

# 2017 Update: Suing or Defending the Departing Texas Employee, Including Non-competes, Trade Secrets, and Fiduciary Duties

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# I. Texas Non-Compete Update

To be enforceable, a noncompetition covenant must:

1. Be ancillary to an otherwise enforceable agreement at the time that the agreement is made; and
2. Contain limitations of time, geographic area, and scope of activity that are reasonable and that do not impose greater restraint than necessary to protect the company's goodwill or other business interests.

Tex. Bus. & Com. Code Ann. § 15.50.

# Texas Non-Compete Update

- What does it mean to “be ancillary to an otherwise enforceable agreement at the time that the agreement is made”?
- In 2011, the Texas Supreme Court overruled a 1994 case (*Light v. Centel Cellular Co. of Texas*) and held that a covenant not to compete is “ancillary to or part of” an otherwise enforceable agreement at the time it was made if: (a) the consideration given by the employer in that agreement is “reasonably related to,” an “interest worthy of protection”; and (b) the covenant is designed to enforce the employee’s consideration or return promise in that agreement.

*Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 774-76 (Tex. 2011).

# Texas Non-Compete Update

- If the consideration is confidential information, when does it have to be given to the employee to be effective?
  - In *Alex Sheshunoff Mgmt Servs., L.P. v. Johnson*, 209 S.W.3d 644, 648-51 (Tex. 2006), the Texas Supreme Court held that non-compete covenants can be considered unilateral contracts, made at the time a non-compete is signed, that become binding once an employer provides the employee confidential information.
  - *Sheshunoff* overruled *Light* on this point, which had interpreted § 15.50 to require that the non-compete covenant must be supported by a valid promise and actual performance at the very time the agreement is made.



# Texas Non-Compete Update

- Under *Sheshunoff*, employers may enforce non-compete agreements even if they do not provide the employee with the confidential information until days, weeks, months, or even years after the agreements are executed.
- If, however, such information is never provided, then the non-compete agreement is not enforceable. *See, e.g., Digital Generation, Inc. v. Boring*, NO. 3:12-CV-00329-L, 2012 WL 1413386, at \*10 (N.D. Tex. Apr. 24, 2012) (finding non-compete unenforceable where employer did not prove that it gave employee confidential information after he signed the noncompetition agreement).

# Texas Non-Compete Update

1. Regarding first prong: An express or even an implied promise to provide confidential information is sufficient to uphold a non-compete. See *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844 (Tex. 2009).
2. Also, a stock options grant is sufficient to uphold a non-compete. See *Marsh USA Inc. v. Cook*, 354 S.W.3d 764 (Tex. 2011).
3. *Marsh* likely extends to LTIPs, but how much further it goes is up for debate in yet to be decided cases. E.g., could a severance payment of cash or stock be sufficient under *Marsh*?
4. “Specialized training” also may support a non-compete. See *Neurodiagnostic Tex, L.L.C. v. Pierce*, NO. 12-14-00254-CV, 2016 WL 6426830, at \*6 \_\_ S.W.3d \_\_ (Tex.App.–Tyler Oct. 31, 2016).



# Texas Non-Compete Update

Heavy focus on “reasonableness” prong now (the second prong).



Restraint  
of trade

4. Time: Restrictions of two to even up to five years have been upheld.
5. Geography: a reasonable geographic scope is generally considered to be the territory in which the employee worked for the employer. *See Cobb v. Caye Publ'g Grp., Inc.*, 322 S.W.3d 780, 783–84 (Tex. App.—Fort Worth 2010, no pet.)
6. Geography: but sometimes a broader area is justified. *See AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319, 335 (Tex.App.—Dallas 2014, pet. denied) (upholding broad geographic restriction beyond area where the defendant had worked for the plaintiff, because the defendant had been a high level manager.

