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EMPLOYMENT LAW

Tips to Survive the Great Resignation's Wave of Noncompete Litigation

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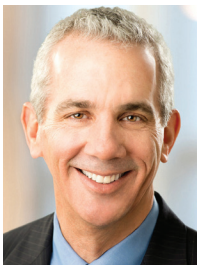
Special to the Legal

The "Great Resignation" is generating a surge in restrictive covenant litigation across the United States as workers quit their jobs to take better-paying openings with competitors, often despite noncompete agreements, and use their phones or computers, intentionally or not, to take confidential information on their way out the door.

This trend and recent litigation offer lessons on how to keep "clean hands" in such a separation and how to avoid being on the losing end of an emergency, high-stakes lawsuit.

First, with regard to the trend. There is no denying that the nation's Great Resignation continues to roll: more than 4 million workers quit their jobs in each of the first two months of 2022, outpacing 2021's numbers, when just under 48 million resigned during the entire year, according to the U.S. Department of Labor's Bureau of Labor Statistics. In addition, a recent survey by Willis Towers Watson found that 44% of employees are "job seekers," with 33% actively looking and 11% planning to look for new work soon—primarily to make more money.



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As for restrictive covenant litigation, while no federal or state database tracks the number of cases, employment lawyers report a dramatic increase in such litigation. Our firm, for instance, is seeing double the number of these cases in the past year, and counting.

Such Great Resignation noncompete litigation reveals seven trends—and tips—worth noting:

• **The laws they are a-changin'.** At the federal level, President Joe Biden has issued an executive order on "Promoting Competition in the American Economy," which includes a call for the Federal Trade Commission (FTC) "to curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility." That order has had no enforcement impact yet, but reflects a zeitgeist playing out in state legislatures across the country. Twenty-four states have modified their noncompete laws in recent years, including limits or bans on using noncompetes against low-wage and nonexempt workers. Others require continued salary payments to employees during any period that they are barred from competing. And some states even prohibit venue clauses that require employees to litigate these issues outside of the state in which they work. Most recently, the District of Columbia joined California in banning noncompete agreements in most contexts.

Tip: Employers—and employees contemplating a jump—should

seek legal review and advice as to changes in state law that may apply, especially if a departure is imminent.

• **Contracts, loopholes and consideration.** In two recent litigations, we found loopholes in the noncompete agreements that allowed the employees to resign and work for competitors, despite the broader language of the agreements. Other contract deficiencies are common, including lack of consideration if not contemplated and signed at or before the start of employment in Pennsylvania, no copy of the signed agreement in the employer's personnel file or data systems, and terms that are overly broad and not reasonably restricted in time and geography to the employee's duties.

Tip: Given that almost half of surveyed employees are now looking for new jobs, employers should consider an immediate review and audit of their existing restrictive covenant agreements to ensure that signed versions are in secure personnel files or databases for each critical employee (it sounds obvious, but this is a common problem when it comes time to enforce the contracts); determine if the restrictions are enforceable under existing state laws and whether any loopholes could limit enforcement—and develop a plan for adopting revised agreements, if needed; and include fee-shifting and favorable choice-of-venue clauses in such agreements.

• **Dirty hands and electronic footprints**. Departing employees in 2022 continue to hold onto—and sometimes download—their employer's confidential information and data after resigning, regardless of any contractual obligations or duties otherwise. Employees, even sophisticated executives and IT professionals, often fail to realize that every email, every download, every print-out, and every deletion can be tracked by their former employers. And if a device is tossed in a river (yes, we've heard this), "lost," or otherwise destroyed, then the employee may be deemed to have unclean hands and lose credibility. Conversely, employers inexplicably continue to fail to require a review of their departing employees' devices or proactive removal of such data upon a resignation. As a result, the parties end up in court sometimes justifiably and other times due to simple neglect or paranoia.

