

Injunction Strategies: Seeking and Avoiding Emergency Injunctions

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
PLAINTIFF: STRATEGIES FOR SUCCESS	1
A. Purpose(s) of the Motion	1
1. Status Quo vs. Shifting Momentum.....	1
2. Drive Early Settlement.....	2
3. Judge's Initial Impressions/Education about the Case	2
4. Other, E.G., Get Employee(s) Fired With or Without Injunction.....	3
B. Threshold Question: to Move or Not to Move.....	3
1. Immediacy of Harm/Damage to Business	3
2. Expense	3
3. Loss on Motion Will Shift Momentum to Defendant.....	3
C. Strategy: How Much Investigation and How Much Do You Spend?.....	4
D. How Fast Do You Move?	5
E. State or Federal Court?	6
1. How Good Is Your Case?	6
2. Do You Have an Option: Federal Question, 28 U.S.C. § 1331?	6
3. Minnesota Uniform Trade Secrets Act, Minn. Stat. §§ 325C.01-325C.07.....	9
4. Applicable Contract Provisions	10
5. Procedural requirements under Minnesota and Federal Court Rules	10
F. Proof of Immediate and Irreparable Harm – The Key Factor.....	14
G. Who Do You Sue: Employee, New Employer or Both?	16
H. Request Expedited Discovery or Other Lesser Relief?.....	17
I. Unique Issues with Arbitration Provisions/Agreements.....	17
DEFENDANTS: STRATEGIES FOR SUCCESS	19
A. High Level Goals	19
1. Defeat the Motion	19
2. Peace with Honor.....	19
3. Drive early settlement.....	20
B. Important and Time-Sensitive Issues.....	20
1. Removal Available?.....	20
2. Arbitration?	20
C. Strategy and Tactics.....	20
1. Fight or flight?	20
2. Counterclaims?	20
3. How Much Investigation (Declarations, Experts, Forensics)?	21
4. Two Firms or One?	21
5. Joint Defense Agreements	22
6. Indemnification	22
7. Early Mediation/Settlement Conference.....	22
8. Possible Voluntary Actions	22
9. Computer Forensics	23

INTRODUCTION

Restrictive covenant and trade secret litigation is often won or lost based on the result of the initial motion for temporary restraining order (“TRO”) or other early injunctive relief. The following materials provide a checklist and overview of strategies for both former employers asserting, and new employers defending, claims for breach of non-competes, misappropriation of trade secrets, and similar claims involving former-employee competition. We also set out applicable court rules and legal authority on certain key points.

For plaintiffs pursuing claims against former employees for unlawful competition and/or misappropriation of confidential or trade-secret information, TRO motions, or early motions for preliminary/temporary injunctive relief, may be a forceful and very effective litigation maneuver. Such motions, however, require a significant showing by a plaintiff in order to prevail, and can require significant effort from counsel to prepare a compelling and ultimately successful motion.

Not all lawsuits present at the outset the necessary evidence and the requisite threat of irreparable harm that are needed to prevail on an early motion. In many cases, even ones in which a plaintiff may ultimately prevail at trial and obtain significant relief, the discovery process is needed to develop the evidence that will support a later motion for injunctive relief. Plaintiffs’ counsel needs to critically analyze whether a given case warrants seeking extraordinary injunctive relief, also factoring in the negative impact of a losing motion. Defendants’ counsel also needs to be sharply focused on the strict legal requirements for a successful motion, to put a plaintiff to their proof. Defendants’ counsel, when faced with such a motion, also need to be prepared to dig in quickly and investigate the key underlying facts and to also consider other alternatives to a formal ruling by the Court on the motion. In short, early motions for injunctive relief require serious consideration from both sides, plaintiff in deciding whether and how to pursue a motion, and defendant in recognizing the significant threat of the motions and analyzing how to best respond.