# Texas Non-Compete Update

Restraint  
of trade

7. Geography: A reasonable restriction on scope of activity can substitute for a geographic restriction, even absent a geographic restriction – for example, limiting the employee from contacting customers he or she had contact with during a reasonable time frame before he or she left his or her employer is generally reasonable and enforceable. *See, e.g., Sheshunoff.*
8. Scope of Activity: In the context of front line sales employees: “A restraint on client solicitation in a personal services contract is overbroad and unreasonable if it extends to clients with whom the employee had no dealings during his employment.” *EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 660 (Tex. App.–Houston [14th Dist.], 2010 no pet.).



# Texas Non-Compete Update

Restraint  
of trade

9. Scope of Activity: *But see M-I LLC v. Stelly*, 733 F. Supp. 2d 759 (S.D. Tex. 2010) (enforcing much broader restraint when employee wasn't just a mere salesman, but rather also a high level manager).
10. Scope of Activity: "The Texas Supreme Court has held that an industry-wide exclusion is unreasonable." *John R. Ray & Sons, Inc. v. Stroman*, 923 S.W.2d 80, 85 (Tex. App.—Houston [14th Dist.] 2010, no pet.), *citing Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 386-88 (Tex. 1991); *McNeilus Companies, Inc. v. Sams*, 971 S.W.2d 507, 511 (Tex. App.—Dallas 1997, no writ) (holding covenant prohibition on former employee from working "in any capacity" for competitor of former employer was overbroad in scope).
11. Note: even if both prongs are satisfied, it is still not necessarily a lay down to get an injunction, because of the irreparable harm requirement. *See infra*.



# Texas Non-Compete Update

Money damages are not available based on breach of overbroad non-compete prior to reformation.

*Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 673 (S.D. Tex. 2010) (granting summary judgment against employer's claim for monetary damages based on breach of non-compete because all of the conduct that caused the damages occurred prior to the court's reformation of the non-compete).



# Texas Non-Compete Update

This rule can present a real problem because Texas state appellate courts have repeatedly held that reformation is a final remedy for a SJ ruling or trial, not an interim remedy to be granted at the Temporary Injunction stage. *See also Sentinel Integrity Solutions, Inc. v. Mistras Group, Inc.*, 414 S.W.3d 911, 920 (Tex. App.–Houston. [1st Dist.] 2013, pet. denied) (“Reformation pursuant to section 15.51 is a remedy to be granted at a final hearing, whether on the merits or by summary judgment, not as interim relief”)



# Texas Non-Compete Update

On the other hand, some federal district courts in Texas have been willing to reform overbroad non-compete agreements at the Temporary Injunction stage. *See TransPerfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d 742, 756 (S.D. Tex. 2009) (“In light of this unsettled law, the Court will enter a limited injunction and reform the contract as necessary based on the current evidence, noting that any reformation or permanent injunction to be entered may differ from this temporary reformation based on arguments presented in the parties’ dispositive motions or at trial.”).



# Non-Competes That Impose Monetary Penalties For Competing

- Subject to same analysis, per *Peat Marwick* case.
- But possible distinction recognized by Texas law between a penalty provision concerning a non-contributory profit sharing plan. In *Drennen* the Texas Supreme Court reserved this question for now.



# Non-Compete & Attorneys' Fees Issues

1. For prevailing employer. Perhaps never (*see Ginn v. NCI Bldg. Sys., Inc.*).
2. For prevailing employees.
  - Some courts say only if employee satisfies section 15.51 (*see Perez*).
  - Other courts say prevailing employee may obtain fees even if they do not satisfy section 15.51 (*see Hardy*).
  - 750k fee award for employee out of Houston (*Sentinel Integrity Solutions, Inc.*). A cautionary tale for overzealous employers wielding overbroad non-competition agreements.



# Obtaining Injunctive Relief For Breach of a Non-Compete

- Do you still have to prove “irreparable harm?”
  - Most courts say “yes.” *See, e.g., Cardinal Health Staffing Network, Inc.*
  - But the Fort Worth Court of Appeals said “no” based on Section 15.51(a). *See, e.g., Heritage Operating, L.P.*
- Proof that a highly trained employee is continuing to breach a non-competition agreement gives rise to a rebuttable presumption that the applicant is suffering irreparable harm. *Cardinal Health Staffing Network, Inc.*
- Irreparable harm issue often turns on equitable considerations and black hat / white hat facts.

