

## **The Human Limits of Human Capital: An Overview of Noncompete Agreements and Best Practices for Protecting Trade Secrets from Unlawful Misappropriation**

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*In this article, the authors describe the emerging trends in the enforcement of non-compete agreements which reflect the significant changes taking place in the global economy. The increase in litigation in the enforcement of noncompete agreements will likely continue, and while employers may not be able to control the outcome of every employment decision they make, they can ensure they are on the best ground possible to protect their interests and their property. More importantly, they can better protect themselves from the inherent human limits of human capital. Drafting narrowly tailored but effective noncompete agreements by employing the tools detailed in this article and others is one of the key, and crucial, steps.*

New technology and an ever changing economy have positioned employees to more frequently abandon their jobs and use their former employers' trade secrets, intellectual property, and practices. To protect their interests from potentially disloyal employees, employers can use a number of tools—one of the most important is the noncompete agreement. Noncompete agreements have existed for many decades, but they have recently swelled in both quantity and importance. If drafted properly, noncompete agreements can reduce the human limits of human capital, helping employers recruit the most talented people without risking their most prized assets. This article explains how.

### **THE RECENT RISE IN LITIGATION OF NONCOMPETE AGREEMENTS**

While it is no secret that the exponential growth in litigation has declined somewhat in recent years, many employers may be surprised to learn that litigation involving noncompete agreements has increased dramatically over the last decade. Figures show that lawsuit filings “rose a scant 5 percent in 2009, down from 9 percent in the previous year, as economic pressures kept plaintiffs’ activity in check.”<sup>1</sup> According to

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Law360's examination of federal court dockets, the number of new cases brought in 2009 rose from 266,055 in 2008 to 279,391.<sup>2</sup> Thus, while litigation continues to increase nationwide, it has done so at a slower rate than in past years.

Nonetheless, some commentators have predicted "an increase in litigation against companies," including in "employment litigation."<sup>3</sup> Furthermore, over the last decade, the "number of published non-compete decisions in state and federal courts nationwide has doubled."<sup>4</sup> In fact, from 2004 to 2006, the number of decisions shot up to 37 percent.<sup>5</sup> These statistics do not include the number of noncompete cases filed each year,<sup>6</sup> as trial courts resolve most noncompete cases.<sup>7</sup> "Most trial court decisions go unpublished, particularly when the decision is just a ruling on a motion for a preliminary injunction, which is how most non-compete cases end."<sup>8</sup> Thus, the increase in the number of cases filed may be "even more dramatic"<sup>9</sup> than the published statistics show.

There are a number of factors that have helped increase the number of litigated noncompete agreements, but three causes are primary: increased mobility of employees, decreased loyalty of employees for their employers, and technological developments. It is these factors that have been viewed to contribute to employees' leaving employment for "greener pastures," and in turn, to employers' more vigorous efforts to protect their intellectual property through enforcement of noncompete agreements in court.

### ***An Increase in Employee Mobility***

Employers realize that "their employees are more mobile than ever before."<sup>10</sup> Such mobility "is prompted not only by the lack of employer structures designed to promote longevity, but also by career advice to employees to build their knowledge, skills, and experience to make themselves more marketable in the ever-changing workplace."<sup>11</sup> In addition, demand for "middle managers and skilled workers" has only increased and "employees, enticed by larger salaries and big bonuses," will continue to move with great frequency.<sup>12</sup> Because the "competition for talented people today is fierce,"<sup>13</sup> a growing number of companies will require noncompete agreements. These companies believe noncompete agreements can "lock up their work force" and prevent talented employees from leaving.<sup>14</sup> Unfortunately, a company must be aware of the strong public policy that favors employee mobility. Thus, even though noncompete agreements serve a legitimate business purpose, courts generally disfavor them as anticompetitive restraints on trade.<sup>15</sup> As such, many courts will not enforce provisions that are overly restrictive on the grounds that they violate public policy and restrict employee mobility.<sup>16</sup> In short, the increase in employee mobility and the public policy that disfavors enforcement of noncompetes suggest that litigation over noncompete agreements will continue to grow.

