Minnesota
Employment
Law Council

MEMORANDUM

TO:	Members of the Conference Committee on the Omnibus Jobs, Economic Development, Labor and Industry Appropriations
FROM:	Minnesota Employment Law Council
DATE:	May 1, 2023
RE:	S.F. 3035 - "Regulation of Restrictive Employment Agreements"

Thank you for the opportunity to comment on S.F. 3035, which will be considered by the Conference Committee this week. MELC's comments are addressed at Article 12 of the Senate bill, "Regulation of Restrictive Employment Agreements." MELC understands the policy priorities on which Article 12 is grounded, and we appreciate the author's earlier addition of some language to address one of MELC's concerns. However, MELC believes that the current language is likely to result in unintended negative consequences. Those concerns may be addressed with straightforward amendments.

Overbroad Prohibition

MELC recognizes that noncompete agreements have been imposed on some employees unfairly, particularly low-wage workers who are not associated with an employer's goodwill or who pose no risk to an employer's trade secrets and sensitive business information. However, Article 12's categorical prohibition on noncompete agreements goes beyond that interest. For example, employers may have legitimate business interests in preventing competition for a reasonable period of time by a C-suite executive or sales or marketing leader who is closely associated with the company's goodwill, or an R & D employee who would inevitably use the company's confidential information by virtue of working in a similar capacity for a competitor. Article 12 should be tailored to protect low-wage workers, while not restricting companies that have legitimate business reasons to use noncompete agreements.

For example, consistent with the bill introduced by Representative Elkins in the House, Section 2(a) and 2(b) of S.F. 3035 (Lines 169.25-170.7) could be replaced with:

> An employer may not require an employee to execute a covenant not to compete if, at the time such covenant is executed, the employee earns or is expected to earn total annual compensation equal to or less than the median family income for a four-person family in Minnesota, as determined by the United States Census Bureau, for the most recent year available.

Likewise, the inclusion of independent contractors, including corporate entities, in the prohibition against noncompete agreements is overbroad. The parties to a contract may have legitimate

business reasons to negotiate for such restrictions in their agreement, which should not be categorically precluded.

Additional Exclusions

MELC appreciates the language included by the author at Lines 169.10-169.13 to clarify that non-disclosure and non-solicitation agreements are not within the scope of the prohibition. MELC respectfully submits that additional exclusions for agreements that (1) prohibit interference with an employer's vendor, supplier or other business relationships, and (2) allow employers and employees to negotiate incentive-based restrictive covenants also are appropriate, as well as other non-controversial clarifications. In particular, permitting agreements whereby *an employee can choose* to compete with their employer or agree not to compete in exchange for incentives or equity aligns with the principles on which Article 12 is grounded, by empowering employees while also allowing employers to offer incentives to protect their business interests. MELC recommends the following be added at the end of Line 169.13:

> A covenant not to compete also does not include (1) an agreement not to interfere with an employer's vendor, supplier or other business relationships; (2) an invention assignment agreement; (3) an agreement entered into by a person purchasing or selling the goodwill of a business or otherwise acquiring or disposing of an ownership interest; (4) an agreement whereby an employee agrees to forfeit incentives or equity if they elect to compete with the employer; or (5) an agreement between an employer and an employee requiring advance notice of termination of employment, during which notice period the employee remains employed by the employer and receives compensation.

Prevailing Plaintiff Attorneys' Fees

Consistent with amendments to other bills this session, MELC submits that Lines 170.11-170.12 and 170.23-170.24 should be clarified to confirm that only "prevailing plaintiffs" are entitled to recover attorneys' fees in the event of litigation:

> (d) In addition to injunctive relief and any other remedies available, a court may award ~~an employee who is enforcing rights~~ a prevailing plaintiff under this section reasonable attorney fees.

Clarifying Choice of Law and Venue

MELC respectfully submits that the choice of law and venue provision in lines 170.13-170.19, as drafted, might be misconstrued to sweep in any agreements between an employer and a Minnesota employee, not only agreements that would impose prohibited noncompete provisions contrary to Article 12. That would be an unnecessary imposition on national employers who may have agreements with employees unrelated to the issues addressed by this bill. This concern

may be easily addressed by specifying that the choice of law and venue applies to claims "arising under this Section" only:

> Subd. 3. **Choice of law; venue**. (a) An employer must not require an employee who primarily resides and works in Minnesota, as a condition of employment, to agree to a provision in an agreement or contract that would do either of the following:
>
> (1) require the employee to adjudicate outside of Minnesota a claim arising ~~in Minnesota~~ under this Section; or
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> (2) deprive the employee of the substantive protection of Minnesota law with respect to a controversy arising ~~in Minnesota~~ under this Section.

Thank you again for your time and your consideration of MELC's input; we would appreciate the opportunity to discuss with you.

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