# Obtaining Injunctive Relief For Breach of a Non-Compete

- Successor companies' rights to seek injunctive relief enforcing a noncompetition agreement: they can, but the scope is limited to the business sold. *See M-I LLC v. Stelly* (S.D. Tex. 2010)
- The effect of contractual stipulations of irreparable harm – most cases hold that such stipulations are no proof of irreparable harm, but a couple cases hold that they are of some weight. *See Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 293-94 (Tex. App.–Beaumont 2004, no pet.)

# Obtaining Injunctive Relief For Breach of a Non-Compete

- The effect of delay on a party's ability to obtain injunctive relief: a bigger issue in federal cases than state cases. *Rimkus Consulting Group, Inc. v. Cammarata*, 255 F.R.D. 417, 438-39 (S.D. Tex. 2008) ("Rimkus's delay in seeking injunctive relief in this court weighs heavily against a finding of irreparable injury.").
- Equitable extensions of the period of restraint – possible if violation has been "consistent and persistent." See *Farmer v. Holley*, 237 S.W.3d 758, 761 (Tex. App.–Waco 2007, review denied) (covenants not to compete can be equitably extended if the violations of the covenant were "continuous and persistent.").

# Obtaining Injunctive Relief For Breach of a Non-Compete

The Unclean Hand Defense To a Non-compete: Usually a loser.

For example, in *Premier Polymers, LLC v. Wendt*, Civil Action No. H-15-1812, 2015 WL 4434551, at \*5 (S.D. Tex. July 17, 2015), the defendant-employee claimed that his ex-employer had hired employees and then put them to work soliciting potential customers in violation of those employees' non-solicitation obligations to their former employers. Based on this, the employee alleged that under the unclean hands doctrine his ex-employer should be barred from enforcing its non-solicitation agreement against him.

The district court rejected the defendant-employee's unclean hands defense, stating, "[t]he evidence presented regarding former Premier employees and their non-solicitation agreements does not relate to Wendt's conduct or Agreement in this case. The court will not consider this defense."

# Obtaining Injunctive Relief For Breach of a Non-Compete

Is the employee's new employer a necessary part to a Temporary Injunction action?

In *Down Time-South Texas, LLC v. Elps*, NO. 13-13-00495-CV, 2014 WL 1464320, at \*7 (Tex. App.—Corpus Christi Mar. 20, 2014, no pet.) (unpublished), the Corpus Christi Court of Appeals held that the new employer is a necessary party to a case where the new employer's rights would be affected by entry of the requested injunction, and its absence precludes the granting of injunctive relief.

Whether other courts will follow this case remains to be seen.



# Choice of Law and Forum Clauses

- For pure traditional non-competes, choice of law of other state won't be enforced if the employee worked exclusively (or probably even primarily) in Texas. *See DeSantis*.
- For forfeiture agreement in a non-contributory profit sharing plan, likely will be enforced, under 2014 *Drennen* case.
- Choice for Forum clauses requiring all litigation to occur in another state are, however, enforceable. *See In re AutoNation* (Tex. 2007).

# Employee Non-recruitment Covenants Under Texas Law

Much easier to enforce than non-compete agreements.

Most courts say Section 15.50 does not apply to them – but see interesting *Marsh USA* dicta on that point.

But, typically much more difficult to obtain an injunction to halt such activity. *See Spicer* (S.D. Tex. 2006)

## II. At-Will Employee Fiduciary Duty Update

An at-will employee breaches their fiduciary duty to their employer if, during their employment, they: (1) misappropriate the company's trade secrets; (2) solicit the employer's customers while still working for their employer; (3) solicit the departure of other employees while still working for their employer; or (4) carry away confidential information.

*Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002).

# At-Will Employee Fiduciary Duty Update

Aside from those limitations, taking preparatory steps to compete with an employer while still working for that employer is not actionable.

*Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 284 (5th Cir. 2007) (under Texas law, an at-will employee may properly plan to go into competition with his employer and may take active steps to do so while still employed).

