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Preparing for Non-Compete Litigation

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A Practice Note describing the steps an employer can take to prepare to successfully litigate a non-compete action, the primary options for enforcing a non-compete agreement, and the strategic decisions involved with each option. This Note discusses gathering evidence, assessing the enforceability of a non-compete, considerations before initiating legal action, cease and desist letters, seeking declaratory judgments, damages, and injunctive relief, and potential remedies available under the Defend Trade Secrets Act (DTSA). This Note is jurisdiction neutral. For information on state law requirements, see State Restrictive Covenants Toolkit, Non-Compete Laws: State Q&A Tool, and Trade Secret Laws: State Q&A Tool.

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 agreement (also referred to as a non-competition agreement or non-compete). 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 Note discusses the steps an employer can take to best position itself for successful enforcement of a non-compete and the strategic considerations involved with initiating non-compete litigation. In particular, it discusses:

- Best practices for investigating a suspected violation and gathering relevant evidence.
- Key steps for evaluating the likelihood a court will enforce a non-compete.
- Factors to consider before initiating legal action.
- The options for enforcing a non-compete through legal action and the key decisions relevant to each option.

Best Practices for Gathering Evidence

Employers often learn from clients, customers, or employees that an employee or former employee is working for a competitor or preparing to do so. Rather than relying on second-hand knowledge of a suspected violation of a non-compete, employers should promptly conduct their own investigation to:

- Evaluate whether the employee's conduct violates a non-compete.
- Gather evidence to be used if the employer decides to pursue legal action to enforce the non-compete.

This section describes several best practices for investigating a potential non-compete violation. For more information about non-competes generally, see Practice Note, Non-Compete Agreements with Employees: What Is a Non-Compete Agreement?.

Investigating a Suspected Violation

Because of the nature of the conduct at issue and the potential harm inflicted, an employer should act quickly when it suspects an employee is violating a non-compete. There are numerous reasons for doing so. For example, quick action:

- Demonstrates that the employer has a legitimate business interest and takes any suspected violation seriously.
- May minimize damage to the employer's business resulting from an employee's competitive activity.
- Helps ensure that any potential evidence of the employee's conduct will not be lost (see Preserving Electronic Evidence).

In most states, employers must demonstrate that the post-employment restrictions are necessary to protect a legitimate business interest (see, for example, *Reliable Fire Equip. Co. v. Arredondo,* 965 N.E.2d 393, 400 (Ill. 2011); *Star Direct, Inc. v. Dal Pra*, 767 N.W.2d 898, 905 (Wisc. 2009); *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388 (1999); Tex. Bus. & Com. Code § 15.50(a)). For more information on state requirements, see Non-Compete Laws: State Q&A Tool.

To evaluate whether an employer has a legitimate business interest, courts frequently consider how quickly the employer acted to protect its interests. It can be difficult to argue that an employee's conduct caused irreparable injury (a factor courts consider in deciding whether to issue an injunction) if the employer failed to act promptly after learning of a suspected violation (see Standard for Preliminary Injunctive Relief by Circuit Chart). If an employer delays too long, the departing employee also may be able to raise laches as a defense to any enforcement action, though extenuating circumstances such as delays caused by business and court closures during the COVID-19 pandemic may be a relevant factor in the court's analysis. For these reasons, employers can best position themselves for successful enforcement by acting quickly.

Gathering Relevant Documents

Employees often sign numerous documents both before and during their employment such as:

- Employment applications (see Standard Document, Application for Employment).
- Offer letters (see Standard Documents, Offer Letter/Short-Form Employment Agreement for Executive and Offer Letter/Short-Form Employment Agreement for a Non-Executive).
- Employment contracts (see Standard Documents, Executive Employment Agreement (Long-Form) and Executive Employment Agreement (Medium-Form).
- Stock option agreements (see Standard Documents, Non-Qualified Stock Option Agreement (Employees) and Incentive Stock Option Agreement).

Some of these documents may reference, incorporate, or even supersede obligations contained in other agreements. For example, a later agreement may include a merger provision that impacts an earlier non-compete agreement. When there is a suspected violation of a non-compete, employers must be sure to locate all agreements signed by an employee that contain or affect post-employment restrictions, including:

- Non-competes.
- Non-solicitation provisions that may prohibit an employee from:
  - soliciting business from or serving the former employer's clients or customers; or
  - soliciting former coworkers to work for the new employer.

  For a sample, see Standard Clause, Non-Solicitation Clause.

Many non-competes are stand-alone agreements. However, post-employment restrictions can also be found in:

- Employment contracts.
- A release of claims executed as part of a settlement of actual or anticipated litigation (for a sample, see Standard Document, Settlement and Release of Claims Agreement: Single Plaintiff Employment Dispute).
- Separation or severance agreements (for a sample, see Standard Document, Separation and Release of Claims Agreement).

A thorough search for relevant documents should include an employee's personnel file, whether paper or electronic, and whether stored on site with the employer or with a third party vendor or service provider. Employers should also search, to the extent relevant, hard copy and electronic:

- Employee benefits files. Because some employers provide employees with the opportunity to participate in compensation, commission, or stock option plans in exchange for their agreement to a non-compete, employee benefits files may contain copies of non-competes.
- Corporate transaction files. If an employee was hired as part of a merger or acquisition, the corporate transaction paperwork may contain copies of non-competes.

Best practice is to retain **all** agreements with post-employment restrictions even those that are no longer in effect because they may still be useful. For example, an employer that requires employees to sign updated non-competes can use its business practice as evidence that it has a legitimate business interest in enforcing non-competes.

