SESSION 306

Drafting Employment Agreements (Including an Annotated Executive/Key Employee Employment Agreement)

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Drafting Employment Agreements

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A. General Contract Law Principles on Formation

"The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Thomas B. Olson & Assocs, P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. Ct. App. 2008) (citation omitted), *rev. denied* (Minn. 2009); *see also Cruz v. TMI Hosp., Inc.*, No. 14-CV-1128, 2015 WL 5996383, at *12–13 (D. Minn. Oct. 14, 2015). Minnesota courts apply the objective standard to determine whether a contract between parties has been formed. *E.g.*, *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 316 (Minn. Ct. App. 2011); *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 460 (Minn. Ct. App. 2001), *rev. denied* (Minn. July 24, 2001).

In determining whether a contract was formed a court may look behind words to consider the surrounding facts and circumstances in the context of the entire transaction, including the purpose, subject matter, and nature of it. *Your Magazine Publisher, Inc. v. BMO Harris Bank, N.A.*, No. A13-0144, 2013 WL 3868168 (Minn. Ct. App. July 29, 2013) (citing *Powell*, *supra*); *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 371 (Minn. 1995) (citing *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962)).

General contract law principles, when applied to the employment world, can create many interesting—and often unintended—results.

B. Unsigned Employment Contracts

It is not uncommon for employers and employees to have written, but unsigned, agreements in their files. If the parties clearly agreed that there is no agreement until there is a signed agreement (i.e., it is a condition precedent), Minnesota courts will enforce that. "When both parties have 'clearly indicated an intent not to be bound' until they execute a formal document, no contract exists." *Moga v. Shorewater Advisors, LLC*, No. A08-785, 2009 WL 982237, at *4 (Minn. Ct. App. Apr. 14, 2009). Even where "one party has 'intended and expressed the intention from the start not to be bound at all until the execution of the formal contract,' there is no contract until the condition is fulfilled." *Id.* (citation omitted). "Where the parties make the reduction of the agreement to writing and its signature by them a condition precedent to its completion, it will not be a contract until that is done, and this is true although all the terms of the contract have been agreed upon." *Trautman v. JPMorgan Chase Bank*, No. A12-0300, 2012 WL 3263907, at *3 (Minn. Ct. App. Aug. 13, 2012), *rev. denied* (Oct. 24, 2012) (quoting *Lamoreaux v. Weisman*, 161 N.W. 504, 506 (Minn. 1917)). It should be noted that "the test of adequate 'subscription' [is] whether the offeror intended to authenticate the document…." *SN4, LLC v. Anchor Bank, fsb*, No. A13-1566, 2014 WL 2441343, at *3 n.2 (Minn. Ct. App. June 2, 2014) (quoting *Greer v. Kooiker*, 253 N.W.2d 133, 139 n.4 (Minn. 1977)). A symbol written "with the intent that it be tantamount to a written signature, is a sufficient subscription." *SN4*, 2014 WL 2441343, at *3 n.3 (quoting *Radke v. Brenon*, 134 N.W.2d 887, 891 (Minn. 1965) (concluding that a typewritten name at the bottom of a letter was a sufficient subscription)).

However, employers and employees frequently engage in negotiations without expressly stating that a fully signed agreement is a condition of the contract being enforced. In those cases, a

contract may be binding on a party though not signed by that party. *Welsh v. Barnes-Duluth Shipbuilding Co.*, 21 N.W.2d 43, 46–47 (Minn. 1945) ("[w]here a signature is not required by some positive rule of law, as, for example, in certain cases by the statute of frauds, assent or mutuality may be shown by the fact that the parties accepted the writing as a binding contract and acted on it as such, even though it was not signed"); *see also Schwendimann v. Arkwright Advanced Coating, Inc.*, Civ. No. 11-820, 2012 WL 928214, at *6 (D. Minn. Mar. 19, 2012).

C. Oral and Implied Employment Contracts

Oral offers or promises can create binding contractual obligations. *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936) ("Unless the contract is covered by the statute of frauds … a signed agreement is generally not required for formation of a contract."); *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 203 (Minn. Ct. App. 2005); *Lansing v. Wells Fargo Bank, N.A.*, Civ. No. 15-3530, 2016 WL 3390400, at *15 (D. Minn. Apr. 25, 2016), *report & recommendation adopted*, Civ. No. 15-3530, 2016 WL 3406085 (D. Minn. June 17, 2016). Minnesota courts have held that the law does not distinguish between contracts that are expressed in writing, that are oral, that are completed by action, or that combine all three forms of acceptance. *Georgens v. Fed. Deposit Ins. Corp.*, 406 N.W.2d 95, 97 (Minn. Ct. App. 1987).

Many oral contract claims turn on the general question of whether there was a "meeting of the minds." In the employment context, the issue is often whether employment is guaranteed for a specific period of time. For example, the Minnesota Supreme Court long ago held that an employer's oral promise of "permanent" employment might be an enforceable contract. *Skagerberg v. Blandin Paper Co.*, 266 N.W. 872 (Minn. 1936). However, to sustain this claim, the employee must prove that there was a specific and definite offer, which was communicated and accepted by the employee. *Thompson v. Campbell*, 845 F. Supp. 665 (D. Minn. 1994); *Schibursky v. IBM, Corp.*, 820 F. Supp. 1169 (D. Minn. 1993); *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983). *See, e.g., Piekarski v. Home Owners Sav. Bank, F.S.B.*, 956 F.2d 1484, 1489–90 (8th Cir. 1992) (employer's statement that the employee had a "future" was not an oral contract for permanent employment); *Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544, 547 (Minn. Ct. App. 1986) (employer's comment that they would retire together was not an oral contract for permanent employment); *Degen v. Investors Diversified Servs., Inc.*, 110 N.W.2d 863, 866 (Minn. 1961) (employer's comment that employee had a great future with the company and to consider his job a career situation was not enough to create an oral contract for permanent employment); *Songa v. Sunrise Senior Living Inv. Inc.*, 22 F. Supp. 3d 939 (D. Minn. 2014) (alleged statement that her employment would continue "in accordance with applicable laws and regulations" did not change at-will status because it was a general statement of policy lacking in any meaningful degree of specificity, which was insufficiently definite to alter the terms of the otherwise at-will employment relationship and therefor precluded her claim for breach of implied employment contract); *Shelander v. Johnstech Int'l Corp.*, No. A13-1544, 2014 WL 1408068 (Minn. Ct. App. Apr. 14, 2014) (memorialization of his annual sales goal on a napkin did not constitute a separate and independent agreement for a specific term through the end of that year with respect to the marketing of the specific product for which he was responsible, and thus did not modify the terms of his at-will employment contract); *Wood v. SatCom Mktg., LLC*, Civ. No. 11-503, 2012 WL 591503 (D. Minn. Feb. 22, 2012), *aff'd*, 705 F.3d 823 (8th Cir. 2013) (courts presume employees are operating under an at-will contract unless "objective evidence" shows that the parties intended to limit the employer's authority to terminate) (citing *Gunderson v.*

Alliance of Computer Prof'ls, Inc., 628 N.W.2d 173, 181–82 (Minn. Ct. App. 2001), *rev. granted* (Minn. July 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001)); *Newland v. Connexus Energy*, No. A10-820, 2011 WL 206161 (Minn. Ct. App. Jan. 25, 2011) (alleged oral assurances that employee would be employed at least until age 65, and statements that employee "had to stay" and "couldn't leave," were too general to constitute a clear and definite promise of employment until age 65 and thus could not be used as the basis for a breach-of-employment-contract claim).

Another issue that arises is whether the employer orally modified an earlier written agreement with respect to terms and conditions of employment. The "party asserting the oral modification of a written contract has the burden of proving the modification by clear and convincing evidence. The burden is not met by a mere preponderance of the evidence." *Waters v. Cafesjian*, 946 F. Supp. 2d 876, 880–81 (D. Minn. 2013) (quoting *Sokol & Assocs., Inc. v. Techsonic Indus., Inc.*, 495 F.3d 605, 610 (8th Cir. 2007); *Merickel v. Erickson Stores Corp.*, 95 N.W.2d 303, 305 (Minn. 1959)) (finding the former employee failed to establish the employer's purported oral agreement to modify his written employment agreement and to produce adequate evidence supporting his claim).

Interestingly, it is possible to have an oral modification to a written agreement even if the written agreement prohibits oral modifications—as long as the party asserting the modification can prove that the parties did in fact enter into an oral modification of the agreement and that the oral modification did not violate the statute of frauds. *MAS Prods., Inc. v. MAS Acquisition, Inc.*, No. A11-1254, 2012 WL 612318, at *7 (Minn. Ct. App. Feb. 27, 2012). "The general common law rule is that a written contract can be varied or rescinded by oral agreement of the parties, even if the contract provides that it shall not be orally varied or rescinded." *Id.* (quoting *Larson v. Hill's Heating & Refrig. of Bemidji, Inc.*, 400 N.W.2d 777, 781 (Minn. Ct. App. 1987) (holding oral modification agreement effective despite the contract's provision against oral modification), *rev. denied* (Minn. Apr. 17, 1987)). Moreover, "[a]lthough the parol evidence rule excludes evidence of contemporaneous and prior agreements varying the terms of a written contract, it does not exclude evidence of subsequent oral modifications of a contract." *Id.* (quoting *LaPanta v. Heidelberger*, 392 N.W.2d 254, 258–59 (Minn. Ct. App. 1986)). However, "[t]his court respects written contracts and subjects allegations of an inconsistent oral contract to a rigorous examination." *Id.* (quoting *Bolander v. Bolander*, 703 N.W.2d 529, 541–42 (Minn. Ct. App. 2005), *rev. dismissed* (Minn. Nov. 15, 2005)).

"Both the existence and terms of an oral contract are issues of fact, generally to be decided by the fact-finder." *Bowman Constr. Co., Inc. v. LaValla Sand & Gravel, Inc.*, No. A13-0269, 2013 WL 6152194, at *2 (Minn. Ct. App. Nov. 25, 2013) (quoting *Rios v. Jennie-O Turkey Store, Inc.*, 793 N.W.2d 309, 315 (Minn. Ct. App. 2011), *rev. denied* (Minn. Mar. 29, 2011)). Similarly, the question whether the parties entered into an oral modification of the contract is ultimately a question of fact. *MAS Prods., Inc.*, 2012 WL 612318 (citing *Johnson v. Quaal*, 83 N.W.2d 796, 799 (Minn. 1957)).

D. Unilateral Promises in Handbooks, Policies, and Procedures

Employee handbooks and other policies and procedures, if not carefully drafted, may create an employment contract between employers and employees. *See, e.g.*, *Pine River State Bank v. Mettille*, 333 N.W.2d 622 (Minn. 1983) (under certain circumstances an employee handbook may

create an employment contract); *Feges v. Perkins Rest., Inc.*, 483 N.W.2d 701 (Minn. 1992) (finding a breach of contract action where an employer failed to follow its own specific and definite policies).

In *Pine River*, the Minnesota Supreme Court distinguished between a specific and definite offer (enforceable as a contract), and a general statement of policy (not enforceable as a contract). The court identified four factors required for a provision in a personnel manual to be enforceable as a unilateral contract: (1) an offer which is sufficiently definite and specific, and not merely a general statement of policy; (2) communication of the offer to the employee; (3) acceptance of the offer; and (4) consideration. *Pine River State Bank v. Mettille*, 333 N.W.2d 622; *see, e.g.*, *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 810 (Minn. Ct. App. 1992), *rev. denied*; *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 857 (Minn. 1986); *Dumas v. Kessler & Maguire Funeral Home, Inc.*, 380 N.W.2d 544, 546–47 (Minn. Ct. App. 1986); *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732 (Minn. 2000). For purposes of this chapter, let it suffice to say that any number of unilateral "promises" in employee handbooks or elsewhere by an employer may end up being interpreted as contractual obligations—so caution is required in drafting and reviewing handbooks and other documents of employers. However, even if the language of an employee handbook satisfies the four requirements of *Pine River* and *Feges*, "[a] disclaimer in an employment handbook that clearly expresses an employer's intent to retain the at-will nature of the employment relationship will prevent the formation of a contractual right to continued employment." *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 659 (Minn. Ct. App. 2011) (quoting *Alexandria Hous. & Redev. Auth. v. Rost*, 756 N.W.2d 896, 906 (Minn. Ct. App. 2008)).

E. Unilateral Promises in Compensation and Benefit Plans

Compensation and benefit plans may also lead to unilateral contract claims by employees. *Compare Bahr v. Tech. Consumer Prod., Inc.*, 601 F. App'x 359, 367–68 (6th Cir. 2015) (applying Minnesota law, a claim that was a unilateral contract that became binding upon the employee's performance by meeting her sales objectives prevailed because the term "[t]he payout schedule below details the percentage of base salary that *will be paid* for meeting performance objectives" was "sufficiently clear" to require the employer pay the bonus earned under the contract); *with Chambers v. The Travelers Cos., Inc.*, 764 F. Supp. 2d 1071, 1087–88 (D. Minn. 2011), *aff'd sub nom.*, 668 F.3d 559 (8th Cir. 2012) (a bonus policy that stated that bonuses were "discretionary awards used to reward superior performance" is too indefinite to form a binding unilateral contract); *Bley v. ClickShip Direct, Inc.*, Civ. No. 01-611, 2001 WL 1640093, at *1 (D. Minn. Dec. 12, 2001) ("when a contract term leaves a decision to the discretion of one party, that decision is virtually unreviewable, unless that party is charged with fraud, bad faith or grossly mistaken exercise of judgment.").

F. Implied Employment Contracts; Promissory Estoppel

Contracts may be implied from other circumstances, including course of dealing, usage of trade, or course of performance. *See* MINN. STAT. § 336.1-201(b)(3) (2004) (defining "agreement"); *Moga v. Shorewater Advisors, LLC*, No. A08-785, 2009 WL 982237, at *4 (Minn. Ct. App. Apr. 14, 2009) ("Not only are the words and actions of the parties relevant, but 'the surrounding facts and circumstances in the context of the entire transaction, including the purpose, subject matter, and nature of it' may also be considered") (citation omitted).

Even in cases where an employment contract did not exist at all, Minnesota courts have recognized the doctrine of promissory estoppel, where the courts implied the existence of a contract. Promissory estoppel is "a creature of equity which implies 'a contract in law where none exist in fact.'" *Ruud v. Great Plains Supply, Inc.*, 526 N.W.2d 369, 372 (Minn. 1995) (quoting *Grouse v. Grp. Health Plan, Inc.*, 306 N.W.2d 114, 116 (Minn. 1981)).

The doctrine of promissory estoppel provides: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Faimon v. Winona State Univ.*, 540 N.W.2d 879, 882 (Minn. Ct. App. 1995) (citation omitted). The elements of a claim for promissory estoppel in the employment context are: (1) the employer made a promise, (2) the employer expected or reasonably should have expected the promise to induce definite and substantial action by the employee or potential employee, (3) the promise induced such action, and (4) the promise must be enforced to avoid injustice to the employee or potential employee. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 746 (Minn. 2000); *Cohen v. Cowles Media Co.*, 479 N.W.2d 387, 391 (Minn. 1992); *Grouse*, 306 N.W.2d at 116; *Waters v. Cafesjian*, 946 F. Supp. 2d 876, 882 (D. Minn. 2013).

