

Send a non-compete demand letter – buy yourself a lawsuit?

Insights

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When employers seek injunctive relief to enforce a restrictive covenant, nearly every judge begins the injunctive hearing with the same question: What efforts did you make to resolve this matter? Judges encourage settlement; they encourage compromise. Even if such compromise is not possible, they want to know an earnest effort was made.

In order to get the settlement ball rolling, however, parties need to start somewhere. They need to stake out positions, and this cannot happen without communication. Typically, the opening communication comes by way of a letter in which the employer voices its concerns to its former and his or her new employer. The letter commonly outlines the employee's contractual and statutory obligations, and it is not unusual to demand compliance with the terms of the employee's contract.

A recent case illustrates a legitimate concern that employers frequently express – what happens if the new employer simply fires the employee? Will I be sued? The United States District Court for the Eastern District of Michigan recently considered this scenario in [Bonds v. Philips Electronic North America](#), and its decision came down in favor of the former employer. But the limited factual

scenario in Bonds leaves open questions on how far the Court would have taken its conclusion if the facts had varied in ways commonly faced by employers.

In Bonds, the plaintiff alleged that the defendant tortiously interfered with his business relationship by sending a letter to his new employer outlining the terms of his confidentiality agreement and expressing its concerns about his “potential disclosure” of confidential information. After receiving a copy of the letter, his new employer terminated him.

To succeed on his claim for tortious interference, the plaintiff needed to establish that the defendant intentionally interfered with his employment relationship and caused his termination.

Finding that the plaintiff failed to carry his burden, the Court considered whether the defendant acted intentionally and without justification. More specifically, the Court questioned whether the defendant sent the letter for the purpose of causing the plaintiff’s employer to terminate him and whether it had a legitimate interest.

In conducting its analysis, the Court concluded that the defendant did not act wrongfully because its actions were motivated by legitimate business reasons, i.e., preventing the wrongful disclosure of its confidential information. The Court’s decision was further influenced by its observation that the defendant’s letter did not request that the plaintiff be terminated.

While the result in this case is reassuring to employers, the analysis raises some concerns. In particular, the Court repeatedly observed that the defendant never asked that the plaintiff be fired. Does this mean the Court would have reached a different decision if the employee had signed a non-compete agreement and the employer had insisted upon compliance? Would the employer not have a legitimate interest in seeking adherence to a non-compete agreement? Would the answer depend upon whether the non-compete was enforceable, or would the defendant’s good faith belief of enforceability be sufficient?

The decision does not answer these questions, and the answers may very well depend upon a variety of factors ranging from what law applies to what facts are present in each case. For now, employers looking for a take-away from this case should keep the following in mind.

Acting in good faith is key. Consider your legitimate business interests and demand only that which is reasonably related to protecting those interests. Much the same way courts will scrutinize restrictive covenants to ensure they are necessary to protect a legitimate interest, they are likely to scrutinize demand letters for similar legitimacy. Employers should ensure they are speaking out with the intent to protect their legitimate needs and that they are not influenced by the emotion that often permeates non-compete cases. Measured expression predicated on a well-reasoned analysis is the wisest course of action.

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