Employers should confirm that they have fully executed copies of the non-compete. Too often when seeking to enforce a non-compete employers find that they either have unsigned copies or only an executed signature page. If the agreements were signed or transmitted electronically, the employer must have sufficient evidence (often through an IT professional) establishing that the employee assented to the agreement.

Conducting Witnesses Interviews

An employer's investigation into a suspected violation of a non-compete should include interviewing witnesses. Depending on the facts of a particular situation, witnesses may include:

- Individuals who work with the employee. Coworkers may have witnessed conduct by the employee that violates the non-compete or been contacted by clients or customers who the employee tried to solicit for business. They may also provide valuable evidence of a violation of a non-solicitation provision if the employee attempted to recruit these individuals to work for a competitor or the employee's newly formed business.
- Clients or customers. Clients or customers may confirm a suspected violation of a non-solicitation of customers provision if the employee contacted them.

Contacting Clients or Customers

Contacting clients or customers about a suspected violation of a non-compete may not be appropriate in all cases. Employers are often hesitant to involve clients in a non-compete dispute with a former employee. Typically employers do not contact their clients unless:

- The client's testimony is necessary to support their claim.
- The client has initiated contact with the employer about unwanted or improper solicitations from the former employee.

When contemplating non-compete litigation, employers should:

- Consider the likelihood that the client or customer has helpful information.
- Balance the risk of upsetting their business relationship with any potential benefits to be gained.

Obtaining Affidavits

To the extent any coworkers, clients, or customers have first-hand knowledge that an employee has violated a non-compete (for example, a client received a telephone call from the employee soliciting their business), employers should consider obtaining affidavits from these witnesses. An affidavit can bolster an employer's application for injunctive relief or a request for damages. Additionally, witnesses who signs affidavits are less likely to change their story at a future date. For a form of affidavit, see Standard Document, Affidavit: General (Federal).

Preserving Electronic Evidence

Employers suspecting that an employee violated a non-compete can often obtain valuable evidence from the employee's computer. In particular, information about which electronic files a departing employee accessed, transferred, printed, or deleted is often incriminating evidence of impermissible competitive activity.

Before conducting workplace monitoring or surveillance of current employees, employers should confirm they have implemented a clear electronic communications systems policy notifying employees that computers are company property and reserving the employer's right to monitor employees' email, internet, and computer usage. For a model policy, see Standard Document, IT Resources and Communications Systems Policy. For more information, see Practice Note, Electronic Workplace Monitoring and Surveillance.

Because confidential, proprietary, and trade secret information is often stored in electronic form, departing employees may attempt to transfer information by email to a personal email account or to a storage device such as a thumb drive, or upload information to a personal cloud storage account. Employers that suspect a departing employee is violating a non-compete should:

- Shut off the employee's access to the employer's computer system and ensure that the employee no longer has access to the employer's workplace once the employment relationship has ended.
- Immediately preserve the employee's:
  - emails;
  - computer hard drive; and
  - any additional electronic devices, for example, a company-issued laptop or mobile phone.
- Review security footage of the building and records of building access logs for suspicious activity such as the employee accessing the building at late hours to remove boxes of files or printing out a large volume of material.

- Consider hiring a computer professional to make a forensic image (snapshot) of the employee's hard drive and other electronic devices. This should happen before the employer even turns on the employee's computer and opens files to retrieve them. Once the employer is on notice of potential litigation, there is an obligation to preserve all relevant electronically stored information (ESI) (see Practice Note, Collecting Documents and Electronically Stored Information in Federal Civil Litigation). A forensic image can help an employer defend against claims for spoliation of evidence. Although hiring a forensic expert to review the electronic evidence can be expensive, spoliation sanctions can be costly. Employers should consider, at a minimum, preserving the evidence by having a forensic image created. For more on spoliation, see Practice Note, Sanctions for ESI Spoliation Under FRCP 37(e): Overview and Spoliation Sanctions by US Circuit Court Chart.
- Send a litigation hold notice to relevant employees (see Standard Document, Litigation Hold Notice and Litigation Hold Toolkit).

For more about electronic discovery in employment cases generally, see Practice Note, E-Discovery in Employment Cases: Practical Considerations for Employers.

Assessing the Enforceability of a Non-Compete

Before initiating legal action, an employer must determine whether a court is likely to enforce the non-compete. The enforceability of non-competes is largely governed by state common law although some states, for example, Florida, Illinois, Massachusetts, and Texas, have enacted statutes governing non-competes (for more information, see Non-Compete Laws: State Q&A Tool: Question 1).

If the employee has misappropriated trade secrets, the employer also may bring a claim in federal court under the Defend Trade Secrets Act (DTSA). DTSA creates a private cause of action for trade secret misappropriation under federal law (see Common Causes of Action). It supplements, but does not preempt or eliminate, state trade secret or non-compete laws.

For more on DTSA, see:

- Practice Note, Employment Litigation: DTSA Claims.
- Defend Trade Secrets Act Issues and Remedies Checklist.
- Standard Document, Notice of Immunity Under the Defend Trade Secrets Act (DTSA) Provision.
- Article, Expert Q&A on DTSA Seizure Orders.

The likelihood that a court will enforce a specific non-compete against an employee depends on a variety of factors and the court's determination is highly fact-specific. This section describes key steps an employer can take to assess the enforceability of a non-compete before initiating legal action.