Generally, the promissory estoppel theory is not available when a contract exists. *Gorham v. Benson Optical*, 539 N.W.2d 798, 801 (Minn. Ct. App. 1995); *LeJeune Steel Co. v. New Millennium Bldg. Sys., LLC*, Civ. No. 11-CV-1463, 2012 WL 1072402 (D. Minn. Mar. 29, 2012) (holding that when a valid contract was formed, but the parties merely disagreed on one term of that contract, the employee's claim based on a theory of promissory estoppel failed as a matter of law because a valid contract existed between the parties). There is an exception, however, in the case of at-will employment contracts. An at-will employee may assert a claim for promissory estoppel when the employee leaves one job in reliance on another at-will employment offer, and the new employer revokes the offer before the employee can perform. *Spanier v. TCF Bank Sav.*, 495 N.W.2d 18, 20 (Minn. Ct. App. 1993); *see also Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 882–83 (Minn. 1986); *Grouse*, 306 N.W.2d at 116; *Eklund v. Vincent Brass & Aluminum Co.*, 351 N.W.2d 371, 374 (Minn. Ct. App. 1984).

The promissory estoppel doctrine can apply to situations other than promises of employment. For example, the court applied it to enforce an employer's promise to pay commissions to a former employee based on pending sales, as long as the employee helped transition the accounts to other sales representatives before leaving. Even though there was no clear contract obligation in that case, the court implied a contract by implementing the doctrine of promissory estoppel. *Fiebelkorn v. IKON Office Solutions, Inc.*, 668 F. Supp. 2d 1178, 1186 (D. Minn. 2009).

G. Covenant of Good Faith and Fair Dealing

As a general rule, the Minnesota Supreme Court recognizes that contracts contain an implied covenant of good faith, meaning that each party will not unjustifiably hinder the other party's performance. *See Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42, 45 (Minn. 1984). However, Minnesota law generally does not recognize an implied covenant of good faith and fair dealing in employment contracts. *Hunt v. IBM Mid Am. Employees Fed. Credit Union*,

384 N.W.2d 853, 858 (Minn. 1986); *Mandel v. Multiband Corp.*, No. A15-1133, 2016 WL 1175073, at *7 (Minn. Ct. App. Mar. 28, 2016), *rev. denied*; *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 613 (Minn. Ct. App. 1996), *cert. denied*, 519 U.S. 870 (1996).

Some recent court decisions have noted that *Hunt* was not intended to read "employment contracts" broadly to include any contract related to employment, instead of more narrowly to mean at-will employment contracts. *Wilson v. Career Educ. Corp.*, 729 F.3d 665, 672–73 (7th Cir. 2013) ("The facts of *Hunt* were limited to terminating an at-will employee and the court relied on unique policy reasons related to an employer's ability to discharge employees… suggesting that *Hunt* represents a narrow exception to the rule that all contracts imply a covenant of good faith."); *Deleski Ins. Agency, Inc. v. Allstate Ins. Co.*, Civ. No. 13-1780, 2013 WL 6858573, at n5 (D. Minn. Dec. 30, 2013) (finding no precedent in Minnesota contract law that *Hunt* extended to an independent contractor relationship).

II. CONTRACT DISPUTES OFTEN DECIDED BY A JURY AND EXTRINSIC EVIDENCE

A. Existence of Contract Is Jury Question

The existence of a contract is ultimately a question of fact to be decided by the trier of fact—typically a jury. *Lakeview Terrace Homeowners Ass'n v. Le Rivage, Inc.*, 498 N.W.2d 68, 72 (Minn. Ct. App. 1993). Moreover, the construction and terms of implied contracts are questions of fact. *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 82 (Minn. Ct. App. 1989).

B. Parol Evidence Rule May Allow Extrinsic Evidence

The Minnesota Supreme Court has stated that "[t]he parol evidence rule 'prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 312 (Minn. 2003) (citation omitted). "Accordingly, 'when parties reduce their agreement to writing, parol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement.'" *Id.* (citing *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985)).

However, "where a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible…." "If it appears from the circumstances surrounding the case that the parties did not intend the agreement to be a complete integration, then parol evidence can be used to prove the existence of a separate consistent oral agreement." *Id.* at 312 (citing *Gutierrez v. Red River Distrib., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994); *Bussard v. Coll. of St. Thomas, Inc.*, 200 N.W.2d 155, 161 (Minn. 1972)). *See also Redman v. Sinex*, 675 F. Supp. 2d 961, 965 (D. Minn. 2009).

C. Ambiguous or Incomplete Contracts Create a Litigation Minefield

A contract is ambiguous if it is susceptible to more than one interpretation. *Lamb Plumbing & Heating Co. v. Kraus-Anderson of Minneapolis, Inc.*, 296 N.W.2d 859, 862 (Minn. 1980). In the

employment context, and particularly given the number of contract claims that are based on documents or promises that are not contained in formal written agreements, ambiguity is common—this can create a litigation minefield.

Contract terms "will not be considered ambiguous solely because the parties dispute the proper interpretation of the terms." *Cent. Specialties, Inc. v. Todd Cnty., Minn.*, No. A13-1528, 2014 WL 1875843 (Minn. Ct. App. May 12, 2014) (citing *Knudsen v. Transp. Leasing/Contract, Inc.*, 672 N.W.2d 221, 223 (Minn. Ct. App. 2003), *rev. denied* (Minn. Feb. 25, 2004)). A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997). "In construing ambiguous contract language, [courts] consider the contract as a whole in light of the circumstances surrounding its formation, and strive to arrive at the parties' real understanding." *State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006).

Whether a contract is ambiguous is a question of law. *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). However, if the court determines that a provision in an employment agreement is ambiguous—and many are—parol evidence may be considered to determine the parties' intent. *Id.* This is a question of fact, and therefore a jury issue—and there are many facts for the jury to consider, such as:

1. Mutual intent. Every contract, whether written or oral, must be interpreted to give effect to the parties' mutual intent when they made the contract. *See, e.g., Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004); *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003); *Art Goebel, Inc.*, 567 N.W.2d at 515; *Waterworth v. Elkman*, No. A15-1206, 2016 WL 1175099, at *3 (Minn. Ct. App. Mar. 28, 2016); *Nw. Bank Minn., N.A. v. Beckler*, 663 N.W.2d 571, 578 (Minn. Ct. App. 2003); *State v. City of Breezy Point*, 394 N.W.2d 592, 596 (Minn. Ct. App. 1986).

2. Words and conduct. "A manifestation of mutual assent 'may be inferred wholly or partly from words spoken or written or from the conduct of the parties'." *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962). *See also Minneapolis Cablesystems v. Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980); *Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild*, 225 N.W.2d 261, 263 (Minn. 1975); *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. Ct. App. 2005) (citation omitted). The test is whether "one party by his words or by his conduct, or by both, leads the other to reasonably assume that he assents to and accepts the terms of the other's offer." *Holt v. Swenson*, 90 N.W.2d 724, 728 (Minn. 1958). *See also Bergstrom v. Sambo's Rests., Inc.*, 687 F.2d 1250, 1256 (8th Cir. 1982); *Bergstedt*, 225 N.W.2d at 263.

3. Negotiations. The parties' negotiations may be considered in determining their mutual intent. *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966); *Blomker v. Magedanz*, No. A13-1119, 2014 WL 621695, at *5 (Minn. Ct. App. Feb. 18, 2014) (finding a lack of testimony did not preclude consideration of the parties intent in the formation of a deed contract).

4. Course of performing and dealing. The parties' conduct in the course of performing the contract may be considered in determining their mutual intent. *Fredrich v. Indep. Sch. Dist. 720*, 465 N.W.2d 692, 696 (Minn. Ct. App. 1991) ("the interpretation the parties themselves place on the contract is entitled to great, and perhaps controlling, weight in ascertaining the terms of the

contract."); *J.J. Brooksbank Co., Inc. v. Budget Rent-A-Car Corp.*, 337 N.W.2d 372, 375–76 (Minn. 1983); *Blomker v. Magedanz*, No. A13-1119, 2014 WL 621695, at *5 (Minn. Ct. App. Feb. 18, 2014) ("The construction which the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning.").

III. BONUS AND COMMISSION AGREEMENTS

A. Bonus Provisions

Bonus provisions may be included in employment agreements. Often, however, there are no such agreements and/or no bonus provisions in conjunction with them. Employers may want to offer a specific and well-defined bonus agreement to one or more employees to incentivize them, as consideration for a mid-stream non-compete agreement and/or as a way to provide that employee with participation in the company's success. For privately owned employers in particular, a bonus agreement may satisfy the employee's desire for some level of ownership without subjecting the owner to minority shareholder issues, complicated "phantom stock," or other equity participation agreements.

B. Bonus/Commission Factors

The bonus/commission can be based on any number of factors, such as gross sales, net profits, annual growth, or any other measure that can be defined and understood by both parties. It is critical that the bonus be well defined and clear, unless of course it is a discretionary bonus. Likewise, commissions can be based on any selected formula.

C. Common Bonus/Commission Disputes

The possible disputes over bonus and commission plans and agreements are endless. They are also surprisingly common, especially when they are considered in the context of an employment termination. Common commission/bonus disputes include the following:

1. Discretionary Benefit versus Binding Contract

There is a big difference between an employer's discretionary bonus and a binding contractual obligation. Many disputes arise out of this distinction. For example, in *Chambers v. The Travelers Cos., Inc.*, 764 F. Supp. 2d 1071, 1087–88 (D. Minn. 2011), *aff'd sub nom.*, 668 F.3d 559 (8th Cir. 2012), Chambers argued that a prior bonus was not discretionary because through her communications with the employer, their course of dealings, and the fact that she had satisfied all the conditions necessary for receipt of the bonus, the bonus had been fully earned. Chambers relied on *Kvidera v. Rotation Engineering and Manufacturing Co.*, 705 N.W.2d 416 (Minn. Ct. App. 2005) to strengthen this assertion.

In *Kvidera* the court had found that the plaintiff's bonus constituted earned wages, because the plaintiff had contracted with the employer to receive a bonus based upon the satisfaction of specific objectives and a subjective personal evaluation. *Kridera*, 705 N.W.2d at 423. Although the amount was not determined, the plaintiff's right to receive the bonus vested the day after the expiration of his employment contract, and thus the bonus was due and owed to the plaintiff prior to his termination. *Id*. The court in *Chambers* distinguished *Kvidera*, however,

because, unlike the plaintiff in *Kvidera*, Chambers did not have an explicit contract with the employer which stated that she would receive a bonus if she met certain conditions. The claim was dismissed because she was an at-will employee who simply was eligible to receive a bonus at the employer's discretion.

2. Unilateral Changes

Many employers reserve the right to unilaterally change the bonus/commission plan or the interpretation of that plan. Although rare, some do unilaterally exercise this option. An oral promise to modify terms of at-will relationship can become part of a contract if the requirements for the formation of a unilateral contract are met: communication of a definite offer and acceptance for valuable consideration. *T.B. Allen & Assocs., Inc. v. Euro-Pro Operating LLC*, Civ. No. 11-3479, 2013 WL 64605 (D. Minn. Jan. 4, 2013) (citing *Hayes v. K -Mart Corp.*, 665 N.W.2d 550, 553 (Minn. Ct. App. 2003)). Acceptance for valuable consideration need not always be express. In the context of an employment relationship, when an employer unilaterally offers a change in the terms of employment and informs the employee of the proposed change and the employee does not reject the change, the employee's retention of employment constitutes acceptance of the offer. *Id*. (citing *Heath v. Travelers Cos.*, Civ. No. 08-6055, 2009 WL 1921661, at *4 (D. Minn. July 1, 2009) (quoting *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983))). However, where one party has expressly rejected a proposed change, there is no modification to an at-will contract. *Id*. (citing *Simpson v. Norwesco, Inc.*, 583 F.2d 1007 (8th Cir. 1978)).

In *Simpson*, the employer unilaterally informed Simpson that it would be reducing his commission rate, but Simpson did not accept it, instead replying that he would continue his employment "in accordance with the terms of the original agreement." *Simpson*, 583 F.2d at 1010. The employer did not respond or communicate to Simpson that he must either accept the new commission schedule or find other employment, but began paying Simpson according to the reduced commission rate. *Id*. at 1010–11. At trial, Simpson was awarded damages totaling the difference between the two commission structures. *Id*. at 1011. The Eighth Circuit affirmed the verdict, finding that Simpson's statement that he would continue under the original conditions "was far from any acquiescence in the proposed new commission scale," and therefore Norwesco's proposed changes were not incorporated into the contract. *Id*. at 1012. Similarly, in *T.B. Allen*, the court found that T.B. Allen had stated a valid breach of contract claim by alleging that it rejected the proposed changes to its contract. The court found that there may have been no modification to the contract if, as T.B. Allen's alleged, it affirmatively protested to the proposed changes to its contract. *T.B. Allen & Assocs., Inc. v. Euro-Pro Operating LLC*, Civ. No. 11-3479, 2013 WL 64605 (D. Minn. Jan. 4, 2013).

3. When Was the Payment "Earned"

Bonus/commission payments may be "earned" at the time of contract with the customer, the time of delivery/invoicing to the customer, or the time of payment by the customer. Bonus awards, similarly, may be "earned" after the work has been done or on some other select date, such as the end of the year.

4. Post-Termination Payments

A common source of disagreement over commissions and bonuses (and other incentive packages) is whether they are payable if the employee leaves before a particular bonus/commission period (e.g., fiscal year) is over. Similarly, does the employee still have to be employed or under contract at the time of payment (e.g., quarterly) in order to receive it?

Whether a bonus or commission has been earned at the time of termination is generally determined by the language in the agreement or plan. For example, if a commission agreement clearly states that a commission is not earned until the third party renders payment, then the salesperson is not entitled to the commission when it was received after termination; and may not even be entitled to it ever. *See Reiter v. Recall Corp.*, 542 F. Supp. 2d 945 (D. Minn. 2008) (holding that the salesperson was not entitled to a commission on an account secured prior to termination but in which payment was received after termination when the agreement clearly stated that commissions are earned upon receipt of payment).

However, equitable doctrines may be asserted in an attempt by an employee to recover commissions and bonuses when no contract exists. For example, the court applied the promissory estoppel doctrine to enforce an employer's promise to pay commissions to a former employee based on pending sales, as long as the employee helped transition the accounts to other sales representatives before leaving. Even though there was no clear contract obligation in that case, the court implied a contract by implementing the doctrine of promissory estoppel. *Fiebelkorn v. IKON Office Solutions, Inc.*, 668 F. Supp. 2d 1178, 1186 (D. Minn. 2009).