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Tip: To avoid the misappropriation of confidential information employers should have forensic IT analysts—in-house or hired guns—at the ready to immediately begin reviewing an employee's computer activity upon notice of resignation. Better yet, implement an ongoing IT monitoring process to flag suspicious activity by all employees. Moreover, given the increased number of employees working at home post-COVID, employers should consider agreements and methods for recovering devices and data from employees' home offices. For employees: do not download or take anything from your employer, especially in the final weeks or months, as it will be discovered. And make conspicuous, documented efforts to return such information before the last day of work, destroying data only upon approval of the employer.

• **The careful plotters.** A helpful trend we see involves employees who carefully plan their resignations, and review their restrictive covenants with their own counsel and their new employer to ensure they do not breach their obligations. Hiring employers—despite their desperation to fill openings during 2022's historically low unemployment rate—should be diligent in reviewing these restrictions and ensuring compliance by the employee, including clauses in the new employment contract and absolute prohibitions against retaining or using any confidential information from the prior employer.

Tip: High-level executive and sales employees should seek a commitment by the new employer to defend them, and continue their compensation, should restrictive covenant litigation ensue. Hiring employers, of course, will want an "out" should it be discovered that the transitioning employee misappropriated trade secrets or engaged in other deceptive or improper conduct

• **The Hamlet plodders.** To sue or not to sue, that is the question when an employer discovers that an employee has gone to work for a competitor. Cease and desist letters are an essential and affordable first step—but what happens next is often a more anguished analysis. Noncompete litigation can be extremely expensive (six-figure legal bills in the first two months are not uncommon) and many employers, just crawling out of COVID, may not have the funds for such a battle or the desire to divert management attention to such a non-productive endeavor. Such due deliberation is appropriate, but at some point early on the former employer must act "or get off the can," as they say. Too much delay and debate, a la Hamlet, will lead to a defense that the former employer "sat on its rights," the "status quo" changed, and injunctive relief is no longer appropriate.

Tip: Employers must act promptly to enforce their restrictive covenants or they will lose some of their rights (but not all, as noted in the next bullet point).

• **Seeking damages and lost profits, instead of an injunction**. We have seen several cases in which the employer chose to seek damages only, and not injunctive relief, due to either the facts of the case (e.g., delay in enforcement) or the desire to limit legal fees. This can be an appealing option in the right case, as it permits the former employer to engage in discovery, determine the extent of economic harm caused, and dissuade other employees from breaching—while at the same time limiting the scope of litigation, costs and fees. Moreover, in Pennsylvania, parties should keep in mind that even if a court might not allow injunctive relief to enforce a noncompete (e.g., an order to stop working for a competitor), the former employer can still seek lost profits and other damages from the breach. Such economic damages can be exorbitant, as in *Appian v. Pegasystems*, in which a Virginia jury this month awarded an eye-popping $2.06 billion (with a b) in a case involving a former Appian contractor used as a "spy" to transfer trade secrets to Pegasystems.

• **Counterclaims can turn the tables**. Finally, we find that parties often underestimate the impact of counterclaims by the departing employees in recent restrictive covenant litigation. Departing employees and employers on both sides of the dispute should fully explore with counsel whether the former employer has "unclean hands" or otherwise engaged in unlawful conduct with respect to the employee. Counterclaims we have seen and used to good effect post-COVID include violations of the Fair Labor Standards Act, wage payment/wage theft claims (especially with the treble recovery now possible in New Jersey), discrimination, defamation (often when the old employer slanders the former employee to co-workers and customers), and tortious interference with contract. Credibility of the parties is incredibly important in noncompete litigation, and defendant-employees should be ready to launch their counterclaims as soon as possible, both to balance the narrative to the court and to have such claims included in any expedited discovery.

Tip: Involve counsel early in exploring such counterclaims and raise them as soon as possible. If the facts and the law align, flip the narrative to make the story about the employer mistreating the employee, and not vice versa. •