Non-compete litigation is typically fast-paced and expensive. An employer must act quickly when it suspects that an employee or former employee is violating a non-compete (also referred to as a non-competition agreement or non-compete agreement). For a model non-compete agreement, search Employee Non-Compete Agreement on our website.

It is critical to confirm that there is sufficient factual and legal support before initiating legal action. Filing a complaint for monetary damages or a request for an injunction can backfire if an employer is not prepared with sufficient evidence to support its request.

This article examines certain key issues that employers should consider to position themselves for successful enforcement of a non-compete agreement, including:

- The primary factors to consider before initiating legal action to enforce a non-compete.
- Whether to send a cease and desist letter before, or as an alternative to, initiating legal action.
- The advantages of bringing a declaratory judgment action.
- The tactical considerations involved once the employer decides to file a legal action for damages.
- Whether to request injunctive relief and the associated issues.

Factors to Consider Before Initiating Legal Action

Employers considering legal action to enforce a non-compete should evaluate the following factors:

- Does the employer have adequate evidence to demonstrate the need for enforcement? For example, are there first-hand witnesses to the employee’s conduct? Is there a business representative who can testify to the legitimate business interests of the employer in enforcing the non-compete agreement?
- Could litigation give rise to negative publicity which could in turn impact the employer’s business?
- Will litigation lead to bad morale or cause other employees to leave their employment? Is the employer initiating legal action to demonstrate to employees that it will take action to enforce non-competes?
- Is the employer prepared to commit the time necessary to proceed with litigation? For example, written discovery and depositions can be time intensive and expensive.
- Do the costs involved with defending any potential counterclaims by the employee (such as a counterclaim for unpaid wages) outweigh the potential benefit of enforcing the non-compete?
- What is the risk that an action to enforce the non-compete will be unsuccessful? In other words, how confident is the employer that the non-compete is enforceable?
Sending a cease and desist letter has several advantages:

- Remind an employee of his contractual obligations.
- Warn the employer that the employer plans to take legal action if the employee does not stop violating the non-compete.

The potential advantages of a cease and desist letter and relevant strategic considerations are set out below.

**POTENTIAL ADVANTAGES**

Sending a cease and desist letter has several advantages:

- The cease and desist letter provides an employer with an opportunity to resolve a dispute without proceeding with litigation. Some individuals respond to the mere threat of legal action, so the employer may be able to avoid the time and costs involved with litigation.
- An employer can learn valuable information about a suspected violation before commencing litigation. In many instances, an employee (or his counsel) responds to a cease and desist letter by arguing that the employee’s conduct is not unlawful or the non-compete is unenforceable. The response may include information about the circumstances that caused the employee to terminate his employment, details about his new job responsibilities and whether he considers the new employer a direct competitor of the former employer.
- A cease and desist letter can demonstrate the employer’s interest in protecting its business from competition while it continues to investigate the suspected violation. Even if the letter does not resolve the dispute, it can demonstrate the employer’s reasonableness in trying to resolve the matter without court intervention.

Despite the potential advantages, it is not always practical for an employer to send a cease and desist letter. For example, due to the nature of an employee’s violation, an employer may choose to commence legal action as quickly as possible (see below **Filing a Legal Action for Damages**).

**EVALUATING WHETHER TO SEND A COPY TO THE EMPLOYEE’S NEW EMPLOYER**

Depending on the facts of a particular situation, an employer may decide to send a copy of the cease and desist letter, or a similar letter, to the employee’s new employer. This puts the new employer on notice of the existence of the non-compete and the related contractual obligations. If the new employer continues to employ the individual, the employer may have a claim against the new employer for tortious interference with the employee’s contractual obligations.

However, the employer should consider the risk that if the letter is inaccurate or the employee is fired as a result of the letter, the employer may face a claim for:

- Libel.
- Defamation.
- Tortious interference with contract.
- Tortious interference with business relations.

In addition, an employer may find it strategically or psychologically advantageous to isolate the employee from his new employer by not sending the cease and desist letter to the employer. For more information, see below **Deciding Whether to Include the Employee’s New Employer in the Action**.

**DECLARATORY JUDGMENT ACTIONS**

An employee may initiate an action for declaratory judgment requesting that the court declare a non-compete invalid.

In some circumstances, it may be advantageous for an employer to bring a declaratory judgment action requesting that the court declare the non-compete to be valid and enforceable (for example, if an employee has threatened to breach the non-compete). If the employer has not yet suffered harm to its business, it may seek a declaratory judgment to prevent future breaches and harm to its business. In addition, filing for a declaratory judgment before the employee files has certain strategic advantages, such as allowing an employer to choose the timing and forum for litigation.
FILING A LEGAL ACTION FOR DAMAGES

As with other types of litigation, non-compete litigation typically begins when a party files a complaint. This section describes the tactical decisions an employer must make before filing a complaint, including:

- Whether to include the employee’s new employer in the action.
- Where to file the lawsuit.
- The common causes of action related to violation of a non-compete.