Also, if there is no clear contractual or plan language, a former employee might not be able to obtain payment for post-termination commissions based on either an unjust enrichment theory, *Holman v. CPT Corp.*, 457 N.W.2d.740 (Minn. Ct. App. 1990), or a "procuring cause" contract theory, *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 324 (Minn. 2004).

The doctrine of unjust enrichment "allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 838 (Minn. 2012). However, relief under the doctrine "cannot be granted where the rights of the parties are governed by a valid contract." *M.M. Silta, Inc. v. Cleveland Cliffs, Inc.*, 616 F.3d 872, 880 (8th Cir. 2010) (quoting *U.S. Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W.2d 490, 497 (Minn. 1981)).

Similarly, under the procuring-cause doctrine, a terminated salesperson who does not have a contract that addresses the right to commissions after termination has the right to be paid a commission on a sale when that salesperson was the "procuring cause" of that sale, even if the commission was not earned prior to the date of the salesperson's termination. *See Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 327 Minn. 2004); *Raddatz v. Northland Dev. Co. of Minneapolis, Inc.*, 352 N.W.2d 474, 478 (Minn. Ct. App. 1984); *N. Coast Technical Sales, Inc. v. Pentair Technical Prods., Inc.*, Civ. No. 12-CV-1272, 2013 WL 785941 (D. Minn. Mar. 4, 2013); *MRO Indus. Sales, LLC v. Carhart-Halaska Int'l, LLC*, Civ. No. 12-2401, 2013 WL 5781469 (D. Minn. Oct. 25, 2013). However, "[t]he procuring-cause doctrine is designed to fill gaps—gaps that exist because a salesperson was working without a contract, or because the contract under which a salesperson was working did not address his or her entitlement to commissions after termination." *N. Coast Technical Sales, Inc.*, 2013 WL 785941, at *7. The procuring-cause doctrine only applies

when a sales representative is terminated but there is no contract delineating the sales representative's right to commissions after termination. *MRO Indus. Sales, LLC, supra*.

D. Employers Risk Statutory Penalties for Improper Withholding of Wages, Commissions, and/or Bonuses

In addition to contract language, the payment of wages or commissions after the termination of the employment relationship is governed by Minnesota Statutes sections 181.13 (2013) or 181.14 (2013). With some exceptions, employers are required to pay terminated employees for all commissions and/or wages that the employee earned prior to termination. The time limits and penalties change depending on the relationship and the type of separation.

An employee's bonus is considered a wage under Minnesota Statutes section 181.13. *Kvidera v. Rotation Eng'g & Mfg. Co.*, 705 N.W.2d 416 (Minn. Ct. App. 2005). Thus, the penalties for failure to pay as required under Minnesota Statutes section 181.13, and presumably section 181.14, apply to bonus payments in addition to wages and commissions.

Minnesota Statutes section 181.13 (and similarly section 181.14) requires payment of wages or commissions (and presumably bonuses) actually earned at the time of termination. MINN. STAT. § 181.13(a); *see Kvidera*, 705 N.W.2d 416. Whether wages, commissions, or bonuses have actually been earned or not, however, is governed by the employment contract. *See, e.g., Reiter v. Recall Corp.*, 542 F. Supp. 2d 945 (D. Minn. 2008) (holding that a salesperson was not entitled to commissions on an account secured prior to termination but in which payment was received after termination when agreement clearly stated that commissions are earned upon receipt of payment); *see also Ehlen v. Hanratty & Assocs., Inc.*, No. A08-2290, 2009 WL 3255399 (Minn. App. Oct. 13, 2009) (an independent contractor case involving a claim for commissions and penalties under Minnesota Statutes section 181.145).

Minnesota Statutes section 181.13 (and presumably section 181.14) "is a timing statute, mandating not what an employer must pay a discharged employee, but *when* an employer must pay a discharged employee." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 837 (Minn. 2012) (emphasis in original) (quoting *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 125 (Minn. 2007)). Thus, the "wages that an employee has actually earned are defined by the employment contract between the employer and the employee…." *Lee*, 741 N.W.2d at 127–28. If an employee's bonus or commission is not "earned" as of the time of termination as defined by the employment contract, there is no valid claim for breach of contract or violation of Minnesota Statutes section 181.13. *See, e.g., Holman v. CPT Corp.*, 457 N.W.2d 740, 743 (Minn. Ct. App. 1990), *rev. denied* (Minn. Sept. 20, 1990); *Sherwood v. Investors Bank Corp.*, No. CX-96-2370, 1997 WL 259980, at *2 (Minn. Ct. App. May 20, 1997); *Knutson v. Schwan's Home Serv., Inc.*, 711 F.3d 911, 916–17 (8th Cir. 2013); *O'Neal v. Niscayah, Inc.*, Civ. No. 10-4434, 2011 WL 381768 (D. Minn. Feb. 1, 2011).

E. Draws against Commissions Are a Matter of Contract

Employers often provide their sales employees with draws. Typically, the understanding is that draw will be applied against commissions actually earned. Often, the commission account gets overdrawn, and remains overdrawn as of the employee's termination of employment. Minnesota courts have held that, "[where] a salesman working on commission has a draw account against

commissions, there can be no recovery against him for overdrafts received in the absence of a specific contractual obligation, or an express or implied agreement of repayment." *St. Cloud Aviation, Inc. v. Hubbell*, 356 N.W.2d 749, 751 (Minn. Ct. App. 1984) (citation omitted); *see also St. Anthony Motor Co. v. Patterson*, 221 N.W. 719, 720 (Minn. 1928) (citing same rule and adding that "[i]n the absence of either an express or implied agreement or promise to repay such excess, the employer has no remedy against the employee, even though the contract in terms provides that there shall be settlements between them monthly"); *Custom Commc'ns, Inc. v. Vega*, No. A10-1123, 2011 WL 1466385 (Minn. Ct. App. Apr. 19, 2011).

IV. TAX ISSUES

It is beyond the scope of this section to discuss tax issues in depth, but some unique tax issues that may pertain to executive compensation should be noted.

A. I.R.C. §§ 280G and 4999 Impact Severance Packages

Large severance packages to executives, often in conjunction with early termination of employment, change in control, or success fee provisions, have frequently been called "parachutes." Parachutes are often part of the negotiations with executives, and may be necessary to recruit them, retain then, or address their concerns about takeovers or other changes in control. Unfortunately, many companies and executives do not carefully analyze the tax treatment of potential parachute plans, and risk devastating tax results.

B. I.R.C. §§ 280G and 4999 Impact Other Compensation/Benefits

The excise taxes discussed above may apply to compensation and benefits other than severance payments. For example, the value of any stock options or restricted stock, the value of accelerated SERP accrual investing, agreements to pay post-termination welfare benefits (such as health and/or life insurance premiums), agreements to pay other benefits (such as automobile or club memberships and other post-termination payments) could be subject to the golden parachute taxes. *See* 26 C.F.R. § 1.280G-1 (IRS regulations pertaining to I.R.C. §§ 280G & 4999).

C. I.R.C. § 409A May Also Apply

Executive compensation was complicated more by the enactment of I.R.C. § 409A, which was passed in 2004 and imposed new rules on nonqualified deferred compensation arrangements. These new rules institute substantial penalties on taxpayers who are not in compliance. Although I.R.C. § 409A, on its face, deals with "deferred compensation" arrangements, it has become clear that many types of compensation, which were not necessarily considered by many to be "deferred compensation" may be subject to I.R.C. § 409A. Section 409A might apply to severance agreements, employment agreements, bonus or incentive plans, change in control or success fee agreements or other agreements that create an enforceable right to compensation to be paid at a later date.

D. Tax Planning Is Critical

Careful planning with a tax lawyer or an accountant is critical! Any time a large compensation package of any sort is negotiated, the parties should consult with a tax lawyer or

accountant. Many executives seek an agreement that the employer will pay for their tax advice, and/or will agree to indemnification and tax gross-up provisions, in the event tax penalties are triggered.

V. NON-COMPETE BASICS.

This section addresses non-compete agreements in the context of employment. Minnesota law recognizes a difference between non-compete agreements associated with employment contracts and those arising as part of the sale of a business. Although the general rule is that non-compete agreements are strictly construed, the Minnesota Supreme Court has noted that many of the reasons for that rule are not present when such an agreement is entered into in connection with the sale of a business. *B & Y Metal Painting v. Ball*, 279 N.W.2d 813, 815 (Minn. 1979); *see Sealock v. Peterson*, No. A06-2479, 2008 WL 314146, at *4 (Minn. Ct. App. Feb. 5, 2008); *Kunin v. Kunin*, No. C0-99-206, 1999 WL 486814, at *3 (Minn. Ct. App. July 13, 1999) (citing *Bess v. Botham*, 257 N.W.2d 791, 795 (Minn. 1977)). The same principles apply to the sale of shares of a business. A non-compete agreement that is signed in connection with the sale of shares of a business is enforceable, even if no separate consideration was paid for the agreement. *People's Cleaning & Dyeing Co. v. Share*, 210 N.W. 397 (Minn. 1926); *Bess v. Bothman*, 257 N.W.2d 791 (Minn.1977); *Conway v. C.R. Bard, Inc*., 76 F. Supp. 3d 826, 829-32 (D. Minn. 2015); *Yonak v. Hawker Well Works, Inc*., No. A14-1221, 2015 WL 1514166 (Minn. Ct. App. Apr. 6, 2015).

A. Non-compete Agreements Must be Necessary and Reasonable

In Minnesota, non-compete employment agreements are generally disfavored. *Freeman v. Duluth Clinic, Inc*., 334 N.W.2d 626 (Minn. 1983). Notwithstanding their obvious economic appeal to employers, courts consider them partial restraints of trade and construe them narrowly. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892 (Minn. 1965); *Lemon v. Gressman*, No. C8-00-1739, 2001 WL 290512, at *1 (Minn. Ct. App. Mar. 27, 2001). An enforceable non-compete agreement must be *both* necessary to safeguard the employer's protectable interests *and* reasonable as between the parties. *Bennett*, 134 N.W.2d at 898; *Medtronic, Inc. v. Sun*, Nos. C7-97-1185, C9-97-1186, 1997 WL 729168, at *3 (Minn. Ct. App., Nov. 25, 1997). Courts will uphold non-compete agreements that are "for the protection of the legitimate interest of the party in whose favor [they are] imposed, reasonable as between the parties, and not injurious to the public." *Bennett*, 134 N.W.2d at 898; *Anytime Fitness, LLC v. Edinburgh Fitness LLC*, Civ. No. 14-348, 2014 WL 1415081 (D. Minn. Apr. 11, 2014). The restrictive covenant is carefully scrutinized to see if it is "necessary for the protection of the business or good will of the employer," and if the restriction on the employee is no greater than "necessary to protect the employer's business, regard being had to the nature and character of the employment, the time for which the restriction is imposed, and the territorial extent of the locality to which the prohibition extends." *Bennett*, 134 N.W.2d at 899-900.

1. Time and Geographical Restrictions. Minnesota courts have historically reviewed two types of restrictions for their reasonableness: temporal and geographical. *Id*.; *Metro Networks Commc'n v. Zavodnick*, No. Civ. 03-6198, 2004 WL 73591 (D. Minn. Jan. 15, 2004) (enforcing a one-year restriction on competition in the Twin Cities metropolitan area); *Universal*

Hosp. Servs., Inc. v. Hennessy, No. Civ. 01-2072, 2002 WL 192564 (D. Minn. Jan. 23, 2002) (restricting an employee from competing within a 100-mile radius of the employer for one year). A covenant whose restriction extends too far into the future or across too broad of a geographical area might be invalidated or modified. *See, e.g.*, *Ikon Office Solutions, Inc. v. Dale*, 170 F. Supp.2d 892, 895 (D. Minn. 2001) (reducing time period of noncompetition from five years to three years, because five years was too long, placed undue hardship on the employee, and did not serve any legitimate business needs of the former employer); *Dean Van Horn Consulting Assocs., Inc. v. Wold*, 395 N.W.2d 405, 410 (Minn. Ct. App. 1986) (modifying a three-year restriction to one year). In the right circumstances, customer-based restrictions or product-based restrictions may substitute for or complement geographic restrictions. Basing a territorial restriction on the presence of customers in a certain area enhances the reasonableness of a non-compete agreement. *Cook Sign Co. v. Combs*, No A07-1907, 2008 WL 3898267, at *7 (Minn. Ct. App. Aug. 26, 2008) (enforcing a non-compete agreement restricting an employee from competing in three states in which the employer does business and has customers); *Salon 2000, Inc. v. Dauwalter*, No. A06-1227, 2007 WL 1599223, at *2 (Minn. Ct. App. June 5, 2007) (affirming a non-compete agreement restricting an employee from working as a stylist within a ten-mile radius of the employer's business on the ground that customers will seek out the stylist rather than the services of the salon "if the stylist is sufficiently close" geographically to the salon); *Madsen v. Spectro Alloys Corp.*, No. C7-98-225, 1998 WL 373067, at *2 (Minn. Ct. App. July 7, 1998) (concluding that a restriction from competing in "any market in which Spectro does business in the United States" was not unreasonably broad). *Medtronic v. Hughes*, No. A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011) (worldwide scope was deemed reasonable because it was limited to certain cardiology products, and the confidential information that the employee obtained while working with the former employer would be potentially relevant to his sales of products at the new employer in any market). In the right circumstances, customer-based restrictions and/or product-based restrictions may substitute for or complement geographic restrictions. *See* Annotated Agreement, Section 7 f., notes 38 and 39.

2. Blue Pencil Doctrine. The reasonableness inquiry occurs on a case-by-case, fact-specific basis. *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127 (Minn. 1980). Some states hold unreasonably restrictive covenants totally unenforceable, as a way to encourage employers to write more narrowly-tailored covenants. *See, e.g., Fields Found. Ltd. v. Christiansen*, 309 N.W.2d 125 (Wis. Ct. App. 1981); *Telxon Corp. v. Hoffman*, 720 F. Supp. 657 (N.D. Ill. 1989). Minnesota courts utilize a blue pencil doctrine and may, at their discretion, rewrite portions to make them reasonable. *See Davies*, 298 N.W.2d at 134; *Dean Van Horn Consulting Assocs. v. Wold*, 395 N.W.2d 405 (Minn. Ct. App. 1986); *Ikon Office Solutions, Inc. v. Dale*, 170 F. Supp. 2d 892 (8th Cir. 2001); *see also Klick v. Crosstown State Bank of Ham Lake, Inc.*, 372 N.W.2d 85 (Minn. Ct. App. 1985) (observing that courts are not required to modify non-compete agreements that appear unreasonable); *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 384, n.2 (Minn. Ct. App. 2003); *Gavaras v. Greenspring Media, LLC*, 994 F. Supp. 2d 1006, 1012 (D. Minn. 2014) ("Blue-penciling this restrictive covenant does not make sense. Modifying this agreement would require more than modifying the duration and territorial scope. The Court would need to rewrite the agreement wholesale, and rewriting would require the Court to divine the parties' intent at the time of contracting, seventeen years after the fact…"); *Marvin Lumber & Cedar Co. v. Severson*, Civ. No. 15-1869, 2015 WL 5719502, at *8 (D. Minn. Sept. 28, 2015) ("It is within the *discretion* of the trial court to determine whether to

modify non-compete provisions in equitable situations; a trial court's decision *not* to blue-pencil a non-compete is reviewed for abuse of discretion." (Citations omitted, emphasis in original).