# At-Will Employee Fiduciary Duty Update

The employee has no general duty to disclose his plans and may secretly join with other employees in the endeavor without violating any duty to the employer. Further, an employee may use his general knowledge, skill, and experience acquired in the former employment to compete.  
*Abetter Trucking Co.*, 113 S.W.3d at 512.



\* But, there are fact specific exceptions. See *Navigant Consulting, Inc.* (failure to disclose plans to form competitive business while simultaneously signing long term lease for employer in order to put employer in vulnerable position was a breach of fiduciary duty).



# At-Will Employee Fiduciary Duty Update

- In 2010, the Fifth Circuit U.S. Court of Appeals affirmed a \$1.43 million award against a company's two former employees and the new company they formed to compete against their ex-employer.

*Meaux Surface Protection, Inc. v. Fogleman*, 607 F.3d 161 (5th Cir. 2010).

They had solicited many of their coworkers to leave and join their competitive venture before they resigned from plaintiff's employment.

# At-Will Employee Fiduciary Duty Update

*PAS, Inc. v. Engel*, 350 S.W.3d 602, 612 (Tex. App.—Houston [14th Dist.] 2011, no pet.) (holding that if a fiduciary employee obtains a release from a non-compete agreement under fraudulent and falsified circumstances a jury could find that the employee committed a breach of fiduciary duty, and fraud); *see also AmeriPath, Inc. v. Hebert*, 447 S.W.3d 319 (Tex. App.—Dallas 2014, pet. denied) (similar holding and reversing summary judgment that had been granted in the ex-employee's favor).

# III. Trade Secret/UTSA Litigation

- Took effect September 1, 2013.
- Wipes away common law, although the UTSA is not vastly different from the common law of Texas.
- Defines trade secret as “Information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of potential customers or suppliers.”
- Texas added the financial data and customer list part (a Texas twist).
- Remedies include:
  - Injunction
  - Damages (unjust enrichment or reasonable royalty damages)
  - Punitive damages if malice is proven
  - Attorneys’ fees in some instances (big change here)
  - Encourages protective orders in trade secrets cases

# Trade Secret/UTSA Litigation

## 1. Damages issue.

*Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867 (5th Cir. 2013), the court, applying Texas law, affirmed a verdict of more than \$40 million in compensatory and punitive damages in a trade secrets misappropriation case, based on actual harm to the plaintiff.

*Bohnsack v. Varco, L.P.*, 668 F.3d 262 (5th Cir. 2012) (affirming \$600,000 award in trade secrets case based on what a reasonable investor would have paid, and emphasizing the flexible nature of the damages inquiry).

# Trade Secret/UTSA Litigation

## 1. Damages issue.

*Southwestern Energy Production Co. v. Berry–Helfand*, 491 S.W.3d 699 (Tex. 2016):

- Reversed an \$11.445 million award in actual damages in a trade secrets misappropriation case because the plaintiff's expert's simple use of a fixed 3% overriding royalty was in error.
- But also reversed the court of appeal's dismissal of the trial court's \$23.89 million award in equitable disgorgement of profits on the grounds that no fiduciary relationship existed between the parties, stating that "we have not expressly limited the remedy to fiduciary relationships nor foreclosed equitable relief for breach of trust in other types of confidential relationships."



# Trade Secret/UTSA Litigation

1. Damages issue.

*In GlobeRanger Corp. v. Software AG United States of Am., Inc.*, 836 F.3d 477 (5th Cir. 2016), the developer of a passive radio frequency identification (RFID) system for commercial use brought action against competitor in state court, alleging trade secret misappropriation. The developer recovered \$15 million at trial in Dallas. The Fifth Circuit affirmed.

The Court endorsed a broad meaning of the word “use” in determining if a defendant “used” a trade secret that had been misappropriated.