DECIDING WHETHER TO INCLUDE THE EMPLOYEE’S NEW EMPLOYER IN THE ACTION

In most non-compete litigations, employers name both the employee and the employee’s new employer as parties to the action. There are various reasons for this approach, for example, the new employer may be:

- In a better financial position to compensate the employer for any loss to its business as a result of the employee’s conduct.
- More willing to address the former employer’s concerns when faced with the expense and distraction of ongoing litigation.
- Motivated to settle a legal action rather than receive any negative attention from ongoing litigation.

In contrast, an employer may be inclined to name just the employee if:

- Omitting the new employer allows the employer to file suit in federal court on the basis of diversity jurisdiction. Naming the new employer may defeat diversity jurisdiction, which means the employer will be unable to file the legal action in federal court.
- The employer suspects that the new employer will be unwilling to pay the costs to defend a legal action against only the employee. If the employee is covering his own defense costs, he may be more inclined to settle the case.
- In order to avoid being named in the litigation, the new employer will be motivated to limit the employee’s activities to prevent breach of the non-compete.
- The employee will find it more difficult to withstand the psychological pressures of litigation if the employee is the only defendant.

WHERE TO FILE THE LAWSUIT

If there is no choice of forum provision in the non-compete, an employer must decide where to file the complaint. Depending on the circumstances of a particular case, an employer may have the option of filing a complaint in federal or state court. Typically, the circumstances of the case determine which option is more advantageous (for more information, search Commencing a Federal Lawsuit: Overview on our website).

In some jurisdictions, there are perceived or actual differences between federal and state judges regarding their:

- Predisposition to enforcing or not enforcing a non-compete.
- Judicial docket size.
- Willingness to issue injunctive relief.

Some state courts have dedicated equity divisions with assigned judges who are extremely knowledgeable about non-compete cases. These judges may be more inclined to give serious and prompt attention to the case. Additionally, because the threshold evidentiary standards may be different in federal and state court, there may be situations where an employer has sufficient evidence of a non-compete violation to proceed in one forum but not the other.

COMMON CAUSES OF ACTION

An employer’s investigation into the circumstances of the suspected violation helps determine which causes of action to pursue. In general, causes of action vary by state but can include the following claims against the employee:

- Breach of contract (for violation of non-compete, non-solicitation or non-disclosure agreements).
- Tortious interference with contract (for interfering with the employer’s contracts with customers or clients).
- Breach of the duty of loyalty or fiduciary duty, if the employee acted contrary to the employer’s interests while he was still employed.
- Usurpation of corporate opportunities, if the employee identified a business opportunity and took steps to funnel the opportunity to his new employer while still employed by the former employer.
- Misappropriation of trade secrets.
- Defamation, if the employee made defamatory statements to customers to encourage them to transfer their business to his new employer or to former co-workers in an attempt to recruit them.

Causes of action against the new employer vary by state, but can include:

- Tortious interference with contract (for interfering with the non-compete agreement).
- Tortious interference with business relations or prospective business relations.
- Usurpation of corporate opportunities, if the new employer encouraged or benefitted from the employee identifying a business opportunity and taking steps to funnel the opportunity to his new employer while still employed by the former employer.
- Misappropriation of trade secrets, if the employee was acting under the new employer’s direction when he misappropriated the information.

For more information about commencing a federal lawsuit generally, search Commencing a Federal Lawsuit: Overview on our website.
Defamation, if the employer made defamatory statements.

Employers frequently allege multiple causes of action in a complaint to increase the likelihood of success and because not all causes of action provide the same remedies.

REQUESTING INJUNCTIVE RELIEF

If an employer initiates legal action solely to obtain damages for an employee’s violation of a non-compete, filing a complaint is likely the appropriate option (see above Filing a Legal Action for Damages). Often, though, an employer’s goal is twofold:

- To recover any damages the employer has suffered as a result of the employee’s conduct.
- To prevent the employee from inflicting any additional (and often difficult to quantify) harm on the employer’s business.

In these situations, an employer usually seeks injunctive relief. For information regarding whether the presence of a liquidated damages clause in a non-compete agreement precludes injunctive relief under state law, search Non-compete Laws: State Q&A Tool on our website.

