Minnesota
Employment
Law Council

MEMORANDUM

TO: Senate Labor Committee

FROM: Minnesota Employment Law Council

DATE: March 29, 2023

RE: S.F. 2782 – DE Amendment

Thank you for the opportunity to comment on the DE amendment to S.F. 2782, which will be considered by the Senate Labor Committee tomorrow (March 30, 2023). MELC's comments are addressed at Article 7 of the amendment, "Regulation of Restrictive Employment Agreements." MELC understands the policy priorities on which Article 7 is grounded, and we appreciate the author's addition of some language to address one of MELC's concerns. However, MELC believes that the current language is likely to result in unintended negative consequences. Those concerns may be addressed with straightforward amendments. We will summarize our members' concerns in this memo, and would be happy to provide recommended language upon request.

Overbroad Prohibition

MELC recognizes that noncompete agreements have been imposed on some employees unfairly, particularly low-wage workers who are not associated with an employer's goodwill or who pose no risk to an employer's trade secrets and sensitive business information. However, Article 7's categorical prohibition on noncompete agreements goes beyond that interest. For example, employers may have legitimate business interests in preventing competition for a reasonable period of time by a C-suite executive or sales or marketing leader who is closely associated with the company's goodwill, or an R & D employee who would inevitably use the company's confidential information by virtue of working in a similar capacity for a competitor. Article 7 could be tailored to protect *both* low-wage workers (or other categories of employees), as well as companies who have good reason to use noncompete agreements in limited circumstances.

Likewise, the inclusion of independent contractors, including corporate entities, in the prohibition against noncompete agreements is overbroad. The parties to a contract may have legitimate business reasons to negotiate for such restrictions in their agreement, which should not be categorically precluded.

Additional Exclusions

MELC appreciates the language included by the author at lines 70.10-70.13 to clarify that non-disclosure and non-solicitation agreements are not within the scope of the prohibition. MELC respectfully submits that additional exclusions for agreements that (1) prohibit interference with an employer's vendor, supplier or other business relationships, and (2) allow employers and employees to negotiate incentive-based restrictive covenants also are appropriate. In particular,

permitting agreements whereby an employee can *choose* to compete with their employer or agree not to compete in exchange for incentives or equity would seem to align with the principles on which Article 7 is grounded, by empowering employees while also allowing employers to offer incentives to protect their business interests.

Prevailing Plaintiff Attorneys' Fees

Consistent with amendments to other bills this session, MELC submits that lines 71.11-71.12 and 71.23-71.24 should be clarified to confirm that only "prevailing plaintiffs" are entitled to recover attorneys' fees in the event of litigation.

Clarifying Choice of Law and Venue

MELC respectfully submits that the choice of law and venue provision in lines 71.13-71.19, as drafted, might be misconstrued to sweep in any agreements between an employer and a Minnesota employee, not only agreements that would impose prohibited noncompete provisions contrary to Article 7. That would be an unnecessary imposition on national employers who may have agreements with employees unrelated to the issues addressed by this bill. This concern may be easily addressed by specifying that the choice of law and venue applies to claims "arising under this Section" only.

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

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