You Can't Unring A Bell

Client Advisories

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Consider the following: An employer hires and trains an employee. In the course of fulfilling his or her job responsibilities, the employee becomes familiar with valuable information that the employer needs to keep confidential. The employee then resigns and goes to work for a competitor, taking that valuable information along.

The above is a textbook example of why employers require employees to sign noncompete agreements ("NCAs"). NCAs prohibit former employees from taking certain types of positions with competitors for specified periods of time. If the employee violates an NCA, the employer can sue for breach.

However, the wheels of justice turn slowly, and once an employer's valuable information is known by its competitors, the genie is out of the bottle. To guard against this risk, employers can seek a temporary restraining order ("TRO") and a preliminary injunction ("PI") prohibiting the employee from violating the NCA. while the case is pending. This is an important step in the case because, once the employee joins a competitor and the secrets get out, the cat is out of the bag.

This scenario occurred in a recent case decided by the Third Circuit Court of Appeals. In *ADP, Inc. v. Levin*, ADP's chief strategy officer resigned to become the president and chief executive officer of a competitor.[1] This former employee had signed an NCA prohibiting him from providing substantially similar services to a competitor for twelve months after the end of his employment with ADP. Shortly after the former employee started with the new company, ADP sued for breach of the NCA and sought a PI.

However, having a legally enforceable NCA does not automatically mean a PI is appropriate. The court will only issue the PI if the former employer can demonstrate that (1) it has a likelihood of success in the underlying case; (2) it will suffer "irreparable harm" if the PI is denied; (3) the harm to the parties will be greater if the PI is denied than if it is granted; and (4) granting the PI will not be against the public interest.

In *Levin*, the trial court declined to issue the PI, and the appellate court affirmed because ADP failed to establish "irreparable harm." To make this showing, the party seeking the PI must produce affirmative evidence that the potential harm will occur, and cannot merely speculate about what might or might not happen. The court held

that ADP failed to make the showing because it did not prove "that the risk of future harm was anything other than speculative."

Whether ADP could have made this showing if it had waited to gather some evidence of irreparable harm before seeking the PI is impossible to know. The important thing to remember is that having employees sign a valid NCA does not automatically ensure that a court will issue a PI if a former employee goes to work for a competitor. The employer must also do its due diligence in gathering the facts so they can meet all of the requirements for issuance of a PI.

The best way to ensure that due diligence is performed is to consult with attorneys with knowledge of this area of the law. And that's where we can help. Archer's Trade Secret Protection and Non-Compete Group boasts a team of attorneys with a wealth of experience in drafting and reviewing restrictive covenants. And, if the need arises, to also enforce restrictive covenants through litigation and seek injunctive relief to prevent the harm before it occurs, because you can't unring a bell.

For questions or more information, please contact Tom Muccifori at 856-354-3056 or tmuccifori@archerlaw.com, or Anthony Fassano at 856-616-2618 or afassano@archerlaw.com.

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[1] We previously wrote about ADP and its vigorous attempts to enforce its restrictive covenants when its employees are lured away to work for competitors. In *ADP v. Rafferty*, the Third Circuit Court of Appeals ruled that ADP's NCA was largely enforceable. In ADP v. Kusins, the New Jersey Superior, Appellate Division, did the same.

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Thomas A. Muccifori
Partner
tmuccifori@archerlaw.com
856.354.3056

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