3. Vague, Ambiguous Non-competes. Non-compete agreements that are unclear, vague, and incomplete are not enforceable. *E.g.*, *Gavaras v. Greenspring Media, LLC*, Civ. No. 13-3566, 2014 WL 117557 (D. Minn. Jan. 13, 2014) (non-compete agreement between an employee and former employer was unclear, vague, overly broad, and incomplete, and thus was unenforceable, where the agreement, which lacked an effective date, was specifically conditioned on the terms of a written employment agreement, which did not exist); *Marvin Lumber & Cedar Co. v. Severson*, Civ. No. 15-1869, 2015 WL 5719502, at *8 (D. Minn. Sept. 28, 2015) (agreement that prohibits the employee from working in any industry producing "products or services that are competitive with any products or services of the Employer" without defining the "competitive" products or services is likely overbroad and not sufficiently tailored to the employer's legitimate business interests). If the agreement is ambiguous, the court construes the ambiguities against the drafting party. *E.g.*, *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 295 (Minn. Ct. App. 1995).

B. Non-compete Agreements Must be Supported by Adequate Consideration

Even if a non-compete agreement is by its terms reasonable, it may be totally unenforceable if the employer did not give the employee sufficient consideration. The validity of consideration depends on when it was offered to the employee.

1. Non-compete Offered at Time of Hire. Minnesota law treats an employee's new job as sufficient consideration for a non-compete agreement. It is not usually enough for the employer to give the employee notice about the non-compete agreement without actually presenting it prior to or in tandem with the job offer. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982); *Davies & Davies Agency, Inc. v. Davies*, 298 N.W.2d 127, 133 (Minn. 1980) (concluding that a non-compete agreement was not ancillary to the employment contract where the employee had been made aware of its existence during employment negotiations but was not given a chance to examine it despite requesting to see it); *Midwest Sports Mktg. v. Hillerich & Bradsby of Canada, Ltd.*, 552 N.W.2d 254, 265–66 (Minn. Ct. App. 1996) (refusing to enforce an agreement whose terms were not presented to the employee until after he began work); *FSI Int'l, Inc. v. Shumway*, No. CIV.02-402, 2002 WL 334409 (D. Minn. Feb. 26, 2002) (denying motion for preliminary injunction or TRO on the basis that the mid-stream non-compete agreement was not supported by sufficient independent consideration and there was no evidence of a competing product); *J. K. Harris & Co., LLC v. Dye*, No. Civ. 01-2041, 2001 WL 1464728 (D. Minn. Nov. 16, 2001) (denying TRO because court found that covenant not to compete was entered into after employment began and was not supported by adequate consideration); *Drummond Am. LLC v. Share Corp.*, Civ. No. 08-5077, 2010 WL 3167326 (D. Minn. July 23, 2010) (recent summary of Minnesota decisions regarding the independent consideration requirement and great example of the factual analysis needed); *Menzies Aviation (USA), Inc. v. Wilcox*, Civ. No. 13-2702, 2013 WL 5663187 (D. Minn. Oct. 17, 2013) (denying motion for TRO against former employee where employee had already started his employment when he signed agreement and received no new benefits under agreement). Even if an employee has not physically begun to work, but has already accepted an offer of employment, a non-compete agreement following the original offer and acceptance of

employment cannot be enforced absent independent consideration. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161 (Minn. Ct. App. 1993); *see also TestQuest, Inc. v. LaFrance*, No. C0-02-783, 2002 WL 1969287 (Minn. Ct. App. Aug. 27, 2002) (upholding mid-stream agreement allowing the employee to continue working and obtain additional vested stock options, which constituted sufficient consideration). Notably, there are exceptions to this general principle in the case law such as where an employee knew of the implementation of the non-compete agreement, continued working, and continued to receive advance payments on unearned commissions, or where the employee had the opportunity to fully negotiate and discuss the non-compete, offered to draft the agreement, and filled in and typed up the terms of the agreement prior to employment, although he did not sign it until after he started working. *Progressive Techs. Inc., v. Shupe*, No. A04-1110, 2005 WL 832059 (Minn. Ct. App. April 12, 2005); *Tonna Heating Cooling, Inc., v. Waraxa*, No. CX-02-368, 2002 WL 31687601, at *3 (Minn. Ct. App. Dec. 3, 2002). Each case must be decided on its own facts. *E.g., Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 899-900 (Minn. 1965).

2. Mid-Stream Non-compete Agreement. A non-compete agreement executed after an employee has commenced employment is unenforceable unless supported by "independent consideration." Continued employment is not sufficient consideration for a non-compete. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982).

3. Consideration Must Constitute "Real Benefits." Independent consideration consists of real benefits that are bargained for between the employee and the employer. "Real benefits" mean more than those to which the employee is already entitled to by virtue of employee status or a separate contract. *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. Ct. App. 1993). Even when an employee receives some amorphous long-term benefits as a result of signing the non-compete, the non-compete is still invalid if the employee is not aware that the benefits were in exchange for the covenant not to compete. *Nw. Publ'ns, L.L.C. v. Star Tribune Co.*, No. C6-07-003489 (Ramsey Co. Dist. Ct. Sept. 18, 2007). *But see Witzke v. Mesabi Rehabilitation Servs., Inc.*, No. A07-0421, 2008 WL 314535, at *3 (Minn. Ct. App. Feb. 5, 2008), overruled on other grounds, 768 N.W.2d 127 (Minn. Ct. App. 2009) (finding that the employee's rise within the company, continued employment for many years, training, and increased responsibility constituted sufficient consideration); *TestQuest, Inc. v. LaFrance*, No. C0-02-783, 2002 WL 1969287 (Minn. Ct. App. Aug. 27, 2002) (finding that access to an employer's confidential information was adequate consideration for a non-compete agreement). Real benefits might include midstream (or post-termination) benefit agreements, promotions, or a cash payment, all of which are addressed and discussed in the Annotated Agreement below.

4. Statute of Frauds. Non-compete agreements that fail to recite the consideration in the agreement itself may be unenforceable under the Minnesota statute of frauds, which requires contracts that by their terms cannot be performed within one year to be in writing and to state the consideration. Ancillary documents may or may not be admissible to prove the consideration. MINN. STAT. § 513.01(1); *JAB, Inc. v. Naegle*, 867 N.W.2d 254 (Minn. Ct. App. 2015) (two-year nonsolicitation agreement, which failed to state the consideration and which contained an integration clause that forbid the plaintiff from using extraneous evidence was not enforceable due to the statute of frauds).

VI. CONCLUSION

An ounce of prevention is worth a pound of cure. Parties and their attorneys have an opportunity to proactively and cooperatively address all issues up front and avoid creating a "perfect storm" at a later date. Well drafted employment agreements can and should anticipate and clearly state the parties' agreements, obligations, and expectations under all foreseeable circumstances. It is far easier to cooperatively negotiate and clarify possible issues up front than it is to argue—or worse yet litigate—them after a dispute arises.

VII. ANNOTATED EXECUTIVE/KEY EMPLOYEE EMPLOYMENT AGREEMENT

The following annotated executive/key employee employment agreement is intended to highlight drafting issues, practices and strategies. [Sections in brackets may not appear in many agreements, depending on the parties' viewpoints and negotiations.] It is a sample, which has been edited and annotated for purposes of this presentation. Actual agreements need to address the specific needs of the parties and their unique factual and legal issues.

A

ANNOTATED EXECUTIVE/KEY EMPLOYEE EMPLOYMENT AGREEMENT

EMPLOYMENT AGREEMENT

This EMPLOYMENT AGREEMENT ("Agreement") is made and entered into as of the ____ day of _____, 2017, by and between XYZ Corporation ("Company"), a Minnesota corporation, and _____ ("Executive").

RECITALS[1]

1. Executive has the professional and personal skills to serve Company as its [Chief Operating Officer].

2. [The parties wish to establish an employment relationship, to protect Company's business and other interests, [to provide protections to Executive in the event Executive's employment is terminated without Cause] and to provide the essential terms of Executive's employment.]

3. [Company's current business activities include, among other things, designing, developing, manufacturing, shipping, marketing and selling _____ products [and/or] providing _____ services to _____.]

4. [Company and Executive recognize that, in performing his/her anticipated job-related duties and responsibilities, Executive will have extensive access to Company's confidential design, manufacturing, distribution, marketing and sales information; and will have opportunities to cultivate valuable business relationships with Company's employees, customers and vendors.]

AGREEMENT

In consideration of the foregoing premises, the mutual covenants and obligations of this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Employment. Company agrees to employ Executive, and Executive agrees to accept employment with Company, pursuant to the terms and conditions of this Agreement. It is understood that Executive will be subject to the policies and terms (as they may be amended from time to time) by Company, Company's Employee Handbook, Company's Code of Conduct and other policies in effect for salaried employees and officers of Company, except as otherwise specifically provided in this Agreement. [2]

[1] **Recitals.** Recitals are often viewed as mere "boilerplate." However, recitals can provide very helpful language, in the event of future disputes. The language in this sample assumes a new employment relationship. Agreements are often made with existing employees, in which case the recitals would be different.

[2] **General Terms and Conditions.** It is often unclear which general policies apply to executives. They should be subject to company rules and requirements (e.g., policies regarding sexual harassment, ethics, legal behavior, etc.), even if they are not summarized in the agreement – unless, of course, the stated intent is to override other general terms.

2. Duties.[3] The services of Executive shall be exclusive to Company, except as otherwise agreed to in writing by Company. Executive will [initially] serve in the capacity of [Chief Operating Officer]. Executive will assume responsibility for the job titles, reporting responsibilities and duties, which are assigned and which may be changed from time to time, by Company's [Chief Executive Officer]. Executive will perform Executive's obligations in a competent and professional manner, consistent with the expectations of Company's [Chief Executive Officer]. [Notwithstanding the above obligations, Executive may serve on outside boards of directors or committees if the outside activities are first disclosed to and approved in writing by Company's (Chief Executive Officer). That approval will not be granted if the outside activities are deemed by the (Chief Executive Officer) to conflict with the provisions of this Agreement, to impair Executive's ability to perform Executive's duties, or to otherwise conflict with Company's business interests.]

3. Term of Employment.[4] [This Agreement is not intended to establish any minimum or maximum period for Executive's continuing employment. Executive and Company will have an "at-will" employment relationship, which means that either party has the right to

[3] **Duties.** Although it is helpful to describe the ***initial*** title and duties (perhaps with reference to a job description as an exhibit), companies should be careful about this provision. A disenchanted executive may claim breach of contract, claiming the employer changed his or her title and/or duties. Generally, this section should not create the possibility of having later good-faith changes constitute a breach, or otherwise give a disenchanted and/or terminated executive an opportunity to claim that he or she should not be obligated to perform his or her post-termination obligations (non-compete, anti-solicitation, trade secret, etc.). It should be noted, however, that many executive employment agreements clearly do identify that the executive will serve in a particular capacity throughout the term of the agreement "unless mutually agreed" otherwise. Further, several executive employment agreements carefully set out in the body of the agreement, or in a separate exhibit, the exact, detailed duties that are expected. That type of specificity can create problems because detailed job descriptions are rarely kept current. If circumstances change, a company should have the right to expect its employees to be flexible, without risking a breach of contract claim. A good compromise is to have language that assures that, if the duties or titles are materially reduced, it may give the executive grounds to resign for "good reason," as discussed below.

[4] **Term of Employment.** There are many options here. For example:

- *No Term at All; "At-Will" Relationship.* Some employment agreements do not contain any stated term. They state that the relationship can be terminated by either party at any time, and for any reason – expressly stating an "at-will" relationship. That may be the only provision, with no guarantees whatsoever. Many "at-will" agreements, like this sample, allow either party to end the relationship at any time, but set forth post-termination rights. The agreement may change the rights, depending on who decides to terminate the relationship, why and/or when. Consider, for example, an agreement that provides the executive with a substantial severance package if the employer terminates the relationship without cause during the first year, with the size of the separation pay decreasing over time. Such a provision might adequately address an executive's initial concerns (e.g., not being willing to leave a prior employer without minimum guarantees), without creating an overly generous separation package.

- *Specific Period of Time.* (e.g., two years, with no reference to what happens once it expires). Presumably, once this expires, the relationship is either over or converts to an "at-will" employment relationship. If the employment continues without a new agreement, and if some of the provisions in the agreement continue forward, there is much room for misunderstandings and disagreements. For example, if the compensation and benefits packages continue to be in force (as they were during the term of the agreement), does that mean the post-termination compensation package continues to apply? What about other provisions such as non-competes, confidentiality clauses, etc.? The agreement should be clear on these points.

- *Initial Term with Anticipated Renewals.* Employment agreements are often drafted to have an initial term (e.g., one year), with the expressed understanding that the term may continue into the future. If that is the desire of the parties, they should state whether the term automatically renews, absent adequate notice by one party to the other not to renew (commonly referred to as an "evergreen" agreement); or whether the parties must renegotiate a new agreement at the end of its term, and, absent that, the employment will terminate. Regardless which type of renewal system is used, both parties should anticipate and address the renewal period. Beware of an agreement that either automatically renews itself or automatically expires because one or both parties "dropped the ball."

terminate the employment relationship at any time and for any reason, with or without Cause.] [5] [The reason for and timing of the termination, as set forth in Section 5, will determine the amount of post-termination payments and benefits, as set forth in Section 6.]

4. Compensation, Reimbursements, and Benefits.[6] Company agrees to provide Executive the following compensation, reimbursements and benefits:

a. [Signing Bonus.[7] As an inducement to enter into this Agreement, Company will pay Executive a signing bonus in the gross amount of $_____, less standard withholdings, payable within ___ days of _____.]

b. Base Salary.[8] Company will pay Executive a monthly base salary (the "Base Salary"), payable in accordance with Company's standard payroll practices. The initial monthly Base Salary will be in the gross amount of _____ Dollars ($_____). The Base Salary will be subject to annual performance review and possible adjustment by Company's [Chief Executive Officer.]

c. [Equity; Incentive Awards.[9] Executive [may] [will] be eligible to receive [discretionary] equity awards, annual bonuses and/or long term incentive compensation ("Incentive Awards") pursuant to the terms and conditions of Company's _____

[5] **Termination of Employment.** From the company's perspective, only the employment relationship – not the agreement – should be terminated. Termination of the agreement could inadvertently terminate post-termination business protections.

