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Reducing Litigation Costs in Noncompete Litigation: Former Employer's Perspective (Part 1 of 2)

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Tightening labor markets and high demand for key employees increase pressure on employers to enforce covenants not to compete. Those enforcement actions, though, carry heavy and immediate economic and non-economic costs and risks, particularly in seeking immediate injunctive relief. Attorney fees mount quickly because the work necessary for a temporary injunction compresses work done typically over a year in other litigation into less than a month. The employer should consider how it wants to achieve its goals and limit the exorbitant costs and risks of noncompete litigation. Therefore, before sending a demand letter or filing suit, former employers should not only prepare for temporary injunctive relief, but also determine how to reach an early, cost-effective resolution before the temporary injunction hearing.

An effective mediator can assist the parties to such a resolution. When choosing a mediator, in addition to the mediator's reputation, personality, style and experience, counsel and parties should also ascertain whether the mediator has any experience with noncompete litigation. The mediator should be familiar with both the law and judicial views on the enforceability of noncompetes. Additionally, the employer should determine the availability of multiple mediators due to the fast pace of noncompete litigation involving early applications for injunctive relief.

An effective mediator will consider the parties' relative interests. So, even before suing, the employer should consider what its interest are—why it wants to enforce a noncompete. An employer that sues simply because the employee has departed for a new employer may well be wasting time and money. More prudent employers reserve enforcement actions for those instances where their interests are significantly furthered. For example, a group of employees who download trade secrets to help them form their own company may leave the employer with little choice. In other cases, the employer's goal may be retaining customers, particularly when the former employee was in a sales or marketing position.

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Gary Fowler of JAMS.

Alternatively, the employer may fear that a former employee will be a "Pied Piper" who will try to entice other employees to depart, and thus seek enforcement of an employee nonsolicitation clause. In other instances, an employer, even with an otherwise weak case, may feel, after the departure of several employees, that it must do something to "stop the bleeding."

Likewise, the mediator will guide the former employer and its counsel to explore the strengths and weaknesses of its case. Texas law has generally abandoned the formalistic approach of *Light v. Centel Cellular*, 883 S.W.2d 642 (Tex. 1994), in favor of a practical

approach where the employer must show that the covenant contains reasonable limitations as to time, geography and scope of activity no greater than necessary to protect the employer's legitimate interest (*Alex Sheshunoff Management Services L.P. v. Johnson*, 209 S.W. 644 (Tex. 2006); *Marsh USA v. Cook*, 354 S.W.3d 764 (Tex. 2011)). An employer that has evidence that a departing employee downloaded proprietary company files just before leaving has a much stronger case than an employer that has only suspicions that a former employee is calling upon the company's customers. Other facts affecting the strength of the case include how the employee left (i.e., voluntarily or was fired), the employee's history with customers or the industry prior to employment, and the employer's own practices in hiring employees with noncompetes.

Noncompete litigation quickly generates high economic and non-economic costs. In addition to attorney fees and costs preparing for the temporary injunction hearing, emergency requests to preserve and obtain electronic evidence are typical and create forensic expense. Even in a relatively small case, an employer may expect to pay attorney fees and forensic costs exceeding $100,000 through the temporary injunction hearing—and much more in a complex case. While Texas law allows reformation of an overly broad covenant, it also allows an employee to recover his or her own attorney fees when the employer overreaches in the enforcement action. Therefore, even an employer that prevails may find itself paying fees for both sides.

In addition, the mediator will explore, and the employer should consider carefully, the non-economic costs. For example, any deposed customers may no longer wish to do business with either party. Senior personnel must devote time to document production, witness preparation, depositions and testimony—time that would otherwise be spent on business matters.

The mediator can facilitate negotiation of the terms of an agreement by working with each party to review their respective strengths, weaknesses, costs and risks. In noncompete matters, resolution tends to focus more on non-economic terms. For example, the employer may want to be assured that it has retrieved any information taken by a former employee and that the new employer will not be able to use it to compete. For situations involving salespeople and employees working in customer relations, parties often agree to an injunction that prohibits contact with a defined set of customers. In strong cases, the employer may be able to be reimbursed for its fees or seek damages, particularly if the new employer exhibited egregious conduct by encouraging the employee to take information or poach key customers. A major advantage to mediating noncompete cases—particularly with a mediator experienced in such matters—is that it affords the parties the opportunity to craft a mutually agreed-upon practical business solution that may well be much better for everyone than what an overworked court may render through a contested temporary injunction hearing.

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