

## NONCOMPETES: A MATTER OF DOLLARS AND SENSE?

Publication  
Sep 6, 2011

Can employees avoid preliminary injunctions simply because they are not as wealthy as their employers? A recent federal court decision says: "No."

Seasoned (and even not-so-seasoned) litigators are well familiar with the "four factors" that courts commonly consider when deciding whether to enforce a noncompete by way of an injunction. Namely, (1) whether the party seeking injunctive relief is likely to succeed on the merits; (2) whether the party seeking injunctive relief will be irreparably injured by denial of the relief; (3) whether granting injunctive relief will result in even greater harm to the nonmoving party; and (4) whether granting the injunction will be in the public interest.

When opposing requests for injunctions, employees often point to the burden imposed by the restrictions at issue and argue that the burden imposed outweighs the benefit to the employer. In making this argument, employees sometimes focus on the disparate financial standing of the parties. In essence, employees sometimes argue: "I am small. The company is big. Therefore, the burden on me will necessarily outweigh the benefit to the company."

The "takeaway" from these decisions is that when courts assess the enforceability of a restrictive covenant, they may be more swayed by arguments other than the "correlative financial standing" of the parties. Courts are more likely to focus on whether the covenant is reasonable in light of the legitimate interests of the employer, and whether the employee will face any undue burden.

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Courts will likewise factor into their analysis the extent to which all of the harm caused by a breach can be reduced to dollar damages. When drafting restrictive covenants, employers should therefore focus on whether their covenants are reasonably tailored to protect their legitimate interests. Defendants should stand ready to attack covenants as overly broad, and they should seek to demonstrate that damages are readily calculable. As the case law suggests, the outcome is apt to vary on a case-by-case basis.

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This article appeared on September 6, 2011 on [Employment Law360](#).