inland American Winston Hotels, Inc. v. Crockett*, 712 S.E.2d 366, 368-72 (N.C. App. 2011) ("solicit, recruit or induce" …involve active persuasion, request or petition;" extending a job offer after individual seeks employment does not constitute breach; solicitation breach claim dismissed on summary judgment*). Sunbelt Rentals, Inc. v. Victor*, No. C 13-4240 SBA, 2014 WL 492364, at *9 (N.D. Cal. Feb. 5, 2014). In *Sunbelt Rentals, Inc.*, the Court found that an employee's text message asking his manager if his former colleague could contact him was insufficient evidence of solicitation. *Id*. (denying motion for preliminary injunction against a former employee). Without evidence of a "nefarious motive" on the part of the former employee, the Court refused to find that the communication arose to solicitation. *Id*.

[xxiii] *See, e.g. Webb Publishing Co. v. Fosshage*, 426 N.W.2d 445, 449-450 (Minn. Ct. App. 1988).

[xxiv] *Schwan's Consumer Brands North America, Inc. v. Home Run Inn, Inc.*, No. 05-2763 (DWF/JJG), 2005 WL 3434376 (D. Minn. 2005).

[xxv] *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1024, n.5 (8th Cir. 1992).

[xxvi] *ReliaStar Life Insurance Co. v. KMG America Corp*., No. A05-2079, 2006 WL 2529760 (Minn. Ct. App. Sept. 5, 2006).

[xxvii] *C.H. Robinson Worldwide, Inc. v. Kratt*, No. 27-CV-1216003, 2013 WL 6222078 (Henn. Co. Dist. Ct., 4th Judicial Dist. of Minn., Jan. 17, 2013).

[xxviii] *Id.* at *24.

[xxix] *See, e.g. St. Jude Medical, S.C., Inc. v. Biosense Webster, Inc.*, 818 F.3d 785 (8th Cir. 2016) (affirming damages for "lost profits" arising from tortious interference by hiring employee with "term of years" contract).

[xxx] *Sorin Group USA, Inc. v. St. Jude Medical, S.C.*, No. 14-4023 (JRT/JSM), 2016 WL 1301086 (Minn. 2016).

[xxxi] *Central States Indus. Supply, Inc. v. McCullough*, 279 F. Supp. 2d 1005 (N.D. Iowa 2003) (citing Massachusetts law).

[xxxii] *The Manitowoc Company v. Lanning*, No. 2105-AP-1530, 2016 WL 4370181 (Wis. Ct. App. Aug. 17, 2016).

[xxxiii] Mo. Rev. Stat. § 431.202.

[xxxiv] *See H & R Block Enterprises, Inc. v. Short*, No. Civ. 06-608 (JNE/JJG), 2006 WL 3437491 (D. Minn. 2006) (applying Missouri law).

[xxxv] Protection against misappropriation of trade secrets is codified in the Minnesota Trade Secrets Act, Minn. Stat. §§ 325C.01-08, as well as the federal Defend Trade Secrets Act, 18 U.S.C. §§ 1836, *et seq.*

[xxxvi] *Jostens, Inc. v. National Computer Sys., Inc.,* 318 N.W.2d 691, 700 (Minn. 1982).

[xxxvii] *McLaren Macomb*, 372 NLRB No. 58 (2023).