

Using a Temporary Restraining Order (TRO) to Halt a Former Employer's Noncompete

Employment and Labor





From time to time, we use our fictitious legal team at Sunderland Manufacturing to illustrate the challenges real in-house departments face. Previously, the Sunderland legal team has dealt with the opioid crisis, paying employees during natural disasters, and taming communications for litigation.

Sunderland Manufacturing General Counsel Jordan Powers drummed nails on her cherry wood desk, deep in thought. The sales department had hired a business development professional from a competitor, and the former employer sued the employee.

"Do you want to keep her?" Jason Parks, Sunderland's outside counsel, inquired. Jordan nodded slowly.

"She has years of experience. She exemplifies the qualities that the sales department wants in a leader, and they are really excited about having her on board. They are disappointed that we've had to bench her while this litigation is pending," Jordan said.

"Fortunately for her, the noncompete is subject to Oregon law," Jason said cheerfully.

"What's so great about Oregon law?" Jordan asked.

"In Oregon, the employer must inform the employee that a noncompete is required as a condition of employment in a written offer of employment at least two weeks before the employee's first day of work," Jason declared triumphantly.

"Why is that wonderful?" she questioned. Jason slid a letter across the desk. The employee's offer letter made no mention of the noncompete.

"They didn't tell her about the noncompete until a month after she started work," Jason grinned.

Jordan was still worried. "Until a court ruled on the unenforceability, it would be risky to put her to work as if no agreement existed," she noted. "The former employer could potentially sue for monetary damages and sue Sunderland for tortious interference with the employee's noncompete agreement."

"Unless," he said with a gleam in his eye, "we file a temporary restraining order, or TRO, against the former employer. It's an unusual step since normally it's the former employer who is filing the TRO against the employee, but it can be done."

Courts generally dislike the restraint on trade inherent in noncompete agreements. The treatment of noncompete agreements is state and country specific, so when tackling a noncompete, a critical first step is understanding how the applicable jurisdiction views these agreements. For example:

- Asia-Pacific countries generally disfavor restraints on trade as a matter of public policy. Noncompete agreements for longer than six months are enforced in exceptional circumstances in Hong Kong, whereas they can be enforceable for up to two years in China. Malaysia prohibits noncompete agreements except under very limited statutory exception (e.g., the sale of a business). In Taiwan, adequate consideration constitutes at least 50 percent of the employee's average wage as of the termination date and must be sufficient to support the employee's financial needs during the period of restriction. Generally, if enforced at all, in Asia-Pacific, noncompete agreements must be:
    - Reasonable (a fact-specific inquiry);
    - Supported by adequate consideration, and,
    - Protect a legitimate business interest.
- Most states in the United States permit noncompete agreements. These agreements are void in California, North Dakota, and Oklahoma. Idaho, Massachusetts, Minnesota, Oregon, and Utah, and have more restrictive requirements than most other states;

- European countries are more restrictive than the United States, and significantly limit the enforcement of noncompete agreements. Many countries require independent consideration. For example, Belgium requires consideration to be half the employees gross wage, and Germany requires consideration to be at least half the employee's total compensation (including benefits).
- In some countries in Africa and the Middle East, noncompete agreements can be signed upon the employee's departure from the company. Nigeria begins with a presumption that noncompete agreements are prima facie unenforceable, and enforceability becomes a hill for the employer to climb. Common law governs noncompete agreements in Uganda, and such restrictions must be reasonable in respect to the interests of parties and the interest of the public. Although the United Arab Emirates (UAE) recognizes noncompete provisions, they are difficult to enforce and no injunctive relief is afforded.

In the United States, it is not unusual for a former employer to seek a TRO or preliminary injunction to enjoin an employee now working for a competitor. It is less common for the employee to seek a TRO or injunction against the former employer, but it can be done.

If an employee faces imminent termination from her new employment because of the noncompete or is professionally sidelined or blackballed in ways that cannot be compensable with money damages, then there may be grounds for filing a TRO and seeking an injunction thereafter. Courts typically consider four factors in preliminary injunctions:

1. The Movant's likelihood of success on the merits;
2. The threat of irreparable harm;
3. The balance of harm to the parties; and,
4. The public interest: Noncompetes are disfavored as restraints on trade and there is a strong public interest in preserving and fostering business competition, especially regarding a person's right to earn a living.

Even if the TRO is not granted, an early ruling on the validity of the noncompete agreement (as in Sunderland's case, where the noncompete appears invalid) can be instructive and effective in driving the case to resolution. Because a TRO is not dispositive, the most a court may find is that based on the evidence before the court at that point in the case (often scant because discovery may not have commenced), a party has a fair likelihood of success on the merits.

If the case does not improve for the party on the losing end of that initial finding, especially after the employee's deposition or the depositions of key witnesses, the initial ruling can be instrumental in driving the case to early resolution through mediation or partial summary judgment.

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