# Trade Secret/UTSA Litigation

## 1. Damages issue.

The *GlobeRanger Corp* court also found that the \$15 million award was not excessive, even though Software AG only earned \$860,000 from its project with the Navy it obtained through its misappropriation, and only could have obtained \$140,000 in cost savings as a result of any misappropriation. The court noted that Texas takes a “flexible and imaginative’ approach” to damages calculation in trade secret misappropriation cases that allows calculation of damages based on defendant’s avoided costs.”

The evidence supported the jury’s conclusion that Software AG avoided \$15 million in costs through its misappropriation.

# Trade Secret/UTSA Litigation

## 2. Temporary Injunction Standard

\* *St. Jude Medical S.C., Inc. v. Janssen-Counotte*, No. A-14-CA-877-SS, 2014 WL 7237411, at \*14 (W.D. Tex. Dec. 17, 2014), a post-TUTSA case, the district court judge denied the plaintiff's motion for a preliminary injunction under TUTSA, stating that "there are still far too many open questions and disputed issues of fact to conclude at this juncture St. Jude S.C. has a substantial likelihood of success on the merits of its misappropriation claim." The court also objected to the plaintiff's request for a broad, non-compete like injunction in a trade secrets case.

\* *INEOS Group Ltd. v. Chevron Phillips Chemical Co., LP*, 312 S.W.3d 843 (Tex. App.-Houston [1st Dist.] Dec. 17, 2009, no pet.) (holding that the trial court did not abuse its discretion by finding that manufacturer was sufficiently vigilant in guarding its polyethylene manufacturing technology such that manufacturer was entitled to trade secret protection by a temporary injunction pending trial on the merits).



# Trade Secret/UTSA Litigation



## 3. Whether Information Is Truly A “Trade Secret”

*Texas Integrated Conveyor Systems, Inc. v. Innovative Conveyor*, 300 S.W.3d 348 (Tex. App.–Dallas 2009, pet. denied) (holding that genuine issues of material fact existed as to whether former employer’s customer information constituted a “trade secret”).

# Trade Secret/UTSA Litigation

## 3. Whether Information Is Truly A “Trade Secret”

In *GlobeRanger Corp. v. Software AG United States of Am., Inc.*, 836 F.3d 477 (5th Cir. 2016), GlobeRanger produced sufficient evidence for a jury to reasonably conclude that at least some portion of its system constituted a trade secret.

There was testimony explaining how GlobeRanger’s “filtering” technology was unique and its ability to filter large amounts of information in real time added value compared to traditional inventory management systems. In addition, both the value and the difficulty in reproducing the technology were also shown through emails and testimony from Software AG employees.



# Trade Secret/TUTSA Litigation

4. To have a misappropriation claim under TUTSA, must have the defendant “acquired” the trade secrets in the first place through improper means?

One case says, “yes,” which would seem to gut TUTSA cases against employees who obtained the trade secrets properly during their employment, but then took them off and used them. *Educ. Mgmt. Servs., LLC v. Tracey*, 102 F. Supp. 3d 906, 914 (W.D. Tex. 2015).

# Trade Secret/TUTSA Litigation

- The district court stated that, “[t]he plain language of § 134A.002(3)(B)(i) requires that a defendant “acquire” knowledge of the trade secrets at issue through “improper means.”” *Id.*
- Although, under common law, acquisition of the trade secret through improper means was not a requirement (if, for example, the trade secret was acquired during the existence of confidential relationship), the district court noted that, “TUTSA specifically provides that it “displaces conflicting tort ... law of this state providing civil remedies for misappropriation of a trade secret.”” Tex. Civ. Prac. & Rem.Code § 134A.007. *Educ. Mgmt. Servs., LLC*, 102 F. Supp. 3d at 915.

# IV. Trade Secrets In Discovery

Rule 507 of TRE.

High standard to meet to obtain trade secrets in state court discovery.

*In re Cooper Tire & Rubber Co.*, 313 S.W. 910 (Tex. App.–Houston [14th Dist.] 2010, no pet.) (reversing trial court's order to produce trade secrets under a protective order under Rule 507).

\* 2013 law (TUTSA) addresses this point. See Section 134A.006.