Reviewing the Relevant Contract Language

Either before or together with a fact investigation, employers should carefully review the language of all agreements signed by the employee that contain post-employment restrictions. Key considerations in this inquiry include whether the non-compete:

- **Is still in effect.** Many non-competes operate for a limited period of time, for example, six or 12 months post-termination. However, some non-competes contain a tolling provision that extends the temporal restriction for any time period during which the employee is in breach of the non-compete (for a sample, see Practice Note, Non-Compete Agreements with Employees: Provisions to Consider in Drafting Non-Competes and Standard Document, Employee Non-Compete Agreement: Tolling).
- **Is superseded by any other agreement**. If an employee has signed multiple non-competes or an amended employment agreement, later agreements may supersede earlier ones. Depending on the particular facts, an employer may be able to enforce multiple agreements or at least make an argument for enforcing a particular non-compete if it contains language that is more tailored to protecting the employer's business needs.
- **Has been waived or modified**. Employees sometimes negotiate a waiver or modification of an existing non-compete or other restrictive covenant in connection with an employment termination (for a sample, see Standard Document, Waiver and Release of Non-Compete Obligations).
- **Prohibits the employee's conduct based on the non-compete language**. Although an employee's conduct may be unsettling to an employer or competitive with the employer's business, it may not violate the non-compete or fall within its scope.
- **Contains a severability clause or a clause requesting modification of the non-compete if a court finds a particular provision unenforceable**. A severability clause severs invalid, illegal, or unenforceable provisions, while preserving the validity of the remainder of the contract. However, whether a court will modify or sever unenforceable provisions is generally a

question of state law (see Reforming Overly Broad Non-Competes).

- **Includes a choice of law or choice of venue provision**. Because of the vast differences in enforceability of non-competes across jurisdictions, these provisions (if enforceable) may determine whether the restriction is enforceable (see Determining Which State's Law Governs Enforcement).
- **Contains a liquidated damages clause**. In some states, the presence of a liquidated damages clause will preclude injunctive relief (see Requesting Injunctive Relief).

Determining Which State's Law Governs Enforcement

It is crucial at the outset for employers to determine which state's law governs the enforceability of the non-compete and what the standard is in that state. Notably, there are jurisdictions where non-competes are entirely or largely unenforceable, regardless of the impact competition may have on an employer's business. For example, in California and North Dakota, post-employment non-competes in the employment context are generally void, except for covenants entered into in connection with the sale of a business (Cal. Bus. and Prof. Code §§ 16600-16607; N.D. Cent. Code § 9-08-06 (exceptions for sale of business or dissolution of partnership); see also *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008)).

In other states, non-competes are enforceable to some degree but under widely different standards. For example, by statute Massachusetts requires that covered non-competes "be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement," and prohibits non-competes entirely with certain categories of employees (M.G.L. c. 149, § 24L; for more information, see Practice Note, Non-Compete Agreements with Employees: Limitations on Non-Competes with Low-Wage Workers and Non-Compete Laws: State Q&A Tool). Many states have enacted laws prohibiting non-competes with certain segments of workers, such as lower wage workers (see, for example, Practice Note, Non-Compete Agreements with Employees: Limitations on Non-Competes with Low-Wage Workers). This section describes key considerations for employers when determining which state's law will govern enforcement of a non-compete.

Choice of Law or Choice of Venue Provisions

Employers should be familiar with any choice of law and choice of venue provisions from their review of the non-compete language (Reviewing the Relevant Contract Language). Parties to non-competes frequently include these provisions to express their expectations about which state's law governs the enforceability of a non-compete and where any litigation concerning the non-compete will be filed. For more information, see Practice Notes, Employee Non-Compete Agreement: Drafting Note: Governing Law: Jurisdiction and Venue and Choice of Law and Choice of Forum: Key Issues.

Although choice of law and choice of venue provisions improve the likelihood that the parties' expectations will be honored, the enforceability of these provisions is subject to substantial litigation. For example, a court may disregard a choice of law provision if:

- The chosen state does not have a sufficient connection to the action. Note that this analysis may be impacted if an employee's regular work location has changed while working remotely from another location during the COVID-19 pandemic or because the employer shifted to a hybrid remote work model.
- Public policy prohibits applying the law of the chosen state (for information on which states honor choice of law provisions in non-competes, see Non-Compete Laws: State Q&A Tool: Question 7; see also Legal Update, Texas and Oklahoma Restrictive Covenant Laws Clash in Fifth Circuit).
- A statute prohibits the use of choice of law and choice of venue contract provisions that apply another state's law (see, for example, Cal. Lab. Code § 925; M.G. L. c. 149 § 24L(e), (f)) and RCW 49.62.050 (Washington state)).

As a result, employers must review the language of the non-compete for any relevant provisions, and also consider the nature of the parties' relationship as a whole to determine which state's law most likely applies (see Examining the Parties' Relationship as a Whole).

Examining the Parties' Relationship as a Whole

In the absence of a choice of law provision, most courts consider which state has the most significant relationship to the dispute. In doing so, courts typically consider multiple factors such as:

- Where the employer is headquartered.
- Where the employer's offices are located.
- Where the employee resides.

- Where the employee worked for the employer, for example, whether the employee worked out of one office or multiple offices or works remotely. Absent a choice of law provision in a non-compete, this is often the most important factor for many courts in deciding which state's law applies.
- Whether the employee visited other offices of the employer or customers in other states.
- Whether the employee accessed the employer's network from outside the office.
- Where the employer's network is located.