### ***The Inherent Limits of Employee “Loyalty”***

When an employer hires its workforce, the employer hopes, and indeed likely expects, that its employees will be loyal. However, several factors have made employee loyalty a rare commodity. First, as explained above, the free market has led to increased employee mobility, making employees less likely to remain loyal when they are offered better opportunities by their employer’s competitor. Secondly, during a down economy and its resulting duress, loyalty may be forgotten. This is evidenced by the fact that “non-compete agreement disputes are becoming much more frequent because a lot of people are being laid off and the opportunities for new jobs are limited.”<sup>17</sup> These “fewer job opportunities make it more likely that affected employees will join a competitor, which creates a greater likelihood that there will be a breach in a non-compete agreement.”<sup>18</sup> Thus, in times of both economic boom and bust, there is an incentive to some to be disloyal. The increasing willingness of employees to do precisely that may lead to an increase in noncompete litigation in the future.

It is with some fortune that many jurisdictions have well established law that deals with the duty of loyalty or fiduciary duty, even in the absence of an enforceable noncompete agreement. One’s duty of loyalty or fiduciary duty generally means that an employee may not solicit coworkers or customers for himself or herself or a competitor.<sup>19</sup> The “most common manifestation of the duty of loyalty is that an employee has a duty not to compete with his or her employer [during his or her employment] concerning the subject matter of the employment.”<sup>20</sup> However, an employee may plan and prepare for competing enterprises while still employed.<sup>21</sup>

An example of the duty of loyalty at work can be seen in *Huong Que, Inc. v. Mui Luu*, where the California Court of Appeals found that current employees’ use of the employer’s customer list to help a competitor solicit the employer’s customers breached the employees’ duty of loyalty.<sup>22</sup> While the former owners of the company remained employed with the new company, they met with competitors to plan the formation of a competing business and steer plaintiff’s customers to the competing business.<sup>23</sup> The court held the defendants breached their duty of loyalty by attempting to divert customers to the competitor while still employed.<sup>24</sup> Nonetheless, even though the duty of loyalty may reduce the likelihood of unlawful competitive behavior, the increased mobility of employees—in good times and bad—makes employers inherently vulnerable.

### ***Increasing Reliance on Technology***

In the United States, “7.6 million Americans work away from their office the majority of time.”<sup>25</sup> Their ability to do so is in part the result

of technological advances that continue to shape the way companies do business. "With the advent of small laptops, handheld PDA's and tiny cell phones, employees can literally work anywhere."<sup>26</sup> As a result, the risk for unauthorized theft and misappropriation of trade secret information has increased exponentially. This risk is a real one, as just recently Starwood Hotels alleged that two of its former executives engaged in the "theft of more than 100,000 electronic and hard copy files" for a competitor, Hilton Hotels Corp.<sup>27</sup> Thus, "with the increase in employee mobility, the globalization of product markets, and the thrust of technology ... the use of non-compete agreements is more prevalent."<sup>28</sup>

Such a trend is not remarkable, especially in "industries relying heavily on information, intellectual property, or relationships, all of which can be transferred from company to company."<sup>29</sup> Given that many companies now conduct business beyond the narrow geography that in years past was more commonplace, the need to seek wider geographic scope for enforcement seems to have incentivized employers to more vigorously restrict competition, which has the impact of increasing litigation.<sup>30</sup> All in all, the increasing reliance on technological information and devices has made employers more willing to protect their businesses by enforcing, and indeed litigating, noncompete agreements.

#### BEST PRACTICES: HOW TO TIP THE SCALES WHEN DDRAFTING NONCOMPLETE AGREEMENTS

As noncompete litigation increases, employers must refine their legal strategies to amplify their chances of success in enforcement proceedings. Much of this refinement should occur when drafting and implementing noncompete agreements. Courts generally are willing to enforce a noncompete agreement, as long as it is drafted reasonably to protect a legitimate business interest and it is reasonable as to geographic scope and time. With those criteria in mind, employers drafting agreements will increase the likelihood of success in enforcement. For this reason, the investment in a properly crafted noncompete will pay dividends in litigation and increase credibility during a fight.