[6] **Compensation, Reimbursements, and Benefits.** Executives often have unique compensation packages. In addition to base salaries and basic benefits, a compensation package may include intricate bonus plans, incentive compensation plans, separation or severance plans, stock grants, stock warrants, stock options, etc. If unique compensation arrangements are made, be sensitive to the issues that they create. For example, if a stock option is granted, or if stock is given to the executive, it should be clear in the executive agreement and in a separate stock purchase agreement what will happen if the employment relationship ends. From the employer's perspective, typically one would want a stock purchase agreement which triggers in the event of termination of employment, regardless of the reason. Similarly, if there are unique promises for employee benefit plans that may be covered by ERISA, care should be taken to prepare proper documentation which reflects the company's ERISA obligations and desires. Critically, be sensitive to tax, SEC, and Sarbanes-Oxley issues and obligations created by an executive agreement.

[7] **Signing Bonus.** Some companies provide that if the executive voluntarily resigns or is terminated for cause within a certain period of time, some or all of the signing bonus must be repaid.

[8] **Base Salary.** Executive agreements typically set the base salary for the first year, with an understanding that the salary will be subject to annual review. Some agreements state that the base salary will never drop below a certain floor during the entire course of the agreement; some guarantee minimal percentage increases each year; some make no guarantees whatsoever.

[9] **Equity, Bonuses, and Other Incentive Packages.** Executive agreements may provide for equity interests (stock grants, stock options, phantom equity awards, profits interests, etc.), bonuses, or other annual and long-term incentives. They may be guaranteed, considered at the discretion of the employer, or based on objective (or combined objective/subjective) criteria in the applicable plan. Alternatively, the agreement may simply refer to other equity or incentive programs which are in existence, and state that the executive is eligible for equity or incentives under those programs, subject to their terms and conditions. The company should make it clear that it maintains the right to interpret, alter, or replace the equity/incentive program at its discretion, and specifically should reserve the right to add to, delete from, amend, or even cancel the program if business circumstances warrant. The agreement should not supersede the company's obligations under the equity or incentive plan, unless that is what the parties intend to have it do (which would rarely be the case). The executive may want to set minimum expectations/obligations, or make it clear that if certain award levels are not reached, the executive has a right to resign for good reason, discussed below. A common source of disagreement over bonuses and other incentive packages is whether it is payable if the executive leaves before a particular incentive period (e.g., fiscal year) is over. For example, the agreement should state whether a mid-year departure will entitle the executive to a pro rata share of the annual bonus, the entire bonus, or no bonus at all. This may be written to vary, depending on the timing and/or the reason for the departure. In any event, be sure that the executive agreement does not conflict with other equity/incentive plans.

Equity Plan, Annual Bonus Plan and/or Long Term Incentive Plan (jointly, "Incentive Plans"), subject to the following:

(1) Executive's eligibility to receive Incentive Awards will be determined by Company's [Board of Directors] in its sole discretion.

(2) The Incentive Plans are not necessarily all-inclusive because circumstances which Company has not anticipated may arise. Company reserves the right, in its sole discretion, to make any changes at any time to the Incentive Plans or to terminate the Incentive Plans.

(3) Any questions regarding the computation of Incentive Awards under the Incentive Plans will be conclusively determined by Company's [Board of Directors], in its sole discretion, pursuant to the terms and conditions of the Incentive Plans.]

d. Discretionary Bonus. Executive may be awarded an annual discretionary bonus ("Bonus"). The amount of the Bonus and the timing of payment of such Bonus will be determined in the sole discretion of the Company's [Chief Executive Officer.]

e. Expenses.[10] Company will reimburse Executive for ordinary, necessary and reasonable business expenses that Executive incurs in connection with the performance of Executive's duties [including entertainment, telephone, travel and miscellaneous expenses]. Executive must obtain proper approval for such expenses pursuant to Company's policies and procedures, and provide Company with documentation for such expenses in a form sufficient to sustain Company's deduction for such expenses under the Internal Revenue Code.

f. Time Off.[11] Executive will be entitled to time off with or without pay in accordance with Company's policies in effect at any particular time [; provided, however, that Executive shall, in any event, be entitled to _____ (____) days of Paid Time Off ("PTO") during each full year of employment. Executive may carry over up to _____ (___) days annually of PTO.]

g. Health, Disability, Life Insurance, and Other Employee Benefit Plans.[12] Company will provide Executive with health, disability, and life insurance coverage and other employee benefits that are presently existing or which may be established in the future by Company for its full-time salaried employees, subject to the terms and conditions of the applicable benefit plans.

[10] **Business Expenses.** Executive agreements often provide specific provisions for car expenses, plane expenses, country club expenses, and other matters – some of which may or may not be deductible by the company under the Internal Revenue Code. The agreement should clearly state the various responsibilities.

[11] **Time Off.** Executives often mix business and pleasure, and generally work while traveling. Depending on a company's policies and practices, that can lead to large and unexpected accruals of paid time off. Address all of this up front, to avoid major disputes later.

[12] **Benefits.** Agreements often summarize specific benefits available to the executive. The company should make it clear that references in the agreement to particular employee benefit plans established or maintained by the company do not change the terms and conditions of the plans or preclude the company from amending or terminating the plans.

h. Indemnification. Company will defend, indemnify and hold Executive harmless from costs, expenses, damages and other liability incurred by Executive as a result of performing services in good faith to Company, subject to the limitations and other terms and conditions of applicable Minnesota statutes and Company's Articles of Incorporation or Bylaws.

i. Changes in Benefit Plans.[13] No references in this Agreement to particular employee benefit plans established or maintained by Company are intended to change the terms and conditions of the plans or to preclude Company from amending or terminating the plans.

j. Withholding; Taxes. Company may withhold from any compensation, reimbursements and benefits payable to Executive all federal, state, city and other taxes as required by any law or governmental regulation or ruling, as well as other standard withholdings and deductions.

5. Termination.[14] Executive's employment may be terminated at any time as follows:

a. Death.[15] Executive's employment shall automatically terminate upon Executive's death.

b. Disability.[16] Either party may terminate Executive's employment at any time, upon written notice to the other party, if Executive sustains a disability which precludes Executive from performing the essential functions of Executive's job, with or without reasonable accommodations, as defined, and if required, by applicable state and federal disability laws. [Executive shall be presumed to have such a disability for purpose of this Agreement if Executive qualifies to begin receiving disability income insurance payments under any long term disability income insurance policy that Company maintains for the benefit of Executive. If Executive does not qualify for such payments, Executive shall nevertheless be presumed to have such a disability if Executive is substantially incapable of performing the essential functions of Executive's job for a period of more than _____.]

[13] **Changes in Benefits.** Companies often change policies or employee benefit plans, at least on a prospective basis. Particularly if the executive agreement identifies specific policies or employee benefit plans (which they often do), it is critical for the company to reserve its right to make changes to those plans.

[14] **Termination.** The agreement should anticipate and address all likely reasons for termination of employment. The parties may have a very different view about post-termination packages and obligations, depending on the reason for and timing of the departure. It is better to have a road map for the different options than to leave items vague or open, and subject to later disputes.

[15] **Death of Executive.** Obviously, the death of the executive terminates the employment relationship. It is a good idea to state this, however, because the employer almost certainly will have a different view about post-termination payments in this situation, as compared to others.

[16] **Disability of Executive.** An executive's disability, if serious enough, should be a ground for termination. Draft the definition so the agreement does not violate the Americans with Disabilities Act or the Family and Medical Leave Act. Many agreements state that, subject to these laws, the executive will be "presumed" to have such a disability if he or she is substantially incapable of performing his or her duties for a particular period of time (12 weeks would be the minimum here, due to the FMLA; the ADA may dictate a longer period).

c. With Cause.[17] Company may terminate Executive's employment at any time, with "Cause," upon written notice to Executive. "Cause" shall mean any one of the following events:

(1) Executive's breach of any material obligations under this Agreement or any other agreement with Company;

(2) [Executive's [willful and/or repeated] failure or refusal to perform or observe Executive's duties, responsibilities and obligations to Company;]

(3) [Any breach of Executive's duty of loyalty or fiduciary duties to Company;]

(4) [Use of alcohol or other drugs in a manner which affects the performance of Executive's duties, responsibilities and obligations to Company;]

(5) Conviction of Executive, or a plea of *nolo contendere* for a felony or of any crime involving theft, misrepresentation, fraud, or moral turpitude;

(6) [Commission by Executive of any other [willful or intentional] act which could reasonably be expected to injure the reputation, business or business relationships of Company and/or Executive]; or

(7) The existence of any court order or settlement agreement prohibiting Executive's continued employment with Company.

d. Without Cause.[18] Company may terminate Executive's employment at any time, without Cause, upon _____ ( ) days written notice to Executive. [Company may, at its sole discretion, opt not to have Executive provide active employment services during some or all of the notice period, and place Executive on a paid leave of absence for some or all of the notice period.]

e. Resignation.[19] Executive may, upon _____ ( ) days written notice to Company, terminate Executive's employment at any time. [Upon receiving such notice, Company may, at its sole discretion, opt not to have Executive provide active

[17] **Termination by Company "For Cause."** The agreement should make it clear that the company can terminate, at any time, "for cause." The parties should carefully define "cause." Various types of misconduct, illegal activities, intentional breaches of the agreement, etc., will often be included in the definition. Employers often want the definition of "cause" to include less heinous actions or inactions of the executive that would, nevertheless, justify a termination – essentially based on performance. Executives prefer to have "cause" only in misconduct situations. Often, the less serious issues may be subject to a notice/opportunity to cure provision.

[18] **Termination by Company Without Cause.** This is the situation that new executives are most concerned about. What if the employer decides to terminate the employment relationship due to a change in business plans, a down turn in the market, a mere personality dispute, or for some other reason why "it's just not working out?" Employers who enter into executive agreements definitely want to reserve the right to terminate "without cause;" they do not want to prove "cause" every time they want to part ways with the executive. Typically, this is a situation where fairness and the new executive's negotiating demands dictate that post-termination separation packages are warranted.

[19] **Voluntary Termination by Executive.** Employers cannot prevent an executive from voluntarily terminating employment. However, the agreement should state that if the executive voluntarily quits, separation payment obligations will not apply.

employment services during some or all of the notice period, and place Executive on a paid leave of absence for some or all of the notice period. If Company exercises this option, it shall not convert the resignation to a termination by Company.]

f. Resignation for Good Reason.[20] Executive may terminate Executive's employment at any time, with "Good Reason," upon written notice to Company. "Good Reason" shall mean any one of the following events [that is not satisfactorily explained to Executive or cured within _____ ( ) days of written notification thereof to Company by Executive]:

(1) Company's [intentional and material] breach of Company's obligations under this Agreement or any other agreement with Executive [Among other things, if Company materially alters the terms and conditions of Executive's employment, or materially reduces or changes Executive's job duties or authority in conflict with this Agreement, it shall be considered a material breach of this Agreement.];

(2) Working conditions created by Company, which are in violation of Executive's rights under any federal or state law; or

(3) [_____ _____.]

g. Other Reasons. [_____ _____.][21]

6. Payments and Benefits upon Termination.[22] Upon the termination of Executive's employment, Executive shall only[23] be entitled to the following payments and benefits:

[20] **Resignation for Good Reason**. This provision is rare. Employers rarely offer it, and executives often fail to ask for it. Even once it is agreed to in concept, there are often disagreements on the definition. Executives generally want the ability to trigger this provision if the job materially changes after they begin (e.g., material reduction in compensation or title, or forced and unacceptable relocation), or if there is other treatment that may not necessarily rise to the level of a "constructive discharge" under applicable law, but is nevertheless intolerable to the executive. Employers generally resist some or all of these, preferring to maintain flexibility and discretion. This may be a very good place to address situations where the employer and executive discuss and fully expect a situation to occur (such as a promotion from COO to CEO in one year, after the current CEO retires), but the employer cannot contractually guarantee it – basically assuring the executive that if it does not occur, there will be some ability to trigger a termination package. Often, the less serious issues may be subject to a notice/opportunity to cure provision.

[21] **Termination as a Result of Other Reasons.** Executive agreements occasionally address the possible termination of employment as a result of other reasons. For example, executive agreements often discuss terminations as a result of divestitures, acquisitions, mergers, or other changes in control. From the company's perspective, this is not necessary because these types of provisions would constitute a termination "without cause." Executives may want to see this type of provision set out separately, however, to set up a later provision for severance pay in the event of this type of separation. The executive may even want to make it a ground for a good reason resignation.

[22] **Post-Termination Compensation Packages.** Many executive agreements provide a flat severance payment (e.g., twelve months base salary) regardless of the reason for the termination, the timing of the termination, and whether the executive abides by other commitments. This may not be a logical approach from the company's perspective. Employers should not agree to pay separation pay simply because an executive's employment is terminated. The reason for the termination is critical.

a. Death; Disability.[24] If Executive's employment is terminated due to Executive's death or disability, regardless of the date of termination, Executive or Executive's estate or heirs, as appropriate, shall only be paid (i) Executive's Base Salary and accrued, but unpaid, PTO, prorated through the date of termination; (ii) any unpaid expense reimbursement; (iii) other accrued and vested benefits, if any, under any of Company's Incentive Plans or any of Company's other employee benefit plans (e.g., 401(k) plan), subject to the terms and conditions of those plans; and (iv) any benefits payable under any life or disability insurance policy maintained by Company for the benefit of Executive at the time of the termination of employment, subject to the terms and conditions of such policy.

b. For Cause [; Resignation Without Good Reason].[25] If Company terminates Executive's employment for Cause, [or if Executive resigns without Good Reason,] regardless of the date of termination, Executive shall only be paid (i) Executive's Base Salary and accrued but unpaid PTO, prorated through the date of termination; (ii) any unpaid expense reimbursement; and (iii) other accrued and vested benefits as of the date of termination, if any, under any of Company's Incentive Plans or any of Company's other employee benefit plans (e.g., 401(k) plan), subject to the terms and conditions of those plans.

c. Without Cause [; Resignation for Good Reason].[26] If Company terminates Executive's employment without Cause [or Executive resigns for Good Reason], regardless of the date of termination, Executive shall be paid the same payments and benefits as set forth in Subparagraph 6.b. above. In addition, if Executive signs (and does not rescind, as allowed by law) a Release of Claims [in a form satisfactory to Company which assures, among other things, that Executive will not commence any type of litigation or assert other claims against Company] [or] [a copy of which is attached hereto as Exhibit A], and if Executive complies with all of Executive's post-termination obligations to Company under this Agreement [and Executive's Confidentiality, Noncompetition and Nonsolicitation Agreement],[27] Company

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[23] **No Additional Pay/Benefits.** There have been many claims by former executives for bonus or other incentive payments, various fringe benefits (e.g., cars, club dues, profit sharing, etc.), and even claims for bonuses based on post-termination severance pay. Not surprisingly, companies usually take the position that no such benefits or payments were anticipated. To avoid such a dispute, executive agreements should clearly state whether additional payments or benefits will result from the payment of a post-termination payment, or whether the gross payment stands alone.