Evaluating Enforceability Under State Law

In general, to be enforceable, a non-compete must satisfy the requirements of:

- Contract law. In other words, it must be formed through the acceptance of an offer and be supported by consideration (see Is There Sufficient Consideration?).
- State law specific to non-competes. For example, the restrictions must be reasonable under state law (see Does the Non-Compete Meet Specific State Law Requirements?).

This section discusses the key issues for an employer to consider when evaluating the enforceability of a non-compete under state law.

Is There Sufficient Consideration?

One important issue when assessing the enforceability of a non-compete is whether it is supported by sufficient consideration. State law differs regarding whether employment or continued employment is sufficient consideration for a non-compete. In most jurisdictions, the offer of at-will employment alone is sufficient consideration (see, for example, *Standard Register v. Keala,* 2015 WL 3604265 (D. Haw. June 8, 2015), though acknowledging a split of authority among jurisdictions). Some jurisdictions require a minimum employment period, such as two years, for continued employment to be considered adequate consideration (see, for example, 820 ILCS 90/5 and 90/15, effective January 1, 2022, requiring either two years of employment or employment plus additional consideration adequate to support a non-compete). However, some jurisdictions do not consider continued at-will employment, without more, to be sufficient consideration, and require that an employer provide the employee with an additional benefit in exchange for signing a non-compete after employment has begun (see, for example, *Miner, Ltd. v. Anguiano*, 383 F. Supp. 3d 682, 696 (W.D. Tex. 2019); *Durrell v. Tech Elec. Inc.*, 2016 WL 6696070, at *5 (E.D. Mo. Nov. 15, 2016); *Charles T. Creech, Inc. v. Brown*, 433 S.W.3d 345, 354 (Ky. 2014); *Poole v. Incentives Unlimited, Inc.*, 548 S.E.2d 207, 209 (S.C. 2001); *Labriola v. Pollard Grp. Inc.*, 100 P.3d 791, 794 (Wash. 2004)).

For information on what constitutes sufficient consideration under state law, see Practice Note, Non-Compete Agreements with Employees: Consideration and Non-Compete Laws: State Q&A Tool: Question 8.

Does the Non-Compete Meet Specific State Law Requirements?

Before initiating legal action, employers should also consider whether the non-compete meets the requirements of state law. US law generally favors open competition. From a public policy perspective, non-competes can restrain trade and limit competition. Whether a court enforces a non-compete against an employee depends greatly on the circumstances of a particular case. In general, courts balance whether the employer's interest in enforcing the non-compete outweighs any hardship to the employee and potential injury to the public (see, for example, *Maw v. Adv. Clinical Comms., Inc.*, 846 A.2d 604 (N.J. 2004); *Brentlinger Enters. v. Curran*, 752 N.E.2d 994 (Ohio Ct. App. 2001)).

A non-compete should be no more restrictive than reasonably necessary to protect the employer's legitimate business interests, such as confidential business information or trade secrets. Courts generally consider the following factors when determining whether a non-compete is reasonable:

- The scope of activity the non-compete prohibits.
- The non-compete's:
  - duration; and
  - geographic scope.

Some states have passed laws limiting the duration or geographic scope of enforceable non-competes or prohibiting certain non-competes entirely (see Practice Note, Non-Compete Agreements with Employees: Jurisdiction-Specific Limitations on Non-Competes). For example:

- Hawaii law prohibits software development and information technology companies from requiring employees to enter into non-compete and non-solicit agreements as a condition of employment (Haw. Rev.

Stat. § 480-4(d); see Legal Update, Hawaii Bans Non-Compete and Non-Solicit Clauses in High Tech Employment).

- Connecticut and Rhode Island passed laws restricting the use of physician non-compete agreements. For example:
  - in Connecticut, a physician's non-compete cannot exceed one year or be beyond 15 miles from the primary site where the physician practices, and is unenforceable if a physician is terminated without cause (Conn. Gen. Stat. Ann. § 20-14p); and
  - Rhode Island law prohibits virtually all non-competition or patient non-solicitation provisions that restrict the ability of a physician to practice medicine (R.I. Gen. Laws § 5-37-33).

  (See Legal Update, Connecticut and Rhode Island Enact Statutes Restricting Physician Non-Competes.)
- Illinois became one of the first states to ban non-compete agreements for low wage workers. The Illinois Freedom to Work Act (IFWA), effective as of January 1, 2017, barred non-compete agreements for workers who earn the greater of:
  - the federal, state, or local minimum wage; or
  - $13.00 an hour.

  For non-competes entered into on or after January 1, 2022, the IFWA prohibits non-compete agreements with employees earning $75,000 or less.

  (820 ILCS 90/1 to 90/10.)

  For more about jurisdictions banning non-competes for low-wage workers, see Practice Note, Non-Compete Agreements with Employees: Limitations on Non-Competes with Low-Wage Workers.
- Utah law prohibits post-employment restrictive covenants with restrictive periods longer than one year, and declares those agreements void (Utah Code §§ 34-51-101 to 34-51-301; see Legal Update, Utah Passes Bill Regulating Non-Competes).
- Massachusetts bans non-competes for nonexempt workers and interns, and restricts the enforceability of non-competes for all other workers, but exempts non-solicits and other restrictive covenants from the statutory requirements (M.G.L. c. 149, § 24L).

Some state laws define the parameters of temporal reasonableness by providing a rebuttable presumption that durations of certain time periods are unreasonable or unreasonable (see, for example, § 542.335, Fla. Stat.; Ga. Code Ann. § 13-8-57).