### ***The Pitfalls of "Boilerplate" Noncompete Covenants***

A noncompete is "generally enforceable as long as it is no broader than necessary to protect an employer's legitimate business interests."<sup>31</sup> If a legitimate business interest is at stake, the employer needs to be pragmatic and objectively reasonable in terms of the categories of employees it seeks to bind by noncompetes in order to safeguard that interest.<sup>32</sup>

Many courts will balance an employer's business interests against the employee's right to earn a living in the trade of choice. If a covenant is too broad, some courts may not enforce the covenant at all. For example, the Idaho Supreme Court in *Freiburger v. J-U-B Eng'rs, Inc.* addressed the issues regarding the permissible scope of noncompete agreements.<sup>33</sup>

In *Freiburger*, the covenant at issue was clearly an overbroad means of protecting the legitimate business interests of the employer.<sup>34</sup> First, the employer had actively operated throughout the Northwest region for nearly 30 years and clearly had a large client base both past and present. Yet the covenant prohibited the employee from taking any of that large group of clients regardless of whether he helped to develop the employer's goodwill effort toward that client.<sup>35</sup> The covenant prohibited contact with any past, present, or potential client at the time the employee left.<sup>36</sup> Therefore, if the employer had a client 20 years ago and had not had contact with that client since, the noncompete would still prohibit the employee from taking that client for a period of two years after termination.<sup>37</sup> The inclusion of past clients or projects without a reasonable limitation on the scope of the restriction can often be viewed as an unreasonable restraint on the employee that does not protect legitimate business interest.

Consequently, the use of boilerplate noncompete agreements that are generic and overreaching can only lead to weakness when it comes time for enforcement. This is not surprising given the fact that many lawyers will generate an agreement that an employer will simply modify from time to time. Thus, employers should always ensure that noncompete agreements are "narrowly drawn to protect the employer's legitimate business interests."<sup>38</sup>

### ***Narrowing Temporal and Geographic Limitations***

Geographic limitations and time periods are still the key areas courts consider when determining if a covenant is reasonable.<sup>39</sup> The globalization of business and the rapid changes in technology affect the geographical limits in noncompete agreements. Some states enforce noncompete agreements where there is a "demonstrated need for broad geographic protection of the employer."<sup>40</sup> For instance, in *Nat'l Bus. Serv. v. Wright*, the U.S. District Court for the Eastern District of Pennsylvania enforced a one-year, national noncompete agreement, specifically finding that the Internet business at issue extended beyond state boundaries.<sup>41</sup> Nevertheless, courts are still willing to set aside noncompete agreements, or at least modify them, on the issues of the length of the period of the noncompete, and the geographic area that it covers.<sup>42</sup>

The general rule is that restraint as to territory is reasonable as long as it is necessary to protect the legitimate interest of the employer.<sup>43</sup> Though a determination of reasonableness may differ from state to state, courts typically will consider the duration, the geographical limits, and the job duties of the employee restrained by the noncompete agreement.<sup>44</sup> If a restriction "seeks to preclude the employee from any position that competes with the employer," the court may view it as too broad.<sup>45</sup> For example, in *Great Lakes Carbon Corp. v. Koch Industries, Inc.*, the U.S. District Court for the Southern District of New York held the covenant failed the

test of reasonableness both in scope and duration.<sup>46</sup> The scope was so broad that it restrained the former employee from using the faculties, skills, and experience that he learned and developed during his former employment.<sup>47</sup> Restricting a former employee from using accumulated experience, skill, and judgment in new employment was beyond legal limits and thus void.<sup>48</sup> Therefore, the court held that the covenant was unconscionably broad, improper, and unenforceable as a contract.<sup>49</sup>

### ***The Byzantine Regime of Noncompete State Statutes***

The enforcement of noncompete agreements differs from state to state. Employers need to be aware of states' varying statutory provisions governing noncompete agreements, particularly if an employee has worked elsewhere and has signed a competitor's covenant. Many states have adopted a reasonable approach to permit a court to rewrite overbroad noncompete agreements. Courts in states that follow this approach can rewrite overbroad provisions and enforce the new agreements as rewritten.<sup>50</sup>