[24] **Death or Disability of Executive**. If the employment relationship terminates as a result of the executive's death or disability, this is not the employer's choice. Further, executives often have (usually through the employer) life and disability insurance.

[25] **Termination by Company for Cause [; Resignation Without Good Reason].** If the executive truly did give "cause" to terminate, and particularly if it was a serious act of misconduct, employers do not want a contractual commitment to make post-termination payments. Similarly, few employers are happy to make payments to an executive who quits through no fault of the employer.

[26] **Termination by Company without Cause [; Resignation for Good Reason].** Here, a good argument can be made for post-termination compensation. Through no serious fault of the executive, the employment relationship is ended. Accordingly, it is not uncommon for employers to agree to provide post-termination pay to executives who are terminated "without cause." This may be part of an overall benefits package or may be contained within the executive agreement. The amount of post-termination compensation might be a flat amount (e.g., one year), a formula (e.g., one month for each year of service), a diminishing amount (e.g., one year if the termination takes place within the first year, six months, if it takes place in the second year, etc.), or some other formula. If the executive is able to negotiate certain rights to resign for good reason, the severance sections may be similar, or even identical, to the severance for a termination by the company without cause.

[27] **Contingencies.** If an employer agrees to pay post-termination compensation, it should make the receipt of such compensation contingent on the executive's compliance with all post-termination obligations (non-compete agreements, trade secret and confidentiality agreements, agreements not to hire or solicit employees, cooperation with litigation clauses, etc.); *and* a signed release of claims.

shall pay Executive a post-termination payment [in the amount of_____] [, as set forth below:

(1) If the effective date of termination of employment is during the first full year of Executive's employment, an amount equal to ____ (__) months of Executive's Base Salary as of the date of termination;

(2) If the effective date of termination of employment is during the second full year of Executive's employment, an amount equal to ____ (__) months of Executive's Base Salary as of the date of termination; or

(3) If the effective date of termination is after the second full year of Executive's employment, an amount equal to ____ (__) months of Executive's Base Salary as of the date of termination.]

The [applicable] payment shall be made [in a lump sum on] [at the same intervals and amounts as Executive's pre-termination Base Salary, beginning with] the first payroll date after Executive signs (and does not rescind, as allowed by law) the above referenced Release of Claims, subject to appropriate withholdings and deductions, and subject to Executive's compliance with all of Executive's post-termination obligations to Company under this Agreement [and Executive's Confidentiality, Noncompetition and Nonsolicitation Agreement]. No Incentive Awards, retirement savings contributions, 401(k) contributions or other employee payments or benefits will be paid to Executive by Company based on the amount of the post-termination payment[.] [, except the following: _____.]

d. [At Any Time As a Result of a Change of Control.[28] If Company terminates Executive's employment at any time as a result of a "Change of Control," and if Executive does not receive [and accept] an offer of employment [, which has comparable responsibilities and compensation] [that continues for at least ____ ( ) months] with the new controlling entity, Executive shall be paid the same payments and benefits as set forth in Subparagraph 6.b. above. In addition, if Executive signs (and does not rescind, as allowed by law) a Release of Claims in a form satisfactory to Company and the new controlling entity which assures, among other things, that Executive will not commence any type of litigation or assert other claims against Company, and if Executive complies with all of Executive's post-termination obligations to Company under this Agreement [and Executive's Confidentiality, Noncompetition and Nonsolicitation Agreement], Company shall pay Executive a post-termination payment equal to ___ months of Executive's Base Salary as of the effective date of the termination of employment.

This payment shall be made [in a lump sum on] [at the same intervals and amounts as Executive's pre-termination Base Salary, beginning with] the first payroll date after Executive

[28] **Change of Control.** Change of control provisions are rare. This is a simple change of control provision. Many are far more complex. The language in a change of control provision, as a practical matter, can make future business combinations difficult, if not impossible. There needs to be a reasonable balance between protecting executives from the sudden loss of employment and essentially making the business change impossible to achieve.

signs (and does not rescind, as allowed by law) the above-referenced Release of Claims, subject to appropriate withholdings and deductions, and subject to Executive's compliance with all of Executive's post-termination obligations to Company under this Agreement [and Executive's Confidentiality, Noncompetition and Nonsolicitation Agreement]. The payment under this Change of Control provision will be paid in lieu of, and not in addition to, the post-termination payment referenced in Subparagraph 6.c.(1), (2) or (3) above. No Incentive Awards, retirement savings contributions, 401(k) contributions or other employee payments or benefits will be paid to Executive by Company based on this post-termination payment[.] [, except the following: _____].

If Executive does receive an offer of [comparable] employment with the new controlling entity, and chooses not to accept that employment, Executive's termination of employment shall be considered a resignation, and treated as set forth in Subparagraph 6.b. above. For purposes of this provision, "Change of Control" means a sale or lease of the assets or a controlling interest of the stock of Company to a third party, which may come as a result of a divestiture, an acquisition, a lease arrangement, or a merger.]

7. Business Protections.[29]

a. Representations by Executive.[30] Executive represents to Company that Executive has not signed and/or entered into any written or oral noncompetition agreements, confidentiality agreements, or other proprietary information agreements that would prevent Executive from accepting this offer or performing the anticipated duties and services at Company. This Agreement is subject to these representations being correct.

b. No Violations of Others' Rights.[31] Company does not authorize Executive to utilize any other individual or entity's intellectual or other property, confidential or proprietary information on Company's behalf. Executive will not do any of the following on Company's behalf:

(1) Use any other individual or entity's intellectual or other property, confidential or proprietary information. Specifically, Executive will not bring any other individual or entity's proprietary information, customer lists, records, trade secrets, or any other

[29] **Business Protections.** This sample incorporates various business protections. They are often set out in a separate agreement.

[30] **Representations by Executive.** If the new executive has restrictions from a former employer, it is critical to discover that up front, rather than after the fact. These representations should be confirmed as part of the offer. The company may choose not to go forward with the arrangement, to negotiate or litigate with the former employer as needed, or to change the terms of the new agreement in order to avoid violations with the existing agreements and/or prepare to defend claims. A common claim against employees is for breach of one or several restrictive covenants, including: a non-compete agreement, a customer nonsolicitation agreement, an agreement not to solicit employees, or a confidentiality agreement. A common claim against the new employer is for tortious interference with the contract. Fully prepared employers can take steps to avoid these claims or at least minimize their risks.

[31] **No Violation of Others' Rights.** Again, it is important to clearly assure, up front, that the employer does not want the executive to violate any other entity's legal rights. This language may prevent legal conflicts, or at least support "good-faith" defenses to other potential claims, such as trade secret violations.

property or confidential information with Executive when Executive comes to work at Company. All of that information and property should be left with the proper owner(s);

(2) Contact or do business with any supplier or other individual or entity who or which has an exclusive contract or any other agreement with any other individual or entity which prevents him/her/it from doing business with Company; or

(3) Interfere with, infringe, misappropriate or violate any intellectual property rights of a third party.

c. Executive's Acknowledgements Regarding Business Protections.[32] Executive acknowledges that he/she [will be employed] [has been employed, and will continue to be employed], in a position of trust and confidence and [will have access to and will become familiar with] [has had access to and has become familiar with and will continue to have access to and become familiar with,] the Company's proprietary and confidential information, trades secrets, workforce, customers, products, methods, technology, services and procedures used by Company. Executive acknowledges that Company has expended significant time and money on promotion, advertising, and the development of goodwill and a sound business reputation; developed a list of customers and spent time and resources to learn the customers' needs for Company's services and products; entered into business relationships designed to discover likely future customers; developed products, processes, technologies and services, which are valuable, special and unique assets of Company's business; expended significant time and money on technology, research, design, and development. Executive acknowledges that the disclosure to or use by third parties of any of Company's confidential or proprietary information, trade secrets, or Executive's unauthorized use of such information would seriously harm Company's business and cause monetary loss that would be difficult, if not impossible, to measure. Executive further acknowledges that Company has expended significant time and money hiring, contracting, training and managing its employees, sales representatives and other consultants, contractors, suppliers and manufacturers, who are critical to its ongoing business.

d. Consideration[33]. Executive agrees that Company's willingness to enter into this Agreement and to provide Executive with the consideration in this Agreement is conditioned on Executive's acceptance of and compliance with the terms of this Agreement, including the Business Protections in this Section 7. Executive acknowledges that the

[32] **Protective Covenants.** It may be critical to the survival of a company to protect its trade secrets, prevent unfair competition, and prohibit the solicitation of its customers and/or employees if a key executive departs. A company can do many things to protect itself with respect to these problems. To stand the best possible chance of prevailing in litigation, the company wants to be able to prove that its trade secrets and other confidential information were truly secret; that it, from day one, took steps to protect that confidential information; and that the executive knew that the information was confidential, etc. Further, the fairness and reasonableness of non-compete agreements, as well as the consideration requirement, should be clear from day one. Protective covenants can be included in the executive agreement or in a separate agreement. Even if the employer does have a separate agreement, it is a good idea to make reference to that agreement in the executive agreement, and clearly state that a signed business protections agreement is a condition of the executive agreement.

[33] **Consideration.** Even if a non-compete agreement is by its terms reasonable, it may be totally unenforceable if the employer did not give the employee sufficient consideration. The validity of consideration can depend on when it was offered to the employee. Minnesota law treats an employee's new job as sufficient consideration for a non-compete agreement so long as it is entered into at the commencement of the employment relationship. After that point, there must be new and independent consideration. In Minnesota, continued employment is not sufficient consideration for a non-compete. New and independent consideration might include midstream (or post-termination) benefit agreements, promotions, or severance agreements.

consideration consists of real, bargained-for benefits to which he/she would have no entitlement but for this Agreement. Executive further acknowledges that he/she was not entitled to receive the consideration prior to the execution of this Agreement.

e. Confidential Information[34] and Property.

(1) Definition. "Confidential Information" means information belonging to Company of a special and unique nature and value, including, but not limited to, such matters as: Company's personnel and compensation information, accounts, trade secrets, procedures, manuals, financial cost and sales data, supply sources and resources, contracts, price lists, accounting and bookkeeping practices, office policies and practices, financial information, marketing plans, business plans existing and potential business opportunities, confidential reports, customer lists and contracts; customers' needs for Company's products and services prospective customer lists, and all information about prospective customers; litigation and other legal matters information specific to Company's products and services, such as product formulas, product specifications, source code, coding standards, programming techniques, processes and systems; computer programs, techniques, processes, designs, specifications, diagrams, flow charts, ideas, systems (and methods of operation of such programs), and research and development work. Executive acknowledges that Company has taken reasonable measures to preserve the secrecy of its Confidential Information, including, but not limited to, requiring Executive to execute this Agreement.

(2) Confidentiality Provisions. Regardless of the reason for and timing of the termination of Executive's employment, Executive will not, at any time during or after his/her employment, disclose Company's Confidential Information which Executive may learn or acquire during his/her employment to any other person or entity, or use said Confidential Information for Executive's own benefit or for the benefit of another.

(3) Return of Property and Confidential Information. Regardless of the reason for and timing of the termination of Executive's employment, if either Executive or Company terminates the employment relationship, Executive will immediately deliver to Company all property and Confidential Information, including work in progress, originals and copies of business forms, computer files, diskettes, source codes, manuals, including training materials, catalogs, customer lists and information, prospective customer lists and information, price lists, employee lists, financial information, computer equipment, office equipment, product designs, product samples, and all other materials in Executive's possession or control which belong to Company or contain information subject to this Agreement.

f. Competition Restrictions.

(1) Full-Time Commitment. During the period of the employment relationship, Executive will devote his/her full-time and energy to furthering Company's business

[34] **Confidential Information/Trade Secrets.** Before a court will grant protection of a business's trade secrets, the company must show that it made "reasonable efforts" to maintain the secrecy of this information. *See Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890, 901 (Minn. 1983). Execution of confidentiality agreements by all employees has been recognized as one such "reasonable effort." *Surgidev Corp. v. Eye Tech., Inc.*, 648 F.Supp. 661, 693 (D. Minn. 1986), *aff'd* 828 F.2d 452 (8th Cir. 1987).

and will not pursue any other business activity without the written consent of Company's [Chief Executive Officer].

(2) Definitions. For purposes of this Agreement: (1) "Competitive Products" mean _____; _____, _____ and _____; and (2) "Competitive Services" mean _____, _____, and _____.[35]

(3) [Non-Compete Obligations. During the period of his/her employment, and for a period of one (1) year[36] after termination of employment, regardless of the reason for and timing of the termination of Executive's employment, Executive will not, directly or indirectly, personally engage in, nor shall Executive own, manage, operate, join, control, consult with, participate in the ownership, operation or control of, be employed by, or be connected in any manner with any other person or entity which solicits, offers, offers to provide, provides, or plans to provide any Competitive Products or Competitive Services in the following geographic areas:_____, _____ and _____.][37]

[35] **Define the Protection**. Draft the definitions with care to assure that the Company is fully protected. The Court will enforce the language narrowly. *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892 (Minn. 1965); *Lemon v. Gressman*, No. C8-00-1739, 2001 WL 290512 at *1 (Minn. Ct. App. Mar. 27, 2001). If it is not clear, it may be considered vague and unenforceable.

[36] **Reasonable Time.** Non-compete agreements must be reasonable in their temporal scope, or they will not be enforced. *See, e.g., Webb Publishing Co. v. Fosshage*, 426 N.W.2d 445, 448 (Minn. App. 1988) (*citing Dahlberg Brothers, Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965)). Courts consider a variety of factors in determining whether a restrictive covenant is reasonable from a temporal standpoint, including: (1) nature of the work; (2) time necessary to train new employees; (3) time necessary to allow customers to become familiar with new employees; and (4) time necessary to obliterate the identification between the employer and the employee in the minds of the employer's customers. *Vital Images, Inc. v. Martel*, Civ. No. 07-4195, 2007 WL 3095378 at *3 (D. Minn. Oct. 19, 2007) (eighteen months); *Timm & Assoc., Inc. v. Broad*, Civ. No 05-2370, 2006 WL 3759753, at *4 (D. Minn. Dec. 21, 2006) (two years); *Overholt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 704 (Minn. Ct. App. 1989) (two years); *Metro Networks Comm. v. Zavodnick*, Civ. No. 03-6198, 2004 WL 73591 (D. Minn. Jan. 15, 2004. Although Minnesota courts have enforced non-compete agreements for periods of two or more years after the termination of employment, these cases are more likely the exception than the rule. In a traditional employment setting, courts generally are reluctant to enforce non-compete agreements for periods longer than one year, unless it involves a high-level executive, a post-termination severance, deferred compensation, or similar pay-out package that also lasts longer than a year or other unique facts and circumstances. *See, e.g., Medtronic v. Hughes and St. Jude Medical*, A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011) (shortening non-compete from two years to one year, despite ruling in favor of the former employer on all other issues in the case.) In contrast the Court "has consistently found one-year restrictions that are limited to a former employee's sales area to be reasonable." *Boston Scientific Corporation v. Kean*, Civ. No. 11-419 (SRN/FLN), 2011 WL 853644 (D. Minn. March 9, 2011) (quoting *Guidant Sales Corp v. Baer*, No. 09-CV-0358 (PJS/FLN), 2009 WL 490052, at *4 (D. Minn. Feb. 26, 2009).

