Texas' Secret Weapon To Keep Ex-Employees Honest

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Texas employers may be missing out on a little-known strategy that can prove highly effective when dealing with noncompete and trade secret disputes with former employees. Many employers believe expensive litigation is their only option when an employee defects to a competitor or takes off with proprietary company information, especially when the situation involves a high-level employee. However, small- and mid-sized companies may be best suited to leverage Rule 202 of the Texas Rules of Civil Procedure because it allows them to investigate possible trade secret claims before filing a lawsuit; potentially saving them both time and money.

Rule 202 has been in effect since 1999, but is vastly underutilized in employment law. It can apply to situations when employers suspect that an ex-employee is using confidential information to gain a competitive advantage in the marketplace. It often is a far more economical option than temporary restraining orders, action under the Defend Trade Secrets Act or other litigation tactics if the ex-employee's actions have not yet produced significant harm. Most importantly, Rule 202 may have the desired effect of deterring bad or unwelcome behavior without the complexity, extensive inquiry, significant legal expenses and increased exposure that often results from full-scale litigation.

The Process

Prior to filing a lawsuit, Rule 202 allows counsel to petition the court for an order authorizing the taking of a deposition on oral examination or written questions to: (1) perpetuate or obtain the ex-employee's own testimony or that of any other person for use in an anticipated suit; or (2) investigate a potential claim or suit.

Employers' counsel must file a verified petition and outline the reasons for seeking this presuit deposition, as well as establish reasonable grounds to investigate a claim of a breach of the ex-employee's obligations. The ex-employee or his counsel must appear at a hearing to determine if a presuit deposition is allowed. If granted, the ex-employee will be deposed and must answer questions, under oath, as to whether he understands his post-employment obligations and whether he is in violation of them.

The Benefits

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Filing a petition under Rule 202 can serve as a quick and relatively easy method for responding to trade secret and noncompete disputes.

- In most cases, employers and their legal counsel finally get the attention of the ex-employee and/or his new employer. At this point, the two parties often enter into some agreement of mutual understanding. This often includes the ex-employee agreeing to return company property or to stop disseminating confidential information, as well as to change the way he conducts business in the future.
- Counsel can obtain testimonies of potential witnesses through presuit deposition. This helps to avoid surprise testimony if the matter develops into a lawsuit. Additionally, the information gained through deposition allows employers and their legal counsel to better evaluate the company's options for protecting its assets, as well as determine the likelihood of receiving favorable results if they chose to proceed with litigation.
- This process, if handled correctly, often provides employers with some security without the business disruption and expense of a full-fledged litigation war.
- Because action under Rule 202 is an accelerated process compared to a traditional trial that could take years, the defendant is less likely to change his story or forget important details.
- Employers can take action while limiting liability to the company. Counterclaims are not allowed under Rule 202, affording employers with a relatively risk-free option.

Action under Rule 202 may be used as the first line of defense against noncompete and trade secret disputes that do not present an imminent threat in the state of Texas. But do employers have similar options in other states?

Potential Federal Remedy?

The answer is both yes and no. Though there is a federal law and many states have laws allowing presuit deposition, those laws are much less user-friendly than the Texas version. In federal court, the presuit discovery rule, Rule 27 of the Federal Rules of Civil Procedure, allows only a presuit discovery to perpetuate testimony of an individual who may not be available to testify at trial or to preserve evidence. Under Rule 27 the petitioner must show:

1. The petitioner expects to be a party to an action cognizable in a United States court, but cannot presently bring it or cause it to be brought;

2. The subject matter of the expected action and the petitioner's interest;

3. The facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it;

4. The names or a description of the persons whom the petitioner expects to be adverse parties and

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4. The names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known; and

5. The name, address and expected substance of the testimony of each deponent.

A petitioner who cannot meet this standard cannot take presuit discovery. Interestingly, the seemingly straightforward rule is under attack by some recent jurisprudence and the changing times of electronic communications. Given a scenario where electronic data may roll off of a system or not be preserved properly, a party may petition the court to preserve the electronic data. It also is a reasonable argument that a deposition of a person(s) responsible for the storing of the data or the taking of the data may be needed to establish that all necessary preservation steps are being taken. An argument like this may be a backward way to a presuit deposition similar to those taken under Texas Rule 202 if the noncompete issue is paired (as it so often is) with allegations claiming confidential information was taken.

Two U.S. Supreme Court decisions, including Ashcroft v. Iqbal, raised the bar for the amount of factual knowledge plaintiffs now must present to maintain a claim, as well as put pressure on courts to give some sort of presuit relief to plaintiffs, to which some federal courts have responded. It remains to be seen whether this little-used Rule 27 will become more of a tool in the modern environment, however, it is important to consider.

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Related People

Arthur V. Lambert
Senior Counsel
214.220.8324
Email

Related Offices

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