Other states follow the "blue pencil" rule, which does not permit courts to modify the terms of the agreement, but instead allows courts to enforce separate lawful covenants within a contract or to strike language where a change is grammatically possible.<sup>51</sup> In other words, the doctrine empowers courts to cross out overbroad, unreasonable provisions in an agreement while keeping in place less onerous, enforceable ones.<sup>52</sup>

Moreover, the agreement has to be reasonably limited after the overbroad provisions have been removed.<sup>53</sup> In Arizona, for example, courts may blue pencil a covenant by eliminating grammatically severable, unreasonable provisions, but they may not add or rewrite provisions.<sup>54</sup>

Then there are states that employ a "no modification" rule, which restricts a court from rewriting or striking overbroad provisions. Courts in these states determine reasonableness alone—they will enforce a reasonably written covenant, but will reject one that is not. For instance, the State of Wisconsin has mandated the "no modification" approach by statute.<sup>55</sup> According to the statute, "any covenant not to compete imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint."<sup>56</sup>

Finally, some states, such as California, Oklahoma, Montana, and North Dakota, "prohibit noncompete agreements as a matter of public policy, while others apply varying standards of enforceability."<sup>57</sup> For example, Colorado refuses to enforce noncompete agreements except for restrictive covenants of high-level employees.<sup>58</sup> This includes executive and management personnel and officers and employees who constitute professional staff.<sup>59</sup> Similar to California's strict public policy approach, Colorado courts have narrowly construed the exceptions to noncompete agreements.<sup>60</sup> The complexities of state law require diligence in this new



age and, as such, courts and employers will continue to struggle with any uniformity of standards.

## **PREPARING FOR THE WORST: ADDITIONAL PROTECTIVE MEASURES**

### ***Nonsolicitation Provisions***

A nonsolicitation provision prohibits the departing employee from hiring or assisting in hiring another employee of the former employer.<sup>61</sup> Many employers use nonsolicitation provisions to prevent additional harm to the company caused by the departure of an employee and the potential for corporate raiding. Courts generally enforce nonsolicitation covenants to the extent that the agreement prohibits “active” solicitation of employees.<sup>62</sup> Thus, employers can further protect themselves by adding a nonsolicitation provision to supplement their agreements.

### ***Nondisclosure of Confidential Information Provisions***

A nondisclosure of confidential information provision forbids employees from revealing proprietary information outside the company, either during or following their employment. Generally, nondisclosures in agreements are “widely enforced.”<sup>63</sup> Additionally, employers may attempt to protect proprietary information from being misappropriated from former employees. Not all information is granted protection, however, because such information must be deemed worthy of protection and proprietary and confidential. In essence, it must be a trade secret that if discovered by a competitor would give an unfair competitive advantage. A customer list that a business develops through substantial effort and that it keeps in confidence may be a trade secret and therefore an interest that employers can protect.<sup>64</sup> Many states have a trade secret statute that can provide protection whether an agreement exists or not.

### ***Garden Leave Provisions***

“Garden leave,” a practice born in the United Kingdom, is a colloquial term for a special type of restrictive covenant whereby the employee remains under contract, on the payroll, for a fixed period following the employee’s resignation notice.<sup>65</sup> This protects the former employer from its concerns about proprietary information and “is fair to employees.”<sup>66</sup> The fundamental benefit of the “garden leave” provision is that the employee may not perform services for any other employer during this time because the employee is still employed by the company.<sup>67</sup> Thus, a “garden leave” provision affords the company substantive protection because the employee continues to receive normal pay during garden leave and is covered by any contractual duties, such as confidentiality

agreements, until the notice period expires. In exchange, the employer “must bear the primary economic burden itself rather than casting it on the employee.”<sup>68</sup>

“Garden leave” provisions apply most often to senior-level executives or employees who have substantial relationships with the company’s customers, or have had substantial access to the company’s confidential and proprietary information.<sup>69</sup> Companies do not implement such provisions more widely among their employees because of the high costs involved.<sup>70</sup> Many states find it difficult to enforce these types of provisions, especially against a more junior employee who did not have access to confidential and proprietary information.