[37] **Reasonable Geography**. Employment-related covenants restricting competition must be reasonable from a geographic standpoint as well, or they will not be enforced. *See, e.g., Ring Computer Sys. v. Paradata Computer Networks*, No. C4-90-889, 1990 WL 132615 (Minn. Ct. App. Sept. 18, 1990). In the past, global restrictions have generally been unenforceable as unreasonably broad, *See, e.g., Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993) (observing that a non-compete agreement with no geographical limit "will often be held to be unreasonable"). However, this is changing as the world marketplace develops. *See Medtronic v. Hedemark*, No. A08-0987, 2009 WL 511760, at *3–5 (Minn. Ct. App. Mar. 3, 2009) (upholding a global restriction on competition for a multinational corporation, where the other restrictions in the non-compete were reasonable). The factors courts take into account when judging the reasonableness of a geographical limitation include: (1) reasonable trade area; (2) area where employee actually performed duties; (3) employer's actual business area; and (4) location of employer's customers. *Overholt*, 437 N.W.2d 698; *Satellite Indus. Inc. v. Keeling*, 396 N.W.2d 635 (Minn. Ct. App.1986).

(a) [See footnote regarding Customer-Based Restrictions.][38]

(b) See footnote regarding Product-Based Restrictions.][39]

(4) [Nonsolicitation of Customers.[40] [Without limiting the generality of the above Non-Compete obligations,] Executive expressly and further agrees that during the period of his/her employment, and for a period of one year after termination of employment, regardless of the reason for and timing of the term of Executive's employment, he/she will not directly or indirectly (on his/her own behalf or on behalf of any other person or entity) provide or sell Competitive Products or Competitive Services to, attempt to provide or sell such services or products to, or otherwise solicit purchases of such services or products from, the following:

(a) Any customer with whom Executive [or any other employee or representative under Executive's supervision] has had direct or indirect contact or to whom Executive [or any other employee or representative under Executive's supervision] has directly or indirectly provided or sold such services or products during the period of Executive's employment;

Geographical restrictions should be clearly tied to the employer's legitimate business interests, keeping in mind that the increased roles of telephones, e-mails, and the Internet can make geographic restrictions irrelevant in many industries. However, the Court of Appeals has declined to enunciate a per se rule barring the enforceability of non-compete covenants that contained no territorial limitation. "Territorial limitations…are but one of several factors a [district] court is to consider in determining the reasonableness of a restrictive covenant." *Dynamic Air, Inc. v. Bloch,* 502 N.W.2d 796, 799 (Minn. Ct. App. 1993). (Instead of a per se rule, "[t]he covenant must be scrutinized as a whole to determine whether it is reasonable." *Id.* at 800. *Medtronic v. Hughes and St. Jude Medical,* A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011).

[38] **Customer Restrictions.** Customer restrictions may substitute for or complement a geographic restriction. Often, these make far more sense than pure geographic restrictions since customers may be all over the county or even the world. Basing a territorial restriction on the presence of customers in a certain area enhances the reasonableness of a non-compete agreement. *Cook Sign Co. v. Combs,* No. A07-1907, 2008 WL 3898267, at *7 (Minn. Ct. App. Aug. 26, 2008) (enforcing a non-compete agreement restricting an employee from competing in three states in which the employer does business and has customers); *Salon 2000, Inc. v. Dauwalter,* No. A06-1227, 2007 WL 1599223, at *2 (Minn. Ct. App. June 5, 2007) (affirming a non-compete agreement restricting an employee from working as a stylist within a ten-mile radius of the employer's business on the ground that customers will seek out the stylist rather than the services of the salon "if the stylist is sufficiently close" geographically to the salon); *Madsen v. Spectro Alloys Corp.,* No. C7-98-225, 1998 WL 373067, at *2 (Minn. Ct. App. July 7, 1998) (concluding that a restriction from competing in "any market in which Spectro does business in the United States" was not unreasonably broad).

[39] **Product-Based Restrictions**. Under the right circumstances, product-based restrictions may also substitute for or compliment a geographic restriction. Even a world-wide non-compete agreement may be deemed reasonable under the circumstances of the case, where the non-compete covenant prevents the employee from working on competitive products. *Medtronic v. Hughes and St. Jude Medical,* A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011) (world-wide scope was deemed reasonable because it was limited to certain cardiology products, and the confidential information that the employee obtained while working with the former employer would be potentially relevant to his sales of products at the new employer in any market).

[40] **Customer Non-Solicitation**. Non-Solicitation provisions relating to customers are different that using customer-based restrictions for or to complement a geographic restriction. The former permits an employee to work for a competing business but prohibits him/her from soliciting his/her former employer's customers, while the later forbids competition of any kind and merely limits the geographic scope of competition to areas in which the employer has customers. *See IDS Life Ins. Co. v. Sun America, Inc*., 958 F. Supp. 1258, 1273 (N.D. Ill. 1997) *rev'd on other grounds*, 136 F.3d 537 (7th Cir. 1998) (applying Minnesota law); *Commodities Specialists, Co. v. Brummet,* No. Civ. 02-1459, 2002 WL 31898166 (D. Minn. Dec. 27, 2002).

(b) Any prospective customer who has been directly or indirectly solicited by Company, or who has approached Company, and with whom Executive [or any other employee or representative under the Executive's supervision] has had direct or indirect contact or to whom Executive [or any other employee or representative under Executive's supervision] has directly or indirectly attempted to sell or provide such services or products during the period of Executive's employment]; or

(c) Any customer or prospective customer about which Executive learned Confidential Information during the period of Executive's employment.]

(5) [Notice Obligations.[41] For a period of one year after termination of employment, regardless of the reason for and timing of the termination of Executive's employment, if Executive wishes to obtain other employment or otherwise become involved in another business, which solicits, offers, offers to provide, provides or plans to provide any Competitive Products or Competitive Services to its customers or prospective customers, Executive agrees to provide, in writing, Company's [Chief Executive Officer] with the name of any potential future employer or business. Executive also agrees to provide the potential employer or business entity with a copy of all of the Business Protections in Section 7 of this Agreement and gives Company the right to provide a copy of all of the Business Protections in Section 7 of this Agreement this to the potential employer or business entity.][42]

(6) [Workforce Protection. During the period of his/her employment, and for a period of one year following the termination of said employment, regardless of the reason for and timing of the termination of Executive's employment, Executive will not, directly or indirectly hire or otherwise retain any of Company's employees, sales representatives, consultants, contractors, suppliers or manufacturers, or solicit any of them for the purpose of hiring or otherwise contracting with them or inducing them to leave their employment or other relationship with Company, nor will Executive own, manage, operate, join, control, consult with, participate in the ownership, management, operation or control of, be employed by,

[41] **Notice**. To the extent the employee follows this provision, the employer gets notice and a better opportunity to take timely steps to protect its business interests. To the extent the employee does not give notice, the lack of notice is another breach for the employer to assert.

[42] **Breach; Interference**. The most frequent legal claim against employees is for breach of one or several restrictive covenants, including: a non-compete agreement, *see, e.g., Bennett v. Storz Broad. Co.*, 134 N.W.2d 892 (Minn. 1965); a customer non-solicitation agreement, *see, e.g., Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 452 (Minn. Ct. App. 2001); *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. Ct. App. 1993); an agreement not to solicit the employer's employees, *Frank B. Hall & Co., Inc. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir. 1992); and/or a confidentiality agreement, s*ee, e.g., Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983); *Tenant Const., Inc. v. Mason*, No. A07-0413 2008 WL 314515 (Minn. Ct. App. Feb. 5, 2008). Since the new employer is not a party to such agreements; the most frequent claim against the new employer is for tortious interference with the contract. *See, e.g., Kallok v. Medtronic, Inc.*, 573 N.W.2d 356 (Minn. 1998); *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 741 (Minn. 1982); *United Wild Rice, Inc. v. Nelson*, 313 N.W.2d 628, 632 (Minn. 1982); *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 897 (Minn. 1965); *Ultra Lube, Inc. v. Dave Peterson Monticello Ford-Mercury, Inc.*, No. C8-02-658, 2002 WL 31302981 (Minn. Ct. App. Oct. 15, 2002); *Medtronic v. Hughes and St. Jude Medical*, A10-998, 2011 WL 134973 (Minn. Ct. App. Jan. 18, 2011); *McGrath v. MICO, Inc.*, A11-1087, 2012 WL 6097116 (Minn. Ct. App. Dec. 10, 2012), review denied (Feb. 19, 2013). One of the new employer's defenses to a claim for tortious interference is that it did not know about the contract. To the extent the employee follows this provision, this helps assure that the new employer has knowledge of the agreement, and hopefully will abide by it or increase its risk of liability. To the extent the employee does not give notice, the lack of notice is another breach for the employer to assert.

or be connected in any manner with any person or entity which engages in the conduct proscribed by this paragraph.]

g. [Inventions.[43]

(1) "Inventions" as used in this Agreement, means any inventions, discoveries, improvements and ideas (whether or not they are in writing or reduced to practice) or works of authorship (whether or not they can be patented or copyrighted) that Executive makes, authors, or conceives (either alone or with others) and that concern directly Company's business or Company's present or demonstrably anticipated future research or development and result from any work Executive performs for Company.

(2) Executive agrees that all Inventions made by Executive during the term of this Agreement will be Company's sole and exclusive property. Executive will, with respect to any Invention:

(a) Keep current, accurate, and complete records, which will belong to Company and be kept and stored on Company's premises;

(b) Promptly and fully disclose the existence and describe the nature of the Invention to Company in writing (and without request);

(c) Assign (and Executive does hereby assign) to Company all of Executive's rights to the Invention, any applications Executive makes for patents or copyrights in any country, and any patents or copyrights granted to Executive in any country; and

(d) Acknowledge and deliver promptly to Company any written instruments, and perform any other acts necessary in Company's opinion to preserve property rights in the Invention against forfeiture, abandonment or loss and to obtain and maintain patents and/or copyrights on the Invention and to vest the entire right and title to the Invention in Company.

(3) If Executive is needed, at any time, to give testimony, evidence, or opinions in any litigation or proceeding involving any patents or copyrights or applications for patents or copyrights, both domestic and foreign, relating to inventions, improvements discoveries, software, writings or other works of authorship conceived, developed or reduced to practice by Executive, Executive agrees to do so. With respect to any obligations

[43] **Inventions**. Many employers have no need to protect inventions and do not need this section at all. When they do, the employer can require an employee to assign ownership rights in inventions, and should do so in writing. The general rule is that "an individual owns the patent rights to the subject matter of which he is an inventor, even though he conceived it or reduced it to practice in the course of his employment." *See, e.g., Banks v. Unisys Corp.*, 228 F.3d 1357, 1359 (Fed. Cir. 2000). There are two widely recognized exceptions to the general rule: "First, an employer owns an employee's invention if the employee is a party to an express contract to that effect; second, when an employee is hired to invent something or solve a particular problem, the property of the invention related to this effort may belong to the employer." *Id.*

performed by Executive under this Section following termination of Executive's employment, Company will pay or reimburse Executive all reasonable out-of-pocket expenses.

(4) To the extent that any Invention qualifies as "work made for hire" as defined in 17 U.S.C. §101 (1976), as amended, such Invention shall constitute "work made for hire" and, as such, shall be the exclusive property of Company.

(5) Pursuant to Minnesota Statute §181.78[44], this Section does not apply to an invention for which no equipment, supplies, facility, or trade secret information of Company was used and which was developed entirely on Executive's own time, and (1) which does not relate (a) directly to the business of Company or (b) to Company's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by Executive for Company.]

h. Remedies. Executive acknowledges and agrees that his/her breach of this Agreement would cause irreparable harm to Company and that such harm may not be compensable entirely with monetary damages. If Executive violates this Agreement, Company may, but shall not be required to, seek injunctive relief.[45] Any injunctive relief sought by Company shall be in addition to, and not in limitation of, any monetary relief or other remedies or rights to which Company is or may be entitled at law, in equity, or under this Agreement.

[Executive agrees that, in the event Company seeks temporary or permanent injunctive relief, Company is not required to post bond with the Court in an amount in excess of $_____.][46]

[In connection with any suit at law or in equity by Company under this Agreement, Company shall be entitled to an accounting, and to the repayment of all profits, compensation, commissions, fees, or other remuneration which Executive or any other entity or person has

[44] **Statutory Notice**. At the time an agreement regarding inventions is made, the employer must provide the employee with written notice that the agreement "does not apply to an invention for which no equipment, supplies, facility or trade secret information of the employer was used and which was developed entirely on the employee's own time, and (1) which does not relate (a) directly to the business of the employer or (b) to the employer's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by the employee for the employer." Minn. Stat. § 181.78. Existing employees should be provided independent consideration to support such agreements. *See Eaton Corp. v. Giere*, 971 F.2d 136, 139-40 (8th Cir. 1992).

[45] **Injunctive Relief**. In the past, non-compete agreements generally stated that injunctive relief would be appropriate in the event of a breach and that irreparable harm would result absent injunctive relief. *See Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 68–69 In recent years, non-compete agreements have been upping the ante in many ways, some of which are shown above.

[46] **Bond**. If the employer is entitled to a temporary injunction, it likely will be required to post a bond to cover the costs and damages to the former employee if the court later determines that the injunction was in error. Fed. R. Civ. P. 65(c); Minn. R. Civ. P. 65.03(a); *see also Bellows v. Ericson*, 46 N.W.2d 654, 660 (Minn. 1951). Minnesota state courts have discretion over the amount of the bond or whether to waive the security requirement altogether. *Ecolab, Inc. v. Gartland*, 537 N.W.2d 291, 297 (Minn. Ct. App. 1995); *In re Giblin*, 232 N.W.2d 214, 223 (Minn. 1975). Minnesota federal district courts are not entitled to waive the bond requirement completely, although they are permitted to reduce the bond to a nominal fee. *Masterman ex rel. Coakley v. Goodno,* No. Civ.03-2939, 2003 WL 22283375 (D. Minn. Sept. 25, 2003) (setting bond at $1000). See *Novus Franchising, Inc. v. Oksendahl*, Nos. 07-1964 , 07-1965, 2007 WL 2084143 (D. Minn. July 17, 2007) (holding that Rule 65(c) does not allow the parties to waive the bond-posting requirement); *Hypred S.A. v. Pochard*, No. Civ. 04-2773, 2004 WL 1386149 (D. Minn. 2004) (refusing to waive the bond requirement based on the parties' agreement to the waiver).

either directly or indirectly realized on its behalf or on behalf of another and/or may realize, as a result of, growing out of, or in connection with the violation which is the subject of the suit.] [47]

[In the event of a breach by Executive of this Agreement, the period of protection will be extended by the period of the duration of such breach.]