PLAINTIFF: STRATEGIES FOR SUCCESS

A. Purpose(s) of the Motion

1. Status Quo vs. Shifting Momentum

If early motions for injunctive relief are pursued and granted – even in part – that may fundamentally shift momentum in the case, creating significant pressure on the defendant to entertain early settlement discussions and seek an early end to the litigation. In the absence of such a motion, the plaintiff is left with the prospect of protracted litigation, spanning several months and potentially exceeding 18 months before a formal resolution may be obtained in court. In the absence of such a motion, a defendant company is likely to proceed with business activity under the status quo, competing directly and aggressively against plaintiff, and potentially causing significant losses to the plaintiff’s business. Although a plaintiff may always pursue an award of monetary damages, significant business harm may result which makes it

difficult to continue to fund the litigation and, more importantly, for the plaintiff company to remain in business. An early motion for injunctive relief is a plaintiff's only real opportunity to seize control over the litigation early.

2. Drive Early Settlement

As noted, the pursuit of such a motion may have a significant effect on driving early, meaningful, settlement discussions. Because likelihood of success on the merits is part of the legal standard, injunction motions are the rare circumstance when a judge may "tip her hand" early in the case indicating which party is likely to prevail. And as a practical matter, even a partial victory by a plaintiff may present significant business obstacles for a defendant, in limiting the scope of permitted business activity. In addition, the existence of a court order indicating some likely wrongful conduct by defendant can be quite harmful to other aspects of the defendant's business and potentially drive away other customers/clients. On the other hand, an unsuccessful motion, particularly if the judge is critical in his/her order of the plaintiff's claims and evidentiary support, will both embolden the defendant and create the prospect for the plaintiff of much more protracted, and expensive, litigation.

Either outcome is likely to drive the parties to the settlement table, whether through formal mediation/settlement conferences with the court, or informal negotiations between the parties. The results of our informal review of numerous court files support this conclusion. Specifically, a *Westlaw* review of 30 recent cases in which the Federal District of Minnesota granted or denied an early motion for an injunction in a case involving a restrictive covenant and/or trade secret misappropriation claims disclosed that 6 out of the 30 cases were resolved within 60 days of the order granting or denying the injunction and that 11 of the 30 cases were resolved within 90 days of the order. It is expected that a similar review of Minnesota state court decisions would yield similar results, but the limitations of the Minnesota courts' electronic filing system would render such a review much more difficult to undertake.

3. Judge's Initial Impressions/Education about the Case

Motions for early injunctive relief of course present the merits of a case to a judge in a uniquely expedited fashion. Indeed, because of the moving party's burden to establish likely success on the merits of the case (discussed in more detail below), these motions require the judge to dive into the merits of the underlying claims of supposed unlawful conduct and resulting business harm to the plaintiff (unlike other early motions dealing with discovery or case logistical issues). As many practicing attorneys can attest, it is often quite difficult to change a judge's initial impressions of a case after the judge has first assessed the strength of the claims and defenses. Given this danger, both sides need to commit to undertake serious efforts in bringing and opposing these motions. If a plaintiff is careful, and reasonable, in the scope of relief sought in a motion for early injunctive relief, then it may be possible to benefit from even a partially successful motion through the creation of an initial impression by the judge that is favorable to the plaintiff's claims and casts the defendant in an unflattering light. From a defendant's perspective, a strong opposition to the motion and the ultimate rejection of the motion by the judge may create the opposite impression and cause the judge to remain skeptical of the case.

4. Other, e.g., Get Employee(s) Fired With or Without Injunction

Another strategic consideration, when a plaintiff is considering pursuing such a motion, is the plaintiff's central objective in pursuing the litigation. As is often the case, the pivotal goal is the termination by a defendant company of plaintiff's former employee(s), who would likely also be included as defendants in the lawsuit. Depending upon the value of the new employee to their new employer, the defendant may determine that from a business-cost perspective that it makes more sense to terminate the employee than to both finance an expensive lawsuit defense and also bear the potential negative business impact of the pendency of such litigation. Also, such a motion may allow plaintiff the opportunity to forcefully present to the defendant company new evidence of previously unknown and wrongful conduct of the newly hired employee(s), such as misappropriation of confidential business information and/or trade secrets of plaintiff, which may change defendant's views about the wisdom of continuing to employ the defendant employees. A plaintiff may have other such objectives which a motion for early injunctive relief may make accomplishable at an early, and cost-effective, stage in the litigation.