### **AN OPEN QUESTIONS: INEVITABLE DISCLOSURE, UNIQUE EMPLOYEES, AND THE RISK OF EMPLOYEE TERMINATION**

The increase of employers’ use of noncompete agreements, as well as the corresponding increase in litigation over them, has led to a variety of issues about which employers should be aware. Three of the most important are the doctrine of inevitable disclosure, the unique employee doctrine, and the impact of an employee’s termination on noncompete agreements.

#### ***Inevitable Disclosure: PepsiCo and Its Progeny***

Under the doctrine of inevitable disclosure, the argument goes, courts may enjoin a former employee from taking a job where the employee would “inevitably disclose or use the former employer’s confidential information.” The doctrine prevents employees from taking certain positions at rival companies even where the employee has neither signed a noncompete agreement nor taken confidential information.<sup>71</sup> In fact, “some courts have even extended trade secret protection to situations where there has not been an actual or threatened misappropriation by employees but the employees nevertheless remember the trade secrets when they leave.”<sup>72</sup>

Courts have been somewhat inconsistent in interpreting the required elements of inevitable disclosure. “Some courts require a finding of bad faith on the part of the defendant or a showing of irreparable harm by the plaintiff before granting injunctive relief, while others merely require the inevitable disclosure or use of the plaintiff’s trade secret.”<sup>73</sup> Additionally, “the standard for determining the inevitability of disclosure varies from jurisdiction to jurisdiction.”<sup>74</sup>

One of the leading cases that has applied the doctrine of inevitable doctrine is *PepsiCo, Inc. v. Redmond*, in which the Seventh Circuit Court of Appeals held that a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant’s new employment will inevitably lead the defendant to rely on the plaintiff’s trade secrets.<sup>75</sup>



As noted by commentator Brandy L. Treadway, the Seventh Circuit Court of Appeals determined that “the employee must possess ‘extensive and intimate knowledge’ of the trade secrets ... the employee’s positions must be so similar that he would have to rely on the trade secrets to adequately perform his new position” and “lack of candor by the employee or new employer may be proof of their willingness to exploit the secrets for their benefit.”<sup>76</sup> The court also “rejected two elements advanced by the defendant,” reasoning that “the employee’s lack of candor negated the importance of his confidentiality agreement as well as his assertion that he would not disclose the trade secrets.”<sup>77</sup>

Since PepsiCo, “courts have relied upon and further developed the factors used in PepsiCo to analyze whether, based on the inevitable disclosure doctrine,” an injunction should issue.<sup>78</sup> In doing so, “courts balance the competing social interests of employee mobility and the employer’s legally recognized countervailing interests in trade secret protection and commercial morality.”<sup>79</sup> Currently, courts in 18 states utilize the doctrine of inevitable disclosure, three states have declined to do so, and “the remaining states lack adequate case law on the doctrine.”<sup>80</sup>

### ***The Unique Employee Doctrine***

If an employer lacks a need to protect its confidential or proprietary trade secret information, there are some jurisdictions that will protect a business from competition if the former employee was unique. Only a few states have adopted this doctrine and it has yet to develop clear and concise standards.<sup>81</sup>

### ***Impact of Termination on Noncompete Agreements***

There is a troubling trend by some courts in cases where the employer has terminated the employee and the court examines whether the termination is in good faith. If done in good faith, the courts will not consider the termination as a factor weighing against enforcement, but if done in bad faith, courts will not enforce the noncompete agreement.<sup>82</sup>

## **A MIXED BAG: THE ENFORCEABILITY OF NONCOMPETE AGREEMENTS**

Though many states differ on whether to enforce noncompete clauses, almost all require that noncompete clauses be:

1. A part of a valid contract;
2. Necessary to protect an employer’s legitimate business interest; and
3. Reasonable in geographic scope and time.

These standards balance the competing interests between an employee's right to gainful employment and the employer's legitimate interest to prevent unfair competition as a result of a former employee's use of information, knowledge, or contacts obtained during the employment relationship. It is worth noting that courts evaluate each noncompete agreement separately, balancing the contract and circumstance of the business and employee involved. However, "because such restrictive covenants are disfavored restraints on trade," the employer bears the burden of proving that the agreement is narrowly tailored to protect its legitimate interests, and courts will construe any ambiguities in the contract in favor of the employee.<sup>83</sup> Nonetheless, there are several general principles that employers should consider when drafting noncompete agreements.