For more information on what is considered reasonable duration and reasonable geographic scope under state law, see Practice Note, Non-Compete Agreements with Employees: State Law Specific to Non-Compete Agreements and Non-Compete Laws: State Q&A Tool: Questions 9 and 10.

Does the Employee Have Valid Defenses to Enforcement?

Non-competes can be challenged on various grounds and a court typically considers all legal and equitable defenses. Accordingly, before initiating legal action, an employer should consider all potential defenses that an employee may raise and evaluate the strength of the employee's arguments. Available defenses vary by state law but may include:

- The employer does not have a legitimate business interest that justifies enforcing the non-compete.
- The restrictions in the non-compete (duration, geographic scope) are overbroad (see, for example, *Medix Staffing Solutions, Inc. v. Dumrauf*, 2018 WL 1859039, at *3 (N.D. Ill. Apr. 17, 2018) (striking covenant as overbroad where it prohibited employment in any capacity at another company in the same industry)).
- The non-compete is not supported by sufficient consideration (for more information, see Practice Note, Non-Compete Agreements with Employees: Traditional Contract Considerations).
- The employer materially breached an agreement by, for example, failing to pay the employee certain compensation (see, for example, *Lee v. Pinsky*, 895 So. 2d 1187 (Fla. Dist. Ct. App. 2005)).
- The employer violated immigration or wage and hour laws (see, for example, *SpaceAge Consulting Corp. v. Vizconde*, 2017 WL 4183281 (N.J. App. Div. Sept. 22, 2017)).
- The employer failed to provide advance notice of the non-compete as required by applicable state law, such as in:
  - Massachusetts (M.G.L. c. 149, § 24L(b));
  - Minnesota (*Safety Ctr., Inc. v. Stier*, 2017 WL 5077437 (Minn. Ct. app. Dec. 4, 2017)); or
  - Oregon (Or. Rev. Stat. § 653.295(1)).

An employee also may argue against enforcement of a non-compete on the grounds the employee was involuntarily terminated. In most states, non-competes are generally enforceable whether an employee is terminated or leaves voluntarily (see, for example,

Coates v. Bastian Bros., Inc., 741 N.W.2d 539 (Mich. Ct. App. 2007); *Gold Coast Media, Inc. v. Meltzer*, 751 So. 2d 645 (Fla. Dist. Ct. App. 1999)). However, a Montana court declined to enforce a non-compete after the former employer chose not to renew an employment contract (*Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 265 P.3d 646 (Mont. 2011)). Some courts in New York have held that restrictive covenants are only enforceable if the employer can demonstrate a continued willingness to employ the covenanting party (see *Buchanan Capital Mkts.*, 41 N.Y.S.3d 229 (1st Dep't 2016)). Additionally, at least one state has indicated that the fact that an employee is terminated without cause is a factor courts can consider in determining whether a non-compete should be enforced (see, for example, *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233 (Pa. Super. Ct. 2011)). Courts in other states have gone even further and held that for a non-compete to be enforceable, the employment must have been terminated by the employer for cause or voluntarily by the employee (see, for example, *Bishop v. Lakeland Animal Hosp., P.C.*, 644 N.E.2d 33, 36-7 (Ill. App. 1994)).

Effective January 1, 2022, in Illinois non-compete agreements are unenforceable against employees who were terminated, furloughed, or laid off as the result of business circumstances or governmental orders related to COVID-19 or circumstances similar to the COVID–19 pandemic unless the employer pays the employee during the non-compete period (820 ILCS 90/10(d)). By statute, Massachusetts employers cannot enforce non-compete agreements against employees who have been terminated without cause or laid off (M.G.L. c. 149, § 24L(c), though the statute does not define "cause").

For more information on state law regarding enforceability of non-competes when the employer terminates the employment relationship, see Practice Note, Non-Compete Agreements with Employees: Involuntary Termination of Employment and Non-Compete Laws: State Q&A Tool: Question 5.

Reforming Overly Broad Non-Competes Under State Law

Employers should consider the enforceability of a non-compete as written and whether, and to what extent, state law permits a court to modify or blue-pencil a non-compete so it is enforceable. Many states permit courts to modify or blue-pencil non-competes that are overbroad but otherwise enforceable (see, for example, Legal Update, New Arkansas Law Permits Blue-Pencilling of Employment Non-Compete Agreements). However, there is considerable variation from state to state. For example, some states (such as Connecticut) permit courts to modify a non-compete only if it contains a severability clause (see, for example, *Gartner Group Inc. v. Mewes*, 1992 WL 4766 (Conn. Super. Jan. 3, 1992); for a sample severability clause, see Standard Document, Employee Non-Compete Agreement: Severability). Florida, Nevada, and Texas are among the states that require a court to reform a non-compete in certain circumstances whereas courts in Minnesota have discretion about whether to modify (Fla. Stat. § 542.335(1)(c); Tex. Bus. & Com. Code § 15.51(c); N.R.S. § 613.195(5); *Klick v. Crosstown State Bank of Ham Lake*, 372 N.W.2d 85 (Minn. Ct. App. 1985)). In some states, such as New York, a court will only modify an overly broad restriction if the employer sought in good faith to protect a legitimate business interest and did not engage in:

- Overreaching.
- Coercive use of dominant bargaining power.
- Other anti-competitive misconduct.

(*BDO Seidman*, 93 N.Y.2d at 394-5.)