[In addition, Company shall be entitled to collect from Executive any reasonable attorney's fees and costs incurred in bringing any action against Executive or otherwise to enforce the terms of this Agreement, as well as any attorney's fees and costs for the collection of any judgments in Company's favor arising out of this Agreement.][48]

[See footnotes regarding Forfeiture of Equity or Benefits[49] and Liquidated Damages.[50]

i. Stipulated Reasonableness. Executive agrees that his/her obligations under this Agreement are reasonable and necessary for the Company to protect its business. Executive specifically agrees that one year from the time of his/her termination of

[47] **Money Damages**. Violation of a non-compete agreement may provide an employer with the opportunity to seek monetary damages as well as injunctive relief. The employer should include provisions that provide it with contractual remedies, such as full accounting by the former employee of all of activities with the new employer and full payment of various types of damages.

[48] **Attorney Fees.** Attorney fees are not recoverable unless there is a specific contract permitting or a statute authorizing such recovery. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). *See* Tenant Const., Inc. v. Mason, 2008 WL 314515 (Minn. Ct. App. Feb. 5, 2008) (upholding grant of attorney fees to employer in non-compete agreement); *Tonna Heating Cooling, Inc. v. Waraxa*, No. CX-02-368, 2002 WL 31687601 at *5 (Minn. Ct. App. Dec. 3, 2002) (denying an employer's request for attorney fees, despite employee's violation of the non-compete agreement, because the agreement did not provide for the payment of attorney fees in the event of breach).

[49] **Forfeiture of Equity or Benefits**. Increasingly, employers are including provisions in equity or benefit plans and agreements conditioning an employee's retention of stock, stock options, or other benefits on not competing with the employer for a certain time period following the employee's termination. Sometimes the plan/agreement states that the benefit will not be provided if there is a violation of a non-compete agreement. Other plans/agreements contain claw-back provisions, requiring the violating employee to pay back any prior benefit received. Minnesota courts have been willing to enforce forfeiture provisions if they pass a test of reasonableness. For example, a provision requiring an employee to forfeit cash or stock received within six months of the employee's violation of a non-compete agreement was deemed to be reasonable and was upheld because the employee had complete control of the circumstances generating the forfeiture. *Medtronic v. Hedemark*, No. A08-0987, 2009 WL 511760, at *3–5 (Minn. Ct. App. Mar. 3, 2009). In contrast, a forfeiture provision that was "not limited as to time, harm to the employer, or geographical area" was found to be an unreasonable restraint of trade. *Harris v. Bolin*, 247 N.W.2d 600, 603 (Minn. 1976).

[50] **Liquidated Damages**. Liquidated damages provisions should be carefully considered before the employer includes them in its non-compete agreements. Enforcement of a liquidated-damages clause is dependent on satisfaction of two elements: (1) the fixed amount is a reasonable forecast of just compensation for the harm caused by the breach; and (2) the harm is incapable of accurate estimation or is very difficult to estimate. *Bellboy Seafood Corp.*, 410 N.W.2d 349, 352 (Minn. Ct. App. 1987). Whether the liquidated-damages clause is "reasonable" must be determined "in light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Gorco*, 680 N.W.2d at 74; *Tenant Const., Inc. v. Mason*, No. A07-0413, 2008 WL 314515 (Minn. App. Feb 5, 2008); *See also Becker v. Blair*, 361 N.W.2d 434 (Minn. Ct. App. 1985); *Dean Van Horn Consulting Assocs. V. Woldi*, 367 N.W.2d 556, 560 (Minn. Ct. App. 1985), *rev. denied* (Minn. July 17, 1985); *But cf. Costello v. Johnson*, 121 N.W.2d 70 (Minn. 1963). Critically, the existence of a liquidated damages provision in a non-compete may preclude the employer from seeking injunctive relief. Arguably, an employee who breaches his/her non-compete agreement should not have to suffer the further damage of an injunction, since there is an adequate remedy at law under the terms of the contract. *See Timm & Assocs., Inc. v. Broad*, No. 05-2370, 2005 WL 3241832 (D. Minn. Nov. 30, 2005); *Bromen Office 1, Inc. v. Coens*, No. A04-946, 2004 WL 2984374 (Minn. Ct. App. Dec. 28, 2004). *But see Frank B. Hall & Co. v. Alexander & Alexander, Inc*, 974 F.2d 1020 (8th Cir. 1992); *H&R Block Enterprises, Inc. v. Short*, No. Civ. 06-608, 2006 WL 3437491 (D. Minn. Nov. 29, 2006). Also, if the contract spells out the damages in advance, the employee and the new employer can assess the risk with a higher degree of predictability, which may make their decisions easier and be detrimental to the former employer. Generally, the employer is better off avoiding liquidated damages provisions.

employment is a reasonable and necessary amount of time needed for Company to fill his/her position, to allow Company's customers and prospective customers to become familiar with his/her replacement and to obliterate the identification between Company and Executive in the minds of Company's customers and prospective customers. [51]

j. Post-Termination Application. Executive expressly agrees and understands that the restrictions contained in this Agreement shall apply no matter when, how or why his/her employment terminates and regardless whether the termination is voluntary or involuntary. Executive expressly agrees and understands that the restrictions contained in this Agreement shall survive the termination of his/her employment. [52]

8. Miscellaneous.

a. Entire Agreement. This Agreement contains the entire agreement of the parties relating to its subject matter and, except as otherwise stated, supersedes any and all oral or written prior agreements and understandings with respect to its subject matter.[53] The parties have made no agreements, representations, or warranties relating to the subject matter of this Agreement which are not set forth herein. Executive signs this Agreement without reliance on any oral or written promises, inducements, or representations other than those set forth in this Agreement.

b. Judicial Modification. If any one or more of the terms of this Agreement are deemed to be invalid or unenforceable by a court of law, the validity, enforceability, and legality of the remaining provisions will not, in any way, be affected or impaired.

c. Construction. Each provision of this Agreement shall be interpreted so that it is valid and enforceable under applicable law. If any provision of this Agreement is to any extent invalid or unenforceable under applicable law, that provision will still be effective to the extent it remains valid and enforceable. The remainder of this Agreement also will continue to be valid and enforceable, and the entire Agreement will continue to be valid and enforceable in other jurisdictions.

d. Waivers. No term or condition of this Agreement shall be deemed to have been waived, nor there any estoppel to enforce any provisions of this Agreement, except

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[51] **Temporal Factors**. Minnesota courts consider a variety of factors in determining whether a restrictive covenant is reasonable from a temporal standpoint, including: (1) nature of the work; (2) time necessary to train new employees; (3) time necessary to allow customers to become familiar with new employees; and (4) time necessary to obliterate the identification between the employer and the employee in the minds of the employer's customers. *Vital Images, Inc. v. Martel*, No. Civ. 07-4195, 2007 WL 3095378 at *3 (D. Minn. Oct. 19, 2007) (eighteen months); *Timm & Assoc., Inc. v. Broad*, No. Civ. 05-2370, 2006 WL 3759753, at *4 (D. Minn. Dec. 21, 2006) (two years); *Overholt Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 704 (Minn. Ct. App. 1989) (two years).

[52] **Post-Employment Survival**. It may not be clear that the non-compete obligations survive termination of the underlying employment agreement or the employment relationship. Post-termination obligations in the agreement must expressly survive termination of employment. *See, e.g., Burke v. Fine***,** 608 N.W.2d 909, 912 (Minn. Ct. App. 2000) (invalidating non-compete agreement where there was no explicit language stating that the non-compete survived the expiration of the contract).

[53] **Merger Clause.** The employer should be careful not to inadvertently supersede something that it wants to survive.

by a statement in writing signed by the party against whom enforcement of the waiver or estoppel is sought. A waiver shall operate only as to the specific term or condition waived. No waiver shall constitute a continuing waiver or a waiver of such term or condition for the future unless specifically stated. No single or partial exercise of any right or remedy under this Agreement shall preclude any party from otherwise or further exercising such rights or remedies, or any other rights or remedies granted by law or any other document.

e. Captions. The headings in this Agreement are for convenience of reference only and do not affect the interpretation of this Agreement.

f. Modification; Capacity. This Agreement may not be canceled, modified or otherwise changed except by another written agreement signed by Executive and Company. Executive represents that he/she has had a reasonable and adequate opportunity to consult with his/her own attorney regarding the effect of this Agreement, the sufficiency of the consideration provided to Executive, and the reasonableness of the restrictions set forth herein; and that Executive is signing this Agreement voluntarily, in order to receive the consideration that is being offered in exchange for this Agreement.

g. Choice of Law; Forum Selection.[54] The laws of the State of Minnesota shall govern the validity, construction and performance of this Agreement, to the extent not pre-empted by federal law. Any legal proceeding related to this Agreement shall be brought in Minnesota in the Hennepin County District Court or the Minnesota District of the U.S. District Court, and each of the parties hereto hereby consents to the exclusive jurisdiction of the Minnesota state and federal courts for this purpose. The parties acknowledge the existence of sufficient contacts to the State of Minnesota and Hennepin County to confer jurisdiction upon these courts. [55]

h. Notices. All notices and other communications required or permitted under this Agreement shall be in writing and provided to the other party either in person, by fax, or by certified mail. Notices to Company must be provided or sent to its [Chief

[54] **Choice of Law; Forum Selection.** The employer should include a choice-of-law provision and a forum selection clause to best protect it from multi-state legal issues and litigation. Generally, courts have enforced such provisions. *E.g.*, *CH Robinson Worldwide, Inc. v. FLS Transp., Inc*., 772 N.W.2d 528 (Minn. Ct. App. 2009); *Eagle Creek Software Servs., Inc. v. Jones*, Civ. No. 14-4925, 2015 WL 1038534, at *3 (D. Minn. Mar. 10, 2015) (absent minimum contacts, due process "is satisfied when a defendant consents to personal jurisdiction by entering into a contract that contains a valid forum selection clause." (citations omitted)); *Capsource Fin., Inc. v. Moore*, Civ. No. 11-2753, 2012 WL 2449935 (D. Minn. June 27, 2012) (a forum selection clause is enforceable unless it is invalid or enforcement would be unreasonable and unjust); *Milliken & Co. v. Eagle Packaging Co.*, 295 N.W.2d 377, 380 n.1 (Minn. 1980); *BMC Software, Inc. v. Mahoney*, No. 15-CV-2583, 2015 WL 3616069, at *5 (D. Minn. June 9, 2015). Further, the Minnesota Court of Appeals concluded that a forum selection clause in a non-compete agreement binds not only the former employee but binds the new employer as well, where the new employer is "closely related" to the dispute between the employer and the employee. *CH Robinson Worldwide, Inc. v. FLS Transp., Inc.*, 772 N.W.2d 528, 535 (Minn. Ct. App. 2009). However, if an agreement provides a choice of law provision in order to benefit from a more favorable law, but the parties do not have the requisite connections to that state, the courts can, and will, elect not to enforce such a provision. *E.g., Menzies Aviation (USA), Inc. v. Wilcox*, Civ. No. 13-2702, 2013 WL 5663187 (D. Minn. Oct. 17, 2013) (declining to apply more favorable Florida non-compete law where the record demonstrates no connection to Florida).

[55] **Arbitration and/or Mediation Clauses.** Some employers prefer binding arbitration provisions and/or require pre-litigation mediation. If doing so, they should be clear that the company is not prevented from seeking injunctive relief from a court at any time, in order to enforce business protections.

Executive Officer]; notices to Executive must be provided or sent to Executive in person or at Executive's home.

i. Survival. Notwithstanding the termination of Executive's employment with Company, the terms of this Agreement which relate to periods, activities, obligations, rights or remedies of the parties upon or subsequent to such termination shall survive such termination and shall govern all rights, disputes, claims or causes of action arising out of or in any way related to this Agreement.

j. Successors and Assigns.[56] This Agreement may be assigned by Company without Executive's authorization, but may not be assigned by Executive. This Agreement shall be binding on and inure to the benefit of Company's successors and assigns.

k. Section 409A.[57] Notwithstanding any other provision of this Agreement to the contrary, the Parties agree that the payments hereunder shall be exempt from, or satisfy the applicable requirements, if any, of Section 409A of the Internal Revenue Code of 1986, as amended (the "Code") in a manner that will preclude the imposition of penalties described in Code Section 409A. Payments made pursuant to this Agreement are intended to satisfy the short-term deferral rule or separation pay exception within the meaning of Code Section 409A. Executive's termination of employment under this Agreement shall mean a "separation from service" within the meaning of Code Section 409A. Notwithstanding anything herein to the contrary, this Agreement shall, to the maximum extent possible, be administered, interpreted and construed in a manner consistent with Code Section 409A; provided, that in no event shall the Company have any obligation to indemnify the Executive from the effect of any taxes under Code Section 409A.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written.

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[56] **Assignment Clause.** Non-competes are assignable in Minnesota. However, because non-competes are generally disfavored and therefore narrowly construed, the courts generally will not allow assignment of a non-compete absent explicit language permitting assignment. *Inter-Tel, Inc. v. CA Commc'ns, Inc.*, No. Civ. 02-1864, 2003 WL 23119384, at *4 (D. Minn. Dec. 29, 2003) (refusing to assign a non-compete agreement where the contract was silent on assignability). If the language requires the employee's consent to an assignment, the courts will usually not allow assignment without the consent. *Guy Carpenter & Co., Inc. v. John B. Collins & Assocs., Inc.*, No. 05-1623, 2006 WL 2502232, at *5 (D. Minn. Aug. 29, 2006) (refusing to assign a non-compete agreement to a new employer where the former employer failed to obtain consent from employees before assigning the non-compete to the new company, as specified in the employees' contract). However, the courts have allowed successor entities to enforce non-competes in the context of corporate mergers where the acquiring entity succeeded to the acquired entity's rights and obligations, *QBE Americas, Inc. v. McDermott*, No. 14-5020, 2015 WL 138082 (D. Minn. Jan. 9, 2015), and in corporate restructurings where the transfer of assets amounted to "nothing more than a corporate name change" and the employee's job did not change. *Ochsner v. Relco Unisystems Corp.*, No. A13-2399, 2014 WL 4957617 (Minn. Ct. App. Oct. 6, 2014).

[57] **Tax Issues**. I.R.C. § 409A; I.R.C. § 409A imposed new rules on nonqualified deferred compensation arrangements. These new rules institute substantial penalties on taxpayers who are not in compliance. Although I.R.C. § 409A, on its face, deals with "deferred compensation" arrangements, it has become clear that many types of compensation, which were not necessarily considered by many to be "deferred compensation," may be subject to I.R.C. § 409A. Section 409A might apply to severance agreements, employment agreements, bonus or incentive plans, change in control or success fee agreements, or other agreements that create an enforceable right to compensation to be paid at a later date. Careful planning with a tax lawyer or an accountant is critical. Any time a large compensation package of any sort is negotiated, the parties should consult with a tax lawyer or accountant.

XYZ CORPORATION

_____ By:_____

EXECUTIVE Its:_____