### ***Ensuring a "Fair" Bargain***

Noncompete agreements must be supported by sufficient consideration, which is usually in the form of an employment opportunity or salary. This standard is easily met if the contract is entered into at the inception of the employment relationship or if it is later executed following a promotion or substantial pay raise. However, when an employer attempts to impose noncompete agreements at some random time after an employee has already been working, problems arise.<sup>84</sup>

Indeed, "jurisdictions are split as to whether additional consideration is required."<sup>85</sup> As stated by commentator Kenneth R. Swift, "those holding that no additional consideration is necessary generally focus on the fact that the employee could have otherwise been terminated."<sup>86</sup> However, "jurisdictions which require additional consideration to support a noncompete agreement signed after the commencement of employment point to the fact that the employee receives no benefit as a result of signing the agreement because the employee already has the position, and the agreement itself provides no benefit."<sup>87</sup> Quite simply, these states "reject the notion that continued employment alone can support a non-compete agreement, finding any claimed consideration to be 'illusory' since the employer retained the right to terminate the employee at any time."<sup>88</sup> As a result, some courts will "look for an intangible benefit," including "increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information."<sup>89</sup>

### ***The Parameters of an Employer's "Legitimate Business Interest"***

When analyzing a noncompete agreement, courts will generally consider "whether the employer is protecting a legitimate business interest."<sup>90</sup> More importantly, "the purpose of the non-compete agreement cannot be to avoid ordinary competition; rather, the agreement must protect a legitimate business purpose other than protecting against

ordinary competition.”<sup>91</sup> Thus, for an employer to prevail, it “must show that, without the covenant, the employee would gain an unfair advantage in future competition with the employer.”<sup>92</sup>

In short, the employer must have a valid proprietary interest to protect. What constitutes a “valid propriety interest” is debatable, but it can include such things as customer relationships, confidential proprietary trade secrets, and costs of employee training, development, and promotion. An employer must demonstrate the validity of each interest and show how it is tailored to the restriction being sought.<sup>93</sup>

### ***Reasonableness at All Costs***

The restriction must be reasonable at all costs—in terms of what kind of activity is restricted, the duration of such restriction, and its geographic scope and time. Reasonableness requires that the restriction protect only the legitimate business interests of the employer. Employers cannot simply impose a broader restriction than is necessary to protect their interest.<sup>94</sup> This is particularly important, given that “in effect, employee agreements not to compete come to the court with a heavy presumption of invalidity.”<sup>95</sup>

In short, there is just no legitimate reason to justify drafting a noncompete that is objectively unreasonable, because to incur the significant legal expenses and costs of litigating a noncompete agreement that is invalid would not be sound business. Nevertheless, the reasonableness of an agreement and its scope can vary depending on the jurisdiction, the business, and the scope of the business’s reach.

## **WHAT TO EXPECT: THE LITIGATION PROCESS TO ENFORCE NONCOMPETE AGREEMENTS**

Courts decide almost all noncompete cases in the context of a motion for either a temporary restraining order or preliminary injunction.<sup>96</sup> The process usually begins with a demand letter from the employer to the former employee.

### ***Demand Letter***

The “enforcement process” by the former employer “will generally commence” when the employee receives a demand letter, “demanding” that the employee “immediately comply with the non-compete restrictions” in the former agreement.<sup>97</sup> The demand letter will set forth the facts and arguments as to why the new employer’s engagement of the former employee will unlawfully interfere with the noncompete between the former employee and previous employer.<sup>98</sup> It must convey the message that the former employer takes the former employee’s continuing obligations seriously and will not allow anyone to misappropriate unlawfully

its goodwill, trade secrets, or confidential information. These letters are critical tools because many noncompete situations are resolved by settlement following the exchange of the demand letter and response. If the noncompete situation is not resolved by a demand letter, then the employer must assess whether it will file a lawsuit to enforce the noncompete.