Other state courts have adopted either a limited blue pencil approach, or outright rejected blue penciling (see, for example, *Beverage Sys. of the Carolinas, LLC v. Associated Beverage Repair*, LLC, 784 S.E.2d 457, 461-62 (N.C. 2016)).

For more information about which states permit courts to modify overbroad non-competes, see Practice Note, Non-Compete Agreements with Employees: Reformation of Overbroad Non-Competes (Blue-Penciling) and Non-Compete Laws: State Q&A Tool: Question 6.

The Inevitable Disclosure Doctrine

If an employee's non-compete is unenforceable, employers in some jurisdictions may have a remedy against a departing employee based on the inevitable disclosure doctrine. In general, this doctrine applies if a former employee's new job requires the employee to use or disclose the employer's confidential information or trade secrets. In states that recognize the doctrine, such as Illinois, a court essentially implies a non-compete and bars the former employee from working in the employee's new role (see, for example, *Strata Marketing Inc. v. Murphy*, 740 N.E.2d 1166, 1177 (Ill. App. 2000)). Some courts disfavor the inevitable disclosure doctrine and apply it only in rare circumstances (see, for example, *Marietta Corp. v. Fairhurst*, 754 N.Y.S.2d 62, 65-6 (3d Dep't 2003)). Other courts do not recognize the doctrine at all (see, for

example, *Pellerin v. Honeywell Int'l Inc.*, 877 F. Supp. 2d 983, 989 (S.D. Cal. 2012); see also *Cardoni v. Prosperity Bank*, 805 F.3d 573, 589-90 (5th Cir. 2015) (noting that Texas has not yet adopted the doctrine)).

In jurisdictions where it is recognized, the inevitable disclosure doctrine generally requires a higher burden of proof than what is required to enforce a non-compete. Courts consider various factors when determining whether to grant an injunction based on inevitable disclosure, including:

- Whether the employer and new employer are direct competitors.
- Whether the employee's former and new positions are substantially similar.
- The value of the information at issue.

(See, for example, *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 310 (S.D.N.Y. 1999).)

The DTSA has no impact on existing state law inevitable disclosure theories, except to the extent that the standard for obtaining injunctive relief may be different in federal than in state court. For more information about which states recognize the inevitable disclosure doctrine, see Practice Note, Non-Compete Agreements with Employees: Protection in the Absence of Non-Competes: Inevitable Disclosure and Non-Compete Laws: State Q&A Tool: Question 17.

Strategic Decisions Involved with Taking Legal Action

Employers seeking to enforce a non-compete through legal action have several options available. This section describes:

- 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 (for sample letters, see Standard Documents, Restrictive Covenant Cease and Desist Letter to Former Employee and Restrictive Covenant Cease and Desist Letter to New Employer).
- 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 whether:

- The employer has adequate evidence that the employee agreed to the non-compete, such as:
  - a signed hard copy of the agreement to be enforced; or
  - evidence of electronic transmission and the employee's assent.
- The employer has adequate evidence to demonstrate the need for enforcement, such as:
  - first-hand witnesses to the employee's conduct; or
  - a business representative who can testify to the legitimate business interests of the employer in enforcing the non-compete agreement.
- The failure to take steps to enforce the non-compete may jeopardize the employer's ability to enforce similar non-competes in the future.
- The litigation may create negative publicity which in turn may harm the employer's business.
- The litigation may worsen employee morale or cause other employees to leave their employment, recognizing that the employer may need to take legal action to demonstrate to employees that it will take action to enforce non-competes.
- The employer is prepared to commit the time necessary to proceed with litigation. For example, written discovery and depositions can be time-consuming and expensive.
- 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. An employee's meritorious counterclaims may reduce the employer's ability to enforce a non-compete in some jurisdictions.
- There are substantial risks that an action to enforce the non-compete will be unsuccessful. This depends on the employer's degree of confidence that the non-compete is enforceable and that the employee breached it (see Assessing the Enforceability of a Non-Compete).
- If the employer loses, other employees will be encouraged to ignore their own non-competes with the employer.
- The employer or its competitors have been successful in enforcing similar non-competes in the past.

- The employer may take a position during litigation that could later be used against it if the employer defends a non-compete case.

Sending a Cease and Desist Letter

Depending on the facts of a particular situation, a cease and desist letter can be a valuable preliminary step to legal action or a less expensive alternative. It can be used to:

- Remind employees of their contractual obligations.
- Warn employees that the employer plans to take legal action if the employees do not stop violating the non-compete.
- Demand that employees preserve all potentially relevant evidence, including electronic files and data.

Potential Advantages

Sending a cease and desist letter has several advantages, including that:

- 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 the employee's 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 the employment relationship, details about the employee's new job responsibilities, and whether the employee 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.

For a sample letter, see Standard Document, Restrictive Covenant Cease and Desist Letter to Former Employee.

Despite the potential advantages, it is not always practical or beneficial for an employer to send a cease and desist letter. For example, due to the nature of an employee's violation, an employer may need to commence legal action as quickly as possible (see Filing a Legal Action for Damages). A cease and desist letter also has limited value if the employer is not prepared to take further legal action to enforce the non-compete if the employee ignores the letter. Finally, sending a cease and desist letter may prompt the employee (or the new employer) to seek a declaratory judgment that the agreement is unenforceable. This may allow the employee to "win the "race to the courthouse" and choose a more favorable forum for litigating the dispute.

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.

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. 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 by the new employer or the employee for:

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

For more information, see Deciding Whether to Include the Employee's New Employer in the Action. For a sample letter, see Standard Document, Restrictive Covenant Cease and Desist Letter to New Employer.