B. Threshold Question: to Move or Not to Move

1. Immediacy of Harm/Damage to Business

The most important factor, by far, in determining success on a motion for early injunctive relief is whether the plaintiff can establish truly immediate and irreparable harm unless the injunctive relief is granted. (Legal authorities on this issue are set out later in these materials.) Even solely from a business perspective, this issue often carries a similar weight, *i.e.*, can the plaintiff's business ultimately be made whole through a later award of money damages? Or might that relief come too late to truly help the plaintiff?

2. Expense

Motions for early injunctive relief, if calculated to succeed, are expensive, with the total cost often getting into tens of thousands of dollars. As such, these motions should not be pursued lightly. In pursuing such a motion, a plaintiff is asking a judge to quickly "roll up their sleeves" and dig deeply into the merits of a lawsuit, while also seeking extraordinary relief from the judge. Therefore, unless a plaintiff has the rare circumstances where they are thoroughly convinced that the defendant company (or defendant former employee) simply cannot afford to fight a valid lawsuit, it is usually a serious mistake to "pinch pennies" and bring forth a weak motion, not fully supported by a strong evidentiary record and legal authority. In short, motions for early injunctive relief are the type of litigation activity where the client usually "gets what it paid for."

3. Loss on Motion Will Shift Momentum to Defendant

As previously noted, pursuing a motion that is ultimately unsuccessful may actually be counter-productive for a plaintiff and could negatively shift momentum in favor of the defendant. In addition to possibly creating a negative impression about the lawsuit with the judge, the defendant could be emboldened to continue aggressively defending against the motion, to the

exclusion of pursuing early settlement discussions. In many cases, therefore, the better option for a plaintiff may be to delay seeking injunctive relief until discovery has progressed and the plaintiff has had the opportunity to develop a more compelling factual record in support of the motion.

C. Strategy: How Much Investigation and How Much Do You Spend?

Given the previous considerations, plaintiff's counsel must give serious thought, prior to even commencing the lawsuit, about how much evidence is available to be presented as part of a motion for early injunctive relief and options for rapidly developing more supporting evidence. Evidence of a plaintiff's former employees "jumping the gun" and essentially "signing up" customers and accounts before the end of their employment with plaintiff can be quite compelling to judges. Related evidence establishing knowledge of, or even encouragement of, that conduct by the new employer-defendant may also carry significant weight. In addition, some judges are more swayed by firm evidence of misappropriation by former employee defendants than by motions based solely on the wording of a non-compete agreement.

Options for pre-lawsuit and pre-motion legal maneuvering and/or investigation include:

- Cease & Desist: Sending a pre-lawsuit cease and desist communication to the potential defendant demanding essentially the same relief that would be requested in an early motion.
- Computer Forensics: Plaintiff should engage in early analysis of computer/electronic evidence that may exist establishing unlawful actions of defendant(s). That should include review of recent activity on the former employee(s) company email account and, if the in-house capability exists, reviewing the former employee(s) company computer devices for suspicious file downloading (copying), transferring, and deletion activity. Depending upon the magnitude of the business threat presented and the plaintiff's financial resources, they should consider seeking the services at this point of an outside computer forensics expert. This type of evidence tends to be quite persuasive for judges.
- Verified Complaints: It is common to draft a Complaint with a motion for early injunctive relief in mind. That tends to lead to a much lengthier and more detailed pleading which is presented as a "verified complaint" and signed off on by a representative of the client/plaintiff (presumably possessing knowledge of the key facts that would justify injunctive relief). Thoughtful selection of the complaint signatory is extremely important. Using a verified complaint can greatly speed up the motion paper preparation, because it may greatly eliminate the need to prepare supporting factual affidavits or declarations.
- Supporting Affidavits/Declarations: Whether utilizing the verified complaint approach or going with stand-alone witness affidavits/declarations, detailed discussions with the client and possible key witnesses are a crucial step towards building a motion for early injunctive relief. Counsel needs to do quick internal investigation with the client and

determine which persons could provide affidavits/declarations establishing key facts. Haphazard efforts at quickly “slapping out” factual affidavits/declarations can be costly to a plaintiff, creating effective impeachment avenues for a defendant and damaging plaintiff’s credibility with the judge (and perhaps later, with the jury).

