

Injunctions: The Most Common Employment Scenarios

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Federal Rules

FRCP Rule 65:

1. TRO – Temporary Restraining Order

- Notice: Could issue TRO **without notice** to adverse party if (1) an affidavit or verified complaint can show clear immediate, irreparable injury prior to adverse party being heard, **and** (2) movant attorney certifies attempts to give notice and why it should not be required.
 - Requirements from Rule 65(b)(1): “(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; **and** (B) the movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.”
- Contents: TRO without notice must state “the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk’s office and entered in the record.” The order is **only valid for up to fourteen (14) days after entry**, unless the court extends for good cause or the adverse party consents to an extension. Reasons for an extension must be recorded in the record.
- Challenging: If a TRO without notice is granted, the adverse party may move to dissolve or modify the order. **Two (2) – day notice**, unless the court sets a shorter time, to the party who obtained the TRO is required to challenge the TRO.

Federal Rules

FRCP Rule 65:

2. Preliminary Injunction

- Notice to the adverse party required
- Can consolidate with the trial on the merits
- Evidence received while arguing the motion becomes part of the trial record and does not need to be repeated at trial

Federal Rules

FRCP Rule 65:

3. Injunction

- Contents of an order granting injunction or restraining order: the reasons why it was issued; the terms specifically; and reasonable detail describing the act(s) restrained or required (without referring to the complaint).
- Persons bound are those who receive actual notice (by personal service or otherwise) and are one of the following: “(A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; (C) and other persons who are in active concert or participation with anyone” listed under (A) or (B).

Note: FRCP Rule 65 does not modify federal statutes affecting employer/employee injunctions, 28 USC § 2361 (interpleader), or 28 USC § 2284 (three-judge district court). The rule does apply to copyright impoundment.

State Rules

Iowa Rules of Civil Procedure Rules 1.1501-1.1511:

1. Temporary – granted at any stage of proceedings prior to being included in the judgment. If filed with notice, can be basically be considered preliminary.
 - Notice: Court may require reasonable notice of the time and place of hearing to the party being enjoined. If requesting temporary injunction without notice, the attorney must certify either the efforts which have been made to give notice **OR** a reason why notice should not be required.
 - Notice and hearing are required “for a temporary injunction or stay of agency action pursuant to Iowa Code section 17A.19(5), to stop the general and ordinary business of a corporation, or action of an agency of the state of Iowa, or the operations of a railway or of a municipal corporation, or the erection of a building or other work, or the board of supervisors of a county, or to restrain a nuisance.”
 - Contents: Temporary injunction allowed if (1) affidavit supports a petition restraining the commission or continuance of an act that would greatly and irreparably injure the plaintiff; (2) “[w]here, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party’s right respecting the subject the action and tending to make the judgment ineffectual;” and (3) when authorized by statute. Petition must state, or the attorney shall certify, if the same relief (or part thereof) has been previously asked for and refused (by whom and when).
 - Challenge: If order granted **without notice**, the adverse party may move the court where the action is pending to reconsider the motion where and the **hearing must be within ten (10) days after the motion is filed**. The court can vacate, dissolve, or modify the order.
 - Location: Request must be filed in the county where the matter is or will be pending. A judge of the district, the supreme court, or a justice can grant the temporary injunction.
2. Injunction – granted as part of the judgment

Federal Standard

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113-114 (8th Cir. 1981).

- Four Factors: (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest. *Id.* at 113.
- Flexible Standard. *Id.* at 114.
- Probability of success requirement is not a rigid “prove a greater than fifty per cent likelihood that he will prevail on the merits.” Rather, it must be used in tandem with the other factors, a strong showing of harm could reduce the amount of proof required for likelihood of success. *Id.* at 113.

State Standard

Ney v. Ney, 891 N.W.2d 446, 451 (Iowa 2017).