# IV. Trade Secrets In Discovery

In 2016, the Texas Supreme Court ruled that Section 134A.006 of TUTSA authorized a trial court, in an action involving claims for breach of a non-compete agreement and misappropriation of trade secrets, to conduct portions of a temporary injunction hearing involving alleged trade secrets outside the presence of the designated representative of a party defendant to which the secret had not yet been disclosed. *See In re M-I L.L.C.*, 505 S.W.3d 569 (Tex. 2016) (orig. proceeding).

# V. Federal Defend Trade Secrets Act

- Took effect May 11, 2016.
- 3 year SOLs.
- Provides a mechanism for seizing trade secrets where traditional injunctive relief would be insufficient.
- Allows for injunctive relief and damages, including the possibility of a reasonable royalty.
- Provides for whistleblower immunity.
- Allows for punitive damages twice the amount of other damages awarded if the trade secrets were “willfully and maliciously misappropriated,” plus attorneys fees, but only if the employer has advised its employees of the existence of the law’s whistleblower immunity.



# VI. Inevitable Disclosure Doctrine

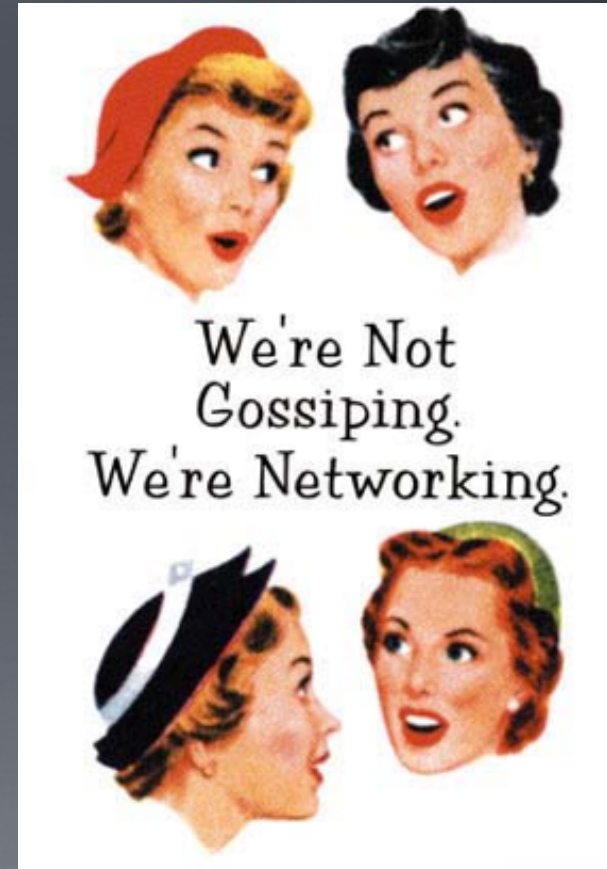
What is the “inevitable disclosure” doctrine?



# It's going to happen ...

“[T]here are circumstances in which trade secrets inevitably will be used or disclosed, even if the defendant swears that he or she will keep the information confidential.”

*Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 242 (Tex. App.—Houston [1st Dist.] 2003, no pet.).



# When does it apply?

When a defendant has had access to trade secrets and then defects to the trade secret owner's competition to perform duties so similar that the court believes that those duties cannot be performed without making use of trade secrets relating to the previous affiliation.



*Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d at 242.

# Have Texas Appellate Courts Adopted The Doctrine?



No Texas case expressly adopts the inevitable disclosure doctrine. *Cardinal Health Staffing Network, Inc.*, 106 S.W.3d 242 (“We have found no Texas case expressly adopting the inevitable disclosure doctrine . . . .”); *Cardoni v. Prosperity Bank*, 805 F.3d 573, 589–90 (5th Cir. 2015) (same).

# BUT . . .

Several Texas cases have applied some variant of the doctrine to grant injunctive relief.