- Motion Filed at Start of Lawsuit: Counsel needs to decide whether it is more advantageous to immediately serve and/or file the motion along with summons and complaint, or to wait to file the motion until sometime later. In cases where a plaintiff already possesses compelling evidence at the time of the commencement of the lawsuit, the immediate filing of a motion may create the most pressure and be the most effective course of action.

The ultimate tension on these decisions is typically between urgency and cost-effective expenditure of resources. That is a very fact-specific inquiry that is often more of a business-based decision than a legal one.

D. How Fast Do You Move?

Perhaps the most important – and difficult – decision for a plaintiff is the question of timing for pursuit of a possible motion for early injunctive relief. Motion options include:

- *Ex parte* TRO motion (requires either showing of sincere but unsuccessful efforts to provide notice to opposing party, or articulation of unusual and emergent circumstances supporting a claim that notice should not be required, in order to avoid significant and irreparable harm)
- TRO motion with notice provided to defendant(s) (the more common TRO approach)
- Early preliminary injunction motion (filed at start of lawsuit or shortly after lawsuit commencement, *e.g.*, within 30 to 45 days thereafter)
 - Expedited Discovery: Request as part of the motion the right to engage in expedited discovery (as discussed more below, expedited discovery may quite useful for building the support needed for a winning motion)
 - Court-Ordered Computer Forensics: Request as part of the motion the right to early access to defendant’s computer devices and the right to engage in computer forensics efforts
- Later preliminary injunction motion (filed after engaging in more traditional and thorough discovery)
- Foregoing preliminary injunctive relief and waiting to seek a permanent injunction at the end of the case

(Applicable court rules are set out later.)

Here again, the ultimate tension typically comes down to weighing urgency and magnitude of potential business losses with cost-effective expenditure of resources. In some cases, whether one that is truly a “bet the company” case or where a significant account or piece of business is at serious risk of irreversible loss, a plaintiff may have little choice but come out fast and hard, pursuing the strongest motion possible. In other cases, either where the plaintiff is equipped to “weather the storm” or it simply lacks adequate early proof to obtain meaningful injunctive relief at the outset of the litigation, it may be wiser for a plaintiff to adopt a more long-term approach to the litigation, *i.e.*, engaging in more traditional and thorough discovery and then filing a preliminary injunction motion later in the litigation.

E. State or Federal Court?

In some cases, the plaintiff may have a choice to make between filing the lawsuit in state or federal court. The forum may sometimes affect the likelihood of success on a motion for early injunctive relief. Possible pathways to federal court and controlling legal requirements and standards applicable to motions for injunctive relief in both federal and state court are set out in the following discussion points.

1. How Good Is Your Case?

It is difficult to predict with precision whether, given the choice, it is better for a plaintiff to be in state or federal court. Conventional wisdom often suggests that the stronger the case, the better it is to be in federal court. With motions for early injunctive relief and cases involving non-compete and business information misappropriation, generally, other considerations may come into play. It is sometimes difficult to get an expedited motion heard by a federal judge and more difficult than with a state court. It is also fairly typical of federal judges that they are more demanding and expect stronger motion papers from moving parties. In addition, the underlying claim may suggest that it is better in the long run to be in front of a state court judge. With trade secret misappropriation cases, in particular, the federal court system (at least the Minnesota federal court and the Eighth Circuit) can be much more demanding of proof of a trade secret and plaintiffs may accordingly be at a higher risk of losing on those claims at the summary judgment stage. In short, the decision as to which court should be chosen should be a reasoned one, tied to the particular circumstances present in a given case.