- Three Factors: (1) an invasion or threatened invasion of a right; (2) that substantial injury or damages will result unless the request for an injunction is granted; and (3) that there is not another adequate means of protection available.
- Questions to ask: Is an equitable remedy necessary to protect rights? Is the relative hardship of the injunction outweighed by the substantial injury sustained by the invasion of a right? Are there any other alternatives to avoid substantial injury?

Restrictive Covenants

- Few areas of law pose more starkly the conflict between:
 - An employer's need to protect itself from employees that it grants access to its most sensitive secrets, and
 - An employee's right to switch jobs.

Restrictive Covenants

- This dilemma is new to the law with it only first emerging in:
 - 1404 when the first covenant not to compete case surfaced. *Dyers Case*, Y.B. Hich. 2 Hen. 5 (1404);
 - With the first public policy challenge surfacing in 1602. *Colgate v. Bachelier*, 78 Eng. Rep. 1097 (1602).

Restrictive Covenants

- Yet, courts still wrestle with these competing interests with various states and various judges tilting one way or the other:
 - Some states make them virtually unenforceable (California); and
 - Some make them largely enforceable (Iowa).
 - Unless you run into a judge who does not.
 - Because these cases are decided in equity, judges have significant freedom.

Restrictive Covenants

Employers have various interests they may wish to protect and various vehicles to do so.

- The various issues most frequently covered by contracts are:
 - Return of Property/Information.
 - Confidentiality/Trade Secrets.
 - Non-solicitation agreements where we want the employee to stay away from certain customers/employees/vendors.
 - Covenants not to compete where we don't want the employee working for a competitor at all.

Restrictive Covenants

Return of Property

- A common desire is to withhold from a final paycheck if the employee does not return property.
 - Is this legal? (Iowa Code Section 91A)
 - Do you have signed permission?
 - Was it for employee's benefit?
 - Does anyone know what that means?
 - You can deduct for lost or stolen property if:
 - It is specifically assigned to the employee, and
 - You have receipt acknowledged in writing.
 - You always can sue.
 - *Condon v. Auto Sales & Serv., Inc.*, 604 NW.2d 587 (1999) (Ahhhh!!!!!!).

Restrictive Covenants

Confidential Information.

- We still frequently see confidentiality provisions to protect your information in employee handbooks.
 - Is this a good idea?
 - How many of your handbooks expressly provide they are not contracts?
 - You are far better off to have a separate policy.

Restrictive Covenants

Confidential Information.

- We still frequently see confidentiality provisions to protect your information in employee handbooks.
 - What can be protected?
 - Contractually, you can protect almost anything.
 - For trade secrets, anything that derives value from not being publicly known may be protected:
 - Customer lists?
 - Recipes?
 - Plans?
 - Methods?
 - Techniques?

Restrictive Covenants

Confidential Information.

- We still frequently see confidentiality provisions to protect your information in employee handbooks.
 - You must have taken steps to protect it
 - What do you do to keep it secret?
 - Have signed agreements?
 - Limited access?
 - Password protection?
 - Kept under lock and key?
 - Scrub phones? There is software that can scrub contacts from phones when someone quits.

Restrictive Covenants

Non Solicitation

- These are almost always enforced.
- What do they really mean?
 - Do you mean they cannot contact your customer?
 - Do you mean they cannot do business with your customer AT ALL?
 - At least one court held that a non-solicit meant only that employee cannot reach out to customers, but can do business with them if the customer contacts them.
Farm Bureau Mut. Ins. Co. v. Osby, 2005 WL 2990129 (Iowa Ct. App. 2005).
 - How do you think you will prove who contacted whom?

Restrictive Covenants

Non Solicitation

- These are almost always enforced.
- What do they really mean?
 - Do you mean they cannot contact your customer?
 - Do you mean they cannot do business with your customer AT ALL?
 - Although “non-solicit” is not as broad as other restrictions, Iowa’s Supreme Court recognizes commercial realities.
 - Contacting a customer to tell them you’ve moved is enough to be solicitation. *Presto-X Company v. Ewing*, 442 N.W.2d 85 (Iowa 1989).
 - What about inviting them to an open house scheduled to coincide with your arrival at new employer?

