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FIGHTING THE TEMPORARY INJUNCTION FIGHT

Obtaining an Injunction to Enforce a Non-Compete Agreement

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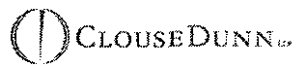
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I. INTRODUCTION

When a party has evidence that a former employee has breached their non-compete agreement, the question becomes, "Should I seek injunctive relief to enforce the agreement?" Injunctive relief is appropriate to prohibit a person from taking action or forcing a person to take action, in order to prevent future harm. It is an equitable remedy that is only given in situations where monetary relief is inapplicable or inadequate. With regard to a restrictive covenant, an employer generally seeks injunctive relief to prevent a former employee from working or competing in violation of their covenant not to compete or solicit.

A party obtains an injunction by filing an application and requesting the court to grant injunctive relief to enforce the non-compete restrictions. In preparing to enforce a restrictive covenant, it is critical to determine objectives quickly but methodically. Because district courts have broad discretion to grant or deny injunctive relief, parties must draft proposed injunctions with realistic expectations that will withstand challenges from both opposing counsel and the court. Ultimately, the most difficult part of enforcing a restrictive covenant is identifying the relief sought. Since monetary relief cannot be given, an employer must specifically state what a former employee can and cannot do without being unreasonable or overly restrictive.

II. OBTAINING TEMPORARY RESTRAINING ORDER ("TRO") OR TEMPORARY INJUNCTION

Texas courts permit injunctive relief to prevent a former employee from wrongfully competing with his or her past employer. *Brink's Inc. v. Patrick*, 2014 WL 2931824 (N.D. Tex. June 7, 2014). These cases typically start with a request for temporary restraining order followed by a temporary injunction hearing. An application for TRO requests the court to immediately prohibit the adverse party from specific behavior. A TRO can be granted or denied without a hearing or notice to the adverse party if the applicant can show that immediate and irreparable injury will occur before notice can be served. TEX. R. CIV. P. 680. In Texas, TRO's are granted for no more than fourteen (14) days, unless the applicant can show good cause for an extension. *Id.* After the TRO expires, a temporary injunction hearing is held to determine whether there is a legal basis to transform the TRO into a temporary injunction, which generally lasts until the time of trial. At a temporary injunction hearing, evidence is presented, testimony is given, and the adverse party can contest the applicant's claims.

Preparing an application for a TRO and temporary injunction involves extreme attention to detail and vast knowledge of the facts. Attorneys must gather evidence, affidavits and other materials to support a claim for injunctive relief. A party should consider filing an application for TRO or temporary injunction when it has strong evidence to satisfy a claim. To obtain a TRO or a temporary injunction a party must show: (1) a claim for permanent relief against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. TEX. R. CIV. P. 680; *Butnaru v. Ford Motor*, 84 S.W.3d 198, 204 (Tex. 2002). The decision to grant injunctive relief lies in the sound discretion of the district court, and the court's grant is subject to reversal only for a clear abuse of discretion. *Walling v. Metcalfe*, 863 S.W.2d 56, 57 (1993). Despite requiring the same burden of proof, a temporary injunction requires more supporting evidence than a TRO and is harder to obtain. The elements to obtain a temporary injunction are described below.

(a) *A claim for permanent relief against the defendant;*

First, the applicant must include a request for permanent relief and assert a bona fide claim against the defendant. This is the easiest element to prove. A party seeking enforcement of a restrictive covenant generally asserts a variety of claims, including, but not limited to, claims for breach of contract and misappropriation of trade secrets. Texas courts permit injunctive relief based on an employee's breach of a non-compete agreement. *Brink's*, 2014 WL 2931824. However, a party must be careful not to oversell its claim for money damages associated with the breach. Injunctive relief is granted for those claims where monetary relief is inadequate. By overselling a claim for money damages, an applicant can diminish its chances of obtaining an injunction because monetary relief will seem obtainable. A party should carefully consider how they plead the maximum amount of money damages and state repeatedly in its application that the primary relief sought is injunctive relief because damages are insufficient.

(b) *A probable right to the relief sought; and*

A probable right of recovery is shown by alleging a cause of action and presenting evidence to sustain it. *Fox v. Tropical Warehouses, Inc.*, 121 S.W. 3d 853, 857 (Tex. App.—Fort Worth 2003, no pet.). A party does not need to prove its case with absolute certainty, but rather prove that there is a reasonable probability of success. *Casarex v. Val Verde Cnty.*, 957 F. Supp. 847, 858 (W.D. Tex. 1997). Enforcement of a restrictive covenant requires a showing that the non-compete is enforceable. *Id.* Under Texas law, a covenant not to compete is enforceable if (1) it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made; and (2) the limitations of time, geographical area, and scope of activity are reasonable and do not impose greater restraints than are necessary to protect the goodwill or other business interest of the promisee. *Digital Generation, Inc. v. Boring*, 869 F. Supp. 2d 761, 772 (N.D. Tex. 2012). The focus in enforcing a non-compete is whether or not the restrictive covenant is reasonable. *Marsh USA v. Cook*, 354 S.W.3d 764, 111 (Tex. 2011).

Companies should draft their application to seek only relief that has a likelihood of being granted. For instance, if a company's non-compete agreement is overly broad as written, it needs to plead reformation and only seek injunctive relief that is "reasonable." See *Brink's*, 2014 WL 2931824. In *Brink's*, the company noted that the non-compete agreement was overly broad, but the preliminary injunction only sought to prevent the departing employee from performing similar services in the same territory. *Id.* Because the company framed its injunction to only apply to reasonable limitations, the court granted its request for injunctive relief. *Id.* at n.2 (the company notes in its brief that while the language of the non-compete provisions is overly broad, it only seeks to enforce the covenant "to prevent [the employee] from performing the services he performed or provided to [the company] for a competitor within his former territory." Thus, the court only enforced the non-compete agreement to the extent that the company requested).

(c) *A probable, imminent, and irreparable injury in the interim*

In order to establish that there is a substantial threat of probable, imminent and irreparable injury, a party must show a significant threat of injury from the impending action, that is imminent, and for which money damages would not fully address the harm. *Brink's*, 2014 WL 2931824,

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