2. Do You Have an Option: Federal Question, 28 U.S.C. § 1331?

a. *Federal Defend Trade Secrets Act, 18 U.S.C. §1836*

Since its enactment in 2016, the Federal Defend Trade Secrets Act (DTSA) provides a new path for plaintiffs to get into federal district court via federal question jurisdiction. It should be noted that the DTSA does not preempt civil or criminal remedies under state or federal law. *See* 18 U.S.C §1838. Therefore, a plaintiff can bring both state and federal trade secret claims based upon the same underlying facts. The DTSA provides, in pertinent part:

An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.

18 U.S.C. §1836(b)(1).

The DTSA's remedies expressly include injunctive relief, damages for actual losses, additional damages for unjust enrichment not included in the actual loss, or a reasonable royalty in lieu of damages. *See* 18 U.S.C. §1836(b)(3). Civil seizure is also available in extraordinary circumstances, where necessary to prevent the disclosure or dissemination of a trade secret. *See* 18 U.S.C. §1836(b)(2). The presence of this provision and possible remedy is one significant way in which the DTSA deviates from Minnesota's separate trade secret statute (discussed below).

The definitions under the DTSA are quite similar to those contained in various state trade secret statutes. Key definitions under the DTSA are as follows:

- (3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
 - (A) the owner thereof has taken reasonable measures to keep such information secret; and
 - (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

- (5) the term "misappropriation" means—
 - (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - (B) disclosure or use of a trade secret of another without express or implied consent by a person who—
 - (i) used improper means to acquire knowledge of the trade secret;
 - (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was—
 - (I) derived from or through a person who had used improper means to acquire the trade secret;

(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or

(iii) before a material change of the position of the person, knew or had reason to know that—

(I) the trade secret was a trade secret; and

(II) knowledge of the trade secret had been acquired by accident or mistake;

(6) the term “improper means”—

(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and

(B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition;

18 U.S.C.A. § 1839.

b. *Computer Fraud and Abuse Act, 18 U.S.C. § 1030*

The Computer Fraud and Abuse Act (CFAA) provides federal question jurisdiction to bring a civil action for damages caused by computer fraud. *See* 18 U.S.C. § 1030(g). Remedies available under the CFAA also expressly include injunctive relief. *Id.*

To assert a civil action under the CFAA, a plaintiff must plead that the defendant:

(1) accessed a protected computer, by

(2) without authorization or exceeding authorized access, and

(3) caused loss in excess of \$5,000.

Porters Bldg. Centers, Inc. v. Sprint Lumber, No. 16-06055-CV-SJ-ODS, 2017 WL 4413288, at *2 (W.D. Mo. Oct. 2, 2017) (*citing* 18 U.S.C. §§ 1030(a)(4), 1030(c)(4)(A)(i)(I)); *see also Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058, 1065–66 (9th Cir. 2016), cert. denied, 138 S. Ct. 313, 199 L. Ed. 2d 206 (2017). Recovery for damages is generally limited to economic damages, including consequential damages. *See, e.g., Keg Technologies, Inc. v. Laimer*, 436 F. Supp. 2d 1364 (N.D. Ga. 2006); *In re Intuit Privacy Litigation*, 138 F. Supp. 2d 1272 (C.D. Cal. 2001); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577 (1st Cir. 2001); *Quantlab Technologies Ltd. (BVI) v. Godlevsky*, 719 F. Supp. 2d 766 (S.D. Tex. 2010). Generally, other forms of relief, such as the punitive/exemplary damages, attorney’s fee awards, and recovery of costs are not likely to be available under this statute.

3. Minnesota Uniform Trade Secrets Act, Minn. Stat. §§ 325C.01-325C.07

The Minnesota Uniform Trade Secrets Act (MUTSA), similar to the DTSA, also provides for the availability of injunctive relief. *See* Minn. Stat. § 325C.02; *see also Analog Techs. Corp. v. Knutson*, A10-1181, 2011 Minn. App., 2011 WL 1236164, at *7, (Minn. App. Apr. 5, 2011). The full universe of remedies available under the MUTSA expressly include injunctive relief, damages for actual losses, additional damages for unjust enrichment not included in the actual loss, or a reasonable royalty in lieu of damages. *See* Minn. Stat. §§ 325C.02, 325C.03, and 325C.04.