Restrictive Covenants

Non Solicitation

- These are almost always enforced.
- What do they really mean?
 - Do you mean they cannot contact your customer?
 - Do you mean they cannot do business with your customer AT ALL?
 - Why take the chance of a bad interpretation or a nonsensical argument?
 - Why not say they cannot have any business contact at all, or do any work for, your customers?

Restrictive Covenants

Covenants not to Compete

- This is the most restrictive type of agreement and typically prevents working for anyone in competition with you.
 - Fights often develop over who is a competitor. Do your best to specify.
 - Must be necessary to protect your business.
 - Do you really need the receptionist and janitor to sign?
 - Ask yourself who can harm you?
 - Sales employees.
 - Executives.
 - Those with access to sensitive information.
 - If you offered/paid for training, they will be easier to enforce.

Restrictive Covenants

Covenants not to Compete

In Iowa:

- Noncompetes are enforceable even if you fire the employee,
- Continued employment is adequate consideration,
- But, they must be reasonable,
- Must be no broader than necessary, and
- Must be clear.

Restrictive Covenants

Covenants not to Compete

- Reasonable means:
 - Non-competes must be reasonable temporally and geographically:
 - What is reasonable temporally?
 - 1 year – almost certainly.
 - 2 years – probably.
 - 3 years – maybe.
 - More? Every additional year makes it less likely.
 - Geographically?
 - Worldwide has been upheld where you really compete worldwide.
 - Think about where you realistically could be harmed.

Restrictive Covenants

Covenants not to Compete

In Iowa:

- Although added consideration may not be required, should you offer it anyway?
 - It makes it seem more equitable.
 - For continued employment to be adequate consideration, do you have to fire anyone who doesn't sign?
 - Do you have to fire anyone who doesn't sign anyway?

Restrictive Covenants

Covenants not to Compete

- What clauses do you want?
 - **Jury Waiver!!!**
 - Agreement that both parties agree it is necessary to protect business.
 - Acknowledgement that irreparable harm can result from violation and consent to entry of injunction in case of violation.
 - Choice of law provision.
 - Clause allowing assignment in the case of sale.
 - Choice of forum?
 - Waiver of bond?
 - Provision to buy out?
 - These can eliminate disputes, but
 - They also undermine the argument for an injunction because injunctions only are available where damages are hard to quantify.

Restrictive Covenants

Covenants not to Compete

An Important development:

- In 2016, President Obama signed the Defend Trade Secrets Act of 2016 giving federal civil protection to trade secrets.
- The Act provides immunity to whistle blowers who disclose trade secrets in confidence to federal, state or local government officials or to government attorneys when made to investigate or report a suspected violation of the law, or when made in a complaint or other document filed in a lawsuit so long as the filing is under seal.
- Now, if you enter into or update contracts regarding trade secrets or other confidential information with individual employees, contractors or consultants, you must include notice of whistle blower immunity in the contract, if you wish to recover exemplary damages or attorney's fees in enforcing your agreement.

Restrictive Covenants

So, you decided to do nothing, and now your former employee is harming you?

- Sorry, Charlie?



- You may not be entirely out of luck.
 - Even without a covenant not to compete, an employee still cannot take your trade secrets, copyrighted work, or patents.
 - Trade secrets are governed by Chapter 550 of Iowa's Code.
 - Iowa even has recognized the doctrine of inevitable disclosure.
 - Attorney's fees may be recoverable.

Restrictive Covenants

So, you decided to do nothing, and now your former employee is harming you?

- Sorry, Charlie?



- You may not be entirely out of luck.
 - Fiduciary duties apply while employee remains employed.
 - They should not have been using your equipment to damage your business.
 - They should (within reason) not have been trying to take your employees.

Restrictive Covenants

So, you decided to do nothing, and now your former employee is harming you?

- Sorry, Charlie?



- You may not be entirely out of luck.
 - Computer Fraud and Abuse Act.
 - They should not take your computer information.
 - They should not destroy your computer information.