TYPES OF INJUNCTIVE RELIEF

As with other types of litigation, there are two primary types of injunctions that a court can issue before it reaches a decision on the merits in a non-compete case:

- **A temporary restraining order (TRO).** The TRO is an emergency order that specifies what a party can and cannot do for a limited period of time. TROs are the fastest form of injunctive relief. In the non-compete context, employers can request that a court issue a TRO to preserve the status quo or provide other affirmative relief such as preventing an employee from working for a new employer, soliciting certain customers or employees, or revealing certain trade secrets or other confidential information. In critical and time-sensitive situations (such as when the revelation of trade secrets is imminent), some courts issue TROs without an appearance by the employee although some court rules may require an employer to give the employee notice before seeking injunctive relief.

- **A preliminary injunction (PI).** PIs provide similar relief to a TRO. They specify what a party can and cannot do for a certain period of time. Courts typically hold a PI hearing to determine whether a PI is necessary to preserve the status quo or provide other affirmative relief until the parties go to trial or the court can decide the merits of a permanent injunction. The court’s ruling on a PI can give the parties a prediction of how the court will rule when considering the merits of the case.

After a trial on the merits, courts can issue a permanent injunction. The permanent injunction is considered a final decision.

As a practical matter, many non-compete cases settle before trial. Often, the parties agree to either a:

- **Permanent injunction.** This is advantageous to the employer because it is a public court order with precedential value. An employee violating an injunction can be held in contempt of court.
- **Contractual agreement that the employee will not engage in certain activities for a defined period of time.** Typically, employees are more likely to agree to a private settlement agreement rather than a permanent injunction.

WHETHER THE EMPLOYER HAS SUFFICIENT EVIDENCE

In most cases, gathering the evidence necessary to support a request for injunctive relief requires a tremendous amount of work in a relatively short period of time. Courts do not typically issue injunctions based on an employer’s mere concerns or suspicions that an employee is violating a non-compete. Instead, the employer must provide admissible evidence concerning why injunctive relief is necessary.

Evidence is frequently presented through affidavits of individuals with direct knowledge that an employee violated the non-compete, for example, customers or co-workers. Before requesting injunctive relief, the employer should feel comfortable with a corporate representative’s testimony about both:

- The employer’s business interest in enforcing the non-compete.
- The potential harm to the employer if the court does not issue an injunction.

When deciding whether to request injunctive relief, employers should also consider that:

- If a court finds the employer’s evidence insufficient to merit an injunction or finds the non-compete agreement to be unenforceable, the employee (and the new employer) will feel more confident in their chances of success at trial and be less likely to settle.
- The employer can incur significant costs in a relatively short period of time. Injunctive proceedings move quickly.
- The employer’s business may suffer if seeking injunctive relief means relying on clients or customers to give up their time, for example, to provide affidavits or testimony.
- There is the potential for further exposure of the employer’s confidential information if court documents are not filed under seal.
- The employer must rely on its strongest arguments in support of the non-compete agreement when arguing for injunctive relief. Therefore, the employee can benefit from observing the employer’s trial strategy at a very early stage.
An employer that lacks sufficient evidence to win a request for injunctive relief should instead consider filing a lawsuit and promptly initiating discovery, either on the standard schedule or on an expedited basis (see below Requesting Expedited Discovery). Although the employer could suffer harm to its business during the interim, the employer can better position itself for success when the court addresses the merits of the non-compete case.

THE STANDARD FOR RELIEF
The standard for issuing an injunction varies by jurisdiction. Typically, the party requesting injunctive relief bears the burden of proof (see, for example, EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 312 (S.D.N.Y. 1999)). In general, courts analyze:

- Whether the employer is likely to prevail on the merits of the case at trial. To demonstrate likelihood of success on the merits, it is not necessary for an employer to prove its entire case when it requests the injunction.
- Whether the employer has suffered (or will suffer) irreparable harm. This typically means harm that cannot be remedied through the payment of monetary damages. In Florida, violation of an enforceable non-compete creates a presumption of irreparable injury to the employer (Fla. Stat. § 542.335(1)(j) (2011)).
- Whether the harm faced by the employer outweighs the harm the employee may suffer if an injunction is issued.
- If the public’s interest will be adversely affected by the injunction (for example, whether competition will be unduly stifled by issuance of the injunction).


REQUESTING EXPEDITED DISCOVERY
Employers are not always able to demonstrate a likelihood of success on the merits without conducting depositions or exchanging written discovery. An employer’s knowledge about an employee’s specific conduct may be limited even after conducting a fact investigation and interviewing witnesses. In these cases, an employer often requests that discovery take place on a shortened schedule. There is no guarantee a court will order expedited discovery, so the employer must be prepared to demonstrate to the court why it is necessary. Best practice is to:

- Narrowly tailor discovery requests to the issues that are relevant to the hearing for injunctive relief.
- Emphasize the potential harm the employer is seeking to prevent.
- Demonstrate the reasonableness of the requested information by attaching the proposed discovery requests to the employer’s motion for injunctive relief.

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