The MUTSA definition of “trade secrets” is essentially identical to the definition contained in the DTSA, and is as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Minn. Stat. § 325C.01, subd. 5.

To be liable for trade secret misappropriation under the MUTSA, a defendant must have: (a) “acqui[red] a trade secret of” the plaintiff’s; and (b) defendant must “know[] or ha[ve] reason to know that the trade secret was acquired by improper means. . . [which] include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”

Importantly for new employers, liability exists for misappropriation of trade secrets even where a defendant originally obtained trade secret information through legitimate means, when that party subsequently wrongfully discloses and uses the trade secrets for their own benefit. “Acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means” constitutes misappropriation. *See* Minn. Stat. § 325C.01, subd. 3(i). *See also Rehab. Specialists, Inc. v. Koering*, 404 N.W.2d at 306-307 (continued retention and use of employer’s information by after the end of the employment can constitute misappropriation); *Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 695 (D. Minn. 1986) (same). A plaintiff need not prove that the new employer defendant encouraged or even knew about the new employee’s misappropriation of the plaintiff’s trade secrets in order to prevail in a trade secrets claim against the new employer.

4. Applicable Contract Provisions

Employment-related agreements, including non-compete and confidentiality agreements, commonly include provisions recognizing an employer's right to seek injunctive relief in court in the event of any breaches of the contract. Neither the federal trade secrets statute (the DTSA), nor the Minnesota trade secrets statute (the MUTSA) preempt or preclude contract-based claims. *See* 18 U.S.C §1838 and Minn. Stat. § 325C.07. Courts, however, rarely grant motions for early injunctive relief solely upon contractual recitations that a breach of an employment-related agreement will necessarily cause "irreparable harm" to the employer.

These agreements also commonly include forum selection clauses. Although the clauses are enforceable to *require venue* in a particular forum (court), they may not properly create court jurisdiction where independent grounds for jurisdiction are lacking.

5. Procedural requirements under Minnesota and Federal Court Rules

a. *Minnesota Injunction Standard and Procedural Rules*

Minnesota Injunction Standard: Minnesota courts consider five factors in determining whether a TRO or temporary injunction should issue. These "*Dahlberg* factors" are:

- (1) **Relationship of the Parties:** The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
- (2) **Irreparable Harm:** The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
- (3) **Likelihood of Success on the Merits:** The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in the light of established precedent fixing the limits of equitable relief.
- (4) **Public Policy:** The aspects of the fact situation, if any, that permit or require consideration of public policy expressed in the statutes, state and federal.
- (5) **Court's Burden:** The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros. v. Ford Motor Co., 137 N.W.2d 314, 321-22 (Minn. 1965).

Applicable Minnesota Court Rules: The main Minnesota court rules addressing TROs and temporary injunctions are Rules 65.01 (Temporary Restraining Order; Notice; Hearing; Duration) and 65.02 (Temporary Injunction), of the Minnesota Rules of Civil Procedure. Those Rules state, in their entirety, as follows:

Minn. R. Civ. P. 65.01

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required. In the event that a temporary restraining order is based upon any affidavit, a copy of such affidavit must be served with the temporary restraining order. In case a temporary restraining order is granted without notice, the motion for a temporary injunction shall be set down for hearing at the earliest practicable time and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and, if the party does not do so, the court shall dissolve the temporary restraining order. On written or oral notice to the party who obtained the *ex parte* temporary restraining order, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Minn. R. Civ. P. 65.02

- (a) No temporary injunction shall be granted without notice of motion or an order to show cause to the adverse party.
- (b) A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor.
- (c) Before or after the commencement of the hearing on a motion for a temporary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion. Even when this consolidation is not ordered, any evidence received upon a motion for a temporary injunction which would be admissible at the trial on the merits becomes part of the trial record and need not be repeated at trial. This provision shall be so construed and applied as to preserve any rights the parties may have to trial by jury.