*See 36 A.L.R.6th 537, Applicability of Inevitable Disclosure Doctrine Barring Employment of Competitor's Former Employee (2008); see also Paper at pages 7-16.*



# What Facts Militate In Favor Of Applying Some Variant of The Inevitable Disclosure Doctrine?

1. An employer targets specialized employees for hire specifically because they are weak in the technology areas and needed to obtain talent from competitors to catch up. (*FMC Corp.*).
2. The new employer has rejected requests to describe the employee's duties or to ensure the ex-employer's confidential information will not be utilized. (*Spicer*). (Not all courts require this proof. *See Conley*, 1999 WL 89955, at \*6 (noting that “the richer the henhouse, the less wise it is to trust even the most responsible and reliable of foxes”)).

# What Facts Militate In Favor Of Applying Some Variant of The Inevitable Disclosure Doctrine?

3. The employee's duties are significantly the same at the new employer as they were at their former employer. *Conley*, 1999 WL 89955, at \*5.

# What Facts Militate In Favor Of Applying Some Variant of The Inevitable Disclosure Doctrine?

4. The case involves research and product development employees – the key employees a company relies on to develop and refine highly valued new technologies and give it a competitive edge.

*See FMC Corp.*, 677 F.2d at 505 (applying doctrine because plaintiff company had clearly superior product that it invested \$85 million dollars in and took extraordinary steps to protect its secrecy).

# What Facts Militate In Favor Of Applying Some Variant of The Inevitable Disclosure Doctrine?

5. The employee could easily memorize his ex-employer's confidential information and trade secrets.

*See Spicer*, 2006 WL 1751786 at \*9-11; *Williams*, 704 S.W.2d at 471 (plaintiff's ex-employee testified that he "had a photographic memory and is able to observe the way something is made and then copy it").

# What Facts Militate In Favor Of Applying Some Variant of The Inevitable Disclosure Doctrine?



6. The new employer refuses to acknowledge that the information is a trade secret.

*See FMC Corp.*, 677 F.2d at 505.



# Practical Pointers For Departing Employees:

1. Give 2 weeks or more of notice in writing.
2. Offer to help transition in writing, and follow through.
3. Don't take anything, and put that you did not in writing.
4. Don't destroy electronic information. Even if you are just "cleaning up."
5. Be honest about where you are going to work.
6. Don't solicit customers or coworkers before you leave. Don't even tell customers or coworkers you are leaving before you do.
7. Don't start showing up to the office at odd, off-hours, or accessing the server at odd hours.

# Practical Pointers For Departing Employees:

8. Provide a carefully worded resignation letter that truthfully reveals where you are going to work, and the name of your new job title.
9. Respond to any post-termination threatening letters honestly after visiting with legal counsel. Don't "blow off" the letters.
10. Work to the end - closing a big sale for your employer before leaving pays huge dividends if they come after you.
11. Tell the new potential employer about your restrictions in advance – before you accept the offer, and have a joint plan. Otherwise, you may end up without any job after you quit and your ex-employer sends a nasty letter to your new employer.

# Practical Pointers For New Employers:

1. Do due diligence on agreement and other issues before hiring.
2. Have employee sign agreement representing they took nothing from former employer and will not use or disclose any of former employer's confidential information or trade secrets, and no one can order them to do otherwise.
3. Include in agreement that employee can and will do job without using or disclosing any of ex-employer's confidential information or trade secrets.
4. Have a plan on a response before hiring, if it is a "hairy" hire (employee has non-compete, history of litigation with company, *etc.*)
5. Have employee sign off on job description that does not violate an enforceable non-compete agreement during its term.

# Practical Pointers For Ex-Employers:

1. Forensics dig asap, with expert report to reflect results and present to court if need be.
2. Don't always walk employee out the door. Rather, consider shutting off all access, and then have them answer critical questions in a signed writing on the spot. This can provide *awesome* evidence to use in court.
3. Put ex-employee and new employer on notice with a strong letter, and demand for information. Often, this will lead to an acceptable resolution, especially when sophisticated counsel represent all the parties.
4. Act fast in going to court, but not too fast (before you have evidence locked down).
5. Before you sue, ask: Does the employee have claims against us that our suit may stimulate them to bring? (*e.g.*, FLSA class action example).

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