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.

For more information on declaratory judgment, see Practice Note, Declaratory Judgment Actions Under Federal Law. For more information on forum selection issues, see Practice Note, Choice of Law and Choice of Forum: Key Issues.

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.
- Common causes of action related to a non-compete violation (see Practice Note, Trade Secrets Litigation: Additional Claims).
- Whether to seek temporary, preliminary, or permanent injunctive relief in addition to damages (see Requesting Injunctive Relief).

For more information about commencing a federal lawsuit in general, see Practice Note, Commencing a Federal Lawsuit: Overview.

Deciding Whether to Include the Employee's New Employer in the Action

In most non-compete actions, employers name both the employee and the employee's new employer as parties to the action. There are various reasons for taking 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 only 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, unless the employer can state a claim under the DTSA for trade secret misappropriation or can allege other claims creating a basis for federal question jurisdiction 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 the employee's own defense costs, the employee may be more inclined to settle the case.
- 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 exclusive forum selection provision in the non-compete, an employer must decide where to file the complaint. Depending on the circumstances of the case, an employer may have the option of filing a complaint in federal or state court. If an employer has evidence that an employee misappropriated trade secrets, it may opt to bring a claim under the DTSA in federal court, and join related state law claims in the federal action under the court's supplemental jurisdiction.

Typically, the circumstances of the case determine which court is more advantageous (for more information, see Practice Note, Commencing a Federal Lawsuit: Overview: Determine Where to File the Case). 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 or commercial departments 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.

An employer also may have the option of filing in one or more states (whether in federal or state court). The choice of court may affect the outcome of the case, regardless of which state's laws apply to the dispute. For example, California judges are often reluctant to enforce non-compete agreements, even where the law of another state arguably governs the dispute (see, for example, *Gatsinaris, D.C. v. Art Corporate Solutions, Inc.*, 2015 WL 4208595, at *12 (C.D. Cal. July 10, 2015)). California law now expressly prohibits the use of choice of law and choice of venue contract provisions that apply another state's law to an agreement with an employee who lives and works in California, unless the employee was represented by counsel when entering into the agreement (Cal. Lab. Code § 925). Massachusetts law similarly prohibits choice of law provisions that would have the effect of avoiding the requirements of its non-compete statute and requires actions under the law to be brought where the employee resides or in Suffolk County, if the parties mutually agree (M.G.L. c. 149, § 24L(f)). Likewise, in Washington state, provisions in non-competition covenants that would require a Washington-based employee or independent contractor to litigate the non-compete outside of Washington state or that apply another state's law are not enforceable (RCW 49.62.050).

Even if employers have sufficient evidence of misappropriation to support a claim under the DTSA, the DTSA does not authorize an injunction placing conditions on a former employee's new employment if the injunction conflicts with applicable state law prohibiting or limiting restraints on the practice of a lawful profession, trade, or business, such as the California Business and Professions Code (Cal. Bus. & Prof. Code §§ 16600-16607).

For more on the DTSA, see:

- Practice Note, Employment Litigation: DTSA Claims
- Article, Expert Q&A on the Defend Trade Secrets Act and Its Impact on Employers.
- Defend Trade Secrets Act Issues and Remedies Checklist.
- Article, Expert Q&A on DTSA Seizure Orders.

Common Causes of Action

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

- Breach of contract (for violation of non-compete, non-solicitation, or non-disclosure agreements) (see Practice Note, Asserting Breach of Contract Claims).
- Tortious interference with contract (for interfering with the employer's contracts with customers or clients) (see, for example, *Acclaim Sys., Inc. v. Infosys, Ltd.*, 679 F. App'x 207 (3d Cir. 2017) and Practice Note, Tortious Interference: Asserting a Claim).
- Breach of the duty of loyalty or fiduciary duty, if the employee acted contrary to the employer's interests while still employed (see Practice Note, Breach of Fiduciary Duty: Asserting a Claim).
- Usurpation of corporate opportunities, if the employee identified a business opportunity and took steps to funnel the opportunity to the employee's new employer while still employed by the former employer.
- Misappropriation of trade secrets under either or both:
  - DTSA (see Practice Note, Employment Litigation: DTSA Claims);
  - any applicable state law version of the Uniform Trade Secrets Act (UTSA), which has been adopted in some form in all but one state (New York), or state common law.
- Defamation, if the employee made defamatory statements to customers to encourage them to transfer their business to his new employer or to former coworkers in an attempt to recruit them (see Practice Note, Defamation Claims in Employment and Defamation in Employment References State Law Chart: Overview).

Potential causes of action against the new employer also vary by state, but can include:

- Tortious interference with contract (for interfering with the non-compete agreement), but only if the new employer had knowledge of the 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 the employee's new employer while still employed by the former employer.
- Misappropriation of trade secrets under the DTSA or applicable state statutory or common law, if:
  - the employee was acting under the new employer's direction when misappropriating the information; or
  - the new employer has received and benefited from the protected information.
- Defamation, if the new 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. For more information on the remedies available under state law for employers enforcing non-compete agreements, see Non-Compete Laws: State Q&A Tool: Question 14.

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 (Filing a Legal Action for Damages). Often, however, 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. This section describes the types of injunctive relief and the key considerations involved with pursuing injunctive relief. For information regarding whether the presence of a liquidated damages clause in a non-compete agreement precludes injunctive relief under state law, see Non-Compete Laws: State Q&A Tool: Question 14.