Restrictive Covenants

So your employee quit
and went to work for a
competitor...

- What now?

- There are many possible actions depending on the answers to certain questions:
 - Can the employee really harm you?
 - Do you need to send a message to your employees and your competitors that you will enforce the agreement?
 - Sometimes the expense is necessary to inhibit others even if you might survive this particular employee's misconduct.

Restrictive Covenants

So your employee quit
and went to work for a
competitor...

- What now?

- There are many possible actions depending on the answers to certain questions:
 - Are you willing to involve your customers/former customers?
 - You may be able to get an injunction without involving customers on a noncompete but it's harder on a non-solicit.
 - It's very hard to prove damages without involving customers.
 - Be forewarned, former customers sometimes will lie to protect your sales person.
 - After all, they left because they liked him/her and wanted to keep doing business with him/her.

Restrictive Covenants

So your employee quit
and went to work for a
competitor...

- What now?

- There are many possible actions depending on the answers to certain questions:
 - Are you better off just competing in the market?
 - What did the employee do?

Restrictive Covenants

So your employee quit and went to work for a competitor...


- What now?

- Once you've concluded there is a risk of some type of harm:
 - Immediately secure the computer your employee used. (This may be necessary before you decide if there's a risk).
 - It's amazing what you can learn.
 - They may have emailed co-workers.
 - They may have emailed their lawyer.
 - They may have downloaded documents.
 - They may have deleted documents.

Restrictive Covenants

So your employee quit
and went to work for a
competitor...

- What now?

- Once you've concluded there is a risk of some type of harm:
 - Did you provide their phone?
 - Secure it.
 - Review the calls made.
 - Review texts.
 - See if they transferred contacts.
 - Evaluate whether you really want to sue with your eyes wide open.
 - Risk of harm v. cost of litigation x probability of prevailing = a nice easy decision. (?) 

Restrictive Covenants

So your employee quit and went to work for a competitor...

- What now?

- Once you've decided to sue, what are the considerations?
DO NOT LITIGATE HALFWAY!!!

Why?

- A. It makes NO sense to spend half the amount to lose, and
- B. I HATE TO LOSE!!!
- C. I HATE TO LOSE!!!
- D. I HATE TO LOSE!!!
- E. I HATE TO LOSE!!!

I HATE TO LOSE!!!

Restrictive Covenants

The lawsuit.

- There is probably no area where litigation is more difficult to predict:
 - Sometimes the other side gives up.
 - Sometimes they think you will give up.
 - If it turns into a game of chicken, it can be costly if nobody blinks.

Restrictive Covenants

The lawsuit.

- Once you sue, there are still choices:
 - In smaller, simpler lawsuits, you can go for a preliminary injunction straight away.
 - Generally, this involves a relatively short evidentiary hearing.
 - The judge will rule thereafter.
 - Because a judge is relatively unlikely to change her/his position after reaching a conclusion, cases usually settle after the preliminary injunction stage.

Restrictive Covenants

The lawsuit.

- Once you sue, there are still choices:
 - With more complicated cases, you may want some discovery prior to seeking a preliminary injunction.
 - Are you really competitors?
 - What has your former employee been doing?
 - What harm has occurred?
 - If you go down this route, be prepared for higher expense.
 - If you seek discovery, they will, too.
 - If the other side tries hard, they can make it very expensive.
 - Seek more discovery in higher stakes cases where you might be able to secure more information.

Restrictive Covenants

The lawsuit.

- What will be the outcome?
 - How much have you found?
 - Someone who stole your documents, used your information, is targeting your customers by lying, cheating and stealing, is likely to be enjoined.
 - The more you “invested” in the employee by either training or access to customers, the better your odds.
 - Did you fire the employee?
 - Realize that injunctions are granted by “courts of equity.”
 - Courts of equity allow concepts of fundamental fairness.
 - There are few areas where the individual judge matters more.
 - The better you behaved and the more you’re at risk, the better your odds.