### ***Temporary Restraining Order***

If the demand letter does not resolve the matter, many employers will file a motion for a temporary restraining order (TRO). If a judge grants the employer's motion, the TRO will prohibit the employee from engaging in the conduct described therein.<sup>99</sup>

Courts will consider several factors when "determining whether to issue a TRO or preliminary injunction, in the non-compete context or otherwise," including:

- (1) the probability of success on the merits of the underlying claim;
- (2) whether without the entry of a TRO or preliminary injunction the movant will suffer irreparable harm;
- (3) whether the harm to be suffered by the movant, in the absence of such relief, is greater than that which will be inflicted on other interested parties; and
- (4) whether public interest will be served by the injunction.<sup>100</sup>

Most importantly, "[b]ecause of the potential damage that a departing employee can inflict in such a short time, employers usually seek a temporary restraining order to keep the employee from competing until the employer can obtain a preliminary injunction."<sup>101</sup> Most courts issue TROs only in emergency situations and, in many states, the court has broad and significant discretion to grant a TRO.

### ***Preliminary Injunction***

"Nearly every judicial opinion addressing a request for preliminary injunctive relief recognizes the historic principle that such relief is a drastic remedy."<sup>102</sup> "Despite the formulation of tests to determine whether injunctive relief is necessary, in certain categories of cases, courts have placed on the scale a judicial thumb that has made the grant of preliminary injunctive relief anything but 'extraordinary.'"<sup>103</sup> Given the "rapidly developing era of social change, technology development, and government legislation and regulation," many courts commonly grant preliminary injunctions "as a remedy for misappropriation of trade secrets; infringement of patents, copyrights, or trademarks; violations of antitrust laws or covenants not to compete; and other kinds of unfair competition."<sup>104</sup> Worth noting, "in intellectual property cases, courts have

applied a ‘presumption of irreparable harm’ and thereby relieved movants from their burden of establishing this factor.”<sup>105</sup>

Federal courts follow the procedures set forth in Rule 65 of the Federal Rules of Civil Procedure when ruling on an application for a preliminary injunction. Any party seeking a preliminary injunction should take great care to allege in its complaint with specificity what protectable interest is at stake and the immediate, irreparable harm that the petitioner will suffer without preliminary injunctive relief. Further, a request for preliminary injunction is used where any after-the-fact monetary damages award will be “inadequate to compensate for the harm caused.”<sup>106</sup>

## CONCLUSION

The emerging trends in the enforcement of noncompete agreements reflect the significant changes taking place in the global economy, and employers need to adapt to those trends. The increase in litigation in the enforcement of noncompete agreements will likely continue, and while employers may not be able to control the outcome of every employment decision they make, they can ensure they are on the best ground possible to protect their interests and their property. More importantly, they can better protect themselves from the inherent human limits of human capital. Drafting narrowly tailored but effective noncompete agreements by employing the tools detailed in this article and others is one of the key, and crucial, steps.

## NOTES

1. See Erin Marie Daly, “Weak Economy Slows Litigation Growth,” *Employment Law 360*, (Jan. 4, 2010), available at <http://legalindustry.law360.com/articles/141372>.

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3. *Id.*

4. See Jay Shepherd, “Are Noncompetes the New Sarbanes-Oxley?” (Mar. 7, 2007), available at [http://www.gruntledemployees.com/gruntled\\_employees/2007/03/are\\_noncompetes.html](http://www.gruntledemployees.com/gruntled_employees/2007/03/are_noncompetes.html).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

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11. See e.g. Ann C. Hodges, and Porcher L. Taylor, III, "The Business Fallout from the Rapid Obsolescence and Planned Obsolescence of High-Tech Products: Downsizing Noncompetition Agreements," 6 *Colum. Sci. & Tech. L. Rev.* 1, 9 (2005).
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13. *Id.*
14. *Id.*
15. *Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc.*, 270 Va. 246, 249 (2005).
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20. See, e.g., *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 479 (Mo. 2005) (citing Restatement (2d) of Agency § 393 (1958)).
21. *Id.*
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24. See *id.*
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