Remedies Under the DTSA

Employers can sue former employees for trade secret misappropriation under the DTSA in federal court, regardless of the amount in controversy in the lawsuit. The remedies available under the DTSA are similar to those under UTSA, but may provide broader relief to employers than by enforcing a non-compete agreement under state law. Available remedies include:

- An injunction to preserve evidence and prevent trade secret disclosure, provided that it does not:
  - prevent a person from entering into an employment relationship, and that any conditions placed on the employment relationship are based on evidence of threatened misappropriation and not merely on the information the person knows; or
  - otherwise conflict with an applicable state law prohibiting restraints on the practice of a lawful profession, trade, or business.
- Compensatory damages measured by:
  - actual loss and unjust enrichment, to the extent not accounted for in the actual loss calculation; or
  - a reasonable royalty for the unauthorized disclosure or use of the trade secret.
- Exemplary damages up to two times the amount of the damages for willful and malicious misappropriation.
- Reasonable attorneys' fees for the prevailing party if:
  - a misappropriation claim is made in bad faith;
  - a motion to terminate an injunction is made or opposed in bad faith; or
  - a trade secret was willfully and maliciously misappropriated.

(18 U.S.C. § 1836(b)(3).)

In addition, the DTSA includes the extraordinary remedy of an ex parte seizure order, but only if the employer can show that an injunction or restraining order under FRCP 65 is inadequate. The DTSA includes additional protections designed to prevent abuse of this powerful remedy. (18 U.S.C. § 1836(b)(2).) For more on DTSA seizure orders, see Article, Expert Q&A on DTSA Seizure Orders.

The DTSA also includes protections for whistleblowers who disclose trade secrets under certain circumstances (18 U.S.C. § 1833(b); see also Practice Note, Employment Litigation: DTSA Claims: Whistleblower Immunity Defenses). Employers must give employees, contractors, and consultants notice of this potential immunity when entering into or amending any contract that governs the use of a trade secret or other confidential information. An employer that does not provide the required notice is precluded from recovering exemplary damages or attorneys' fees under the DTSA in an action against an employee to whom notice was not provided.

For more on the DTSA, see Practice Note, Employment Litigation: DTSA Claims and Defend Trade Secrets Act Issues and Remedies Checklist.

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 where the revelation of trade secrets is imminent), some courts may issue a TRO without an appearance by the employee, although some court rules require an employer to give the employee notice before seeking injunctive relief.

- A preliminary injunction (PI). A PI provides similar relief to a TRO. They specify what a party can and cannot do for a certain period of time. Courts typically hold an evidentiary 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 decides 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.

If the employee has misappropriated the employer's trade secrets, the employer may be entitled to an injunction under DTSA (see Remedies Under the DTSA).

After a trial on the merits, courts can issue a permanent injunction. A permanent injunction is considered a final decision and therefore appealable.

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.

For more information on obtaining injunctive relief in federal court, see:

- Practice Note, Preliminary Injunctive Relief: Initial Considerations (Federal).
- Practice Note, Preliminary Injunctive Relief: Drafting the Required Documents (Federal).
- Practice Note, Preliminary Injunctive Relief: Procedure for Obtaining Preliminary Injunctive Relief (Federal).
- Standard for Preliminary Injunctive Relief by Circuit Chart.

Whether the Employer Has Sufficient Evidence?

In most cases, gathering the evidence necessary to support a request for injunctive relief requires substantial work in a relatively short time period. 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 showing why injunctive relief is necessary.

Evidence is frequently presented through affidavits of individuals with direct knowledge that an employee violated the non-compete, such as customers or coworkers. 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.
- Under the DTSA, an injunction placing conditions on an employment relationship must be based on evidence of threatened misappropriation and not merely on the information the person knows, though that may be sufficient to support a claim under the inevitable disclosure doctrine if recognized by applicable state law (see Practice Note, Employment Litigation: DTSA Claims: Inevitable Disclosure Doctrine).
- The employer can incur significant costs in a relatively short period of time. Injunctive proceedings move quickly and require many early-stage expenditures (such as forensic preservation and analysis).
- 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 (see Practice Note, Filing Documents Under Seal in Federal Court).
- The employer must rely on its strongest arguments in support of the non-compete agreement when arguing for injunctive relief. Therefore, the employee may 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 (Requesting Expedited Discovery). Although the employer may 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.

Standard for Relief

The standard for issuing an injunction varies by jurisdiction (see Standard for Preliminary Injunctive Relief by Circuit Chart). Typically, the party requesting injunctive relief bears the burden of proof (see, for example, *Brock Services, L.L.C. v. Rogillio*, 936 F.3d 290, 296 (5th Cir. 2019); *A.H. Harris & Sons, Inc. v. Naso*, 94 F. Supp. 3d 280 (D. Conn. 2015)). Most federal courts apply a traditional four-part test, or some variation, and 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 requesting 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 at least one state, violation of an enforceable non-compete creates a presumption of irreparable injury to the employer (Fla. Stat. § 542.335(1)(j)).
- 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).

(See, for example, *ADP, LLC v. Rafferty*, 923 F.3d 113, 119-20 (3d Cir. 2019); *First W. Capital Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1141 (10th Cir. 2017).)

For more information on what an employer must show when seeking a preliminary injunction, see Non-Compete Laws: State Q&A Tool: Question 15.

Requesting Expedited Discovery

Employers cannot always 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 that 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.
- Be prepared for the adverse party to make similar requests.