These court rules make clear that TROs are intended to be short-lived and that *ex parte* TRO motions are only available under very limited circumstances.

Motions for temporary injunctive relief are considered non-dispositive under Minnesota law. As explained in the Advisory Committee Comment to Rule 115, Minn. Gen. R. Prac., 1997 Amendment:

Federal court practice treats motions for interlocutory injunctive relief as dispositive because these matters are heard with other dispositive motions before judges rather than magistrates, but there is no reason to treat these motions as dispositive in state-court practice. Indeed, most such motions in state court are heard on expedited schedules set at the time of initial appearance.

Accordingly, the timing in Minnesota state court for motions for a temporary injunction is as follows. The moving party must file notice of motion, proposed order, affidavits/declarations (if any), and a memorandum with the court 14 days prior to the hearing. The opposing party must file its response documents 7 days prior to the hearing, and the moving party's reply brief is due 3 days prior to the hearing. *See* Minn. Gen. R. Prac. 115.04. The timing for TRO motions is generally within the court's discretion. But with respect to *ex parte* TRO motions, the court must when granting the motion set a court hearing (converting the TRO into a temporary injunction) to take place "at the earliest practicable time." *See* Minn. R. Civ. P. 65.01.

b. Federal Injunction Standard and Procedural Rules

Eighth Circuit Injunction Standard: The Eighth Circuit has identified four factors in determining whether a TRO or preliminary injunction should issue. These "*Dataphase* factors" followed by the Minnesota Federal District Court are:

- a. The threat of irreparable harm to the moving party if an injunction is not granted;
- b. The harm suffered by the moving party if injunctive relief is denied as compared to the effect on the non-moving party if the relief is granted;
- c. The probability that the moving party will succeed on the merits; and
- d. The public interest.

Dataphase Sys., Inc. v. CL Sys., Inc., 640 F.2d 109, 113-14 (8th Cir. 1981). The federal *Dataphase* factors are very similar to the core "*Dahlberg* factors" followed by Minnesota state courts.

Applicable Federal and District of Minnesota Court Rules: The main Federal court rule addressing TROs and temporary injunctions is Rule 65 of the Federal Rules of Civil Procedure. That Rule states, in its entirety:

(a) PRELIMINARY INJUNCTION. (1) Notice. The court may issue a preliminary injunction only on notice to the adverse party. (2) Consolidating the Hearing with the Trial on the Merits. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER. (1) Issuing Without Notice. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (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.

These court rules make clear that TROs in federal court are also intended to be short-lived (they normally expire after 14 days) and that *ex parte* TRO motions are only available under very limited circumstances.

Motions for injunctive relief are considered **dispositive** at the federal level. Accordingly, the timing in federal court in Minnesota for motions for a temporary injunction is as follows. A moving party must file a notice of motion, proposed order, affidavits/declarations (if any), and a memorandum of law with the court 42 days prior to the hearing. The opposing party must file its responsive papers 21 days prior to the hearing. The moving party's reply brief is due 14 days prior to the hearing. *See* Rule 7.1(c), Local Rules for the Federal District of Minnesota. Similar to the Minnesota court rules, the timing for TRO motions in Federal District Court is generally within the court's discretion. But with respect to *ex parte* TRO motions, the court must when granting the motion set a court hearing (converting the TRO into a temporary injunction) to take place "at the earliest practicable time," again similar to the practice in Minnesota state court. *See* Fed. R. Civ. P. 65(3).

c. Required Bond

Both Minnesota state and federal court rules require the posting of a mandatory bond (or other form of security, such as depositing of cash into court) to secure any motion for temporary injunctive relief. *See* Minn. R. Civ. P., Rule 65.03 and Fed. R. Civ. P, Rule 65(c). This is a requirement that is often forgotten by moving parties and can trip them up. In reality, however, the "mandatory" security requirements can be fairly easily side-stepped, because *the amount* of the security is solely in the court's discretion. Judge's frequently approve security in very nominal amounts, e.g., \$1,000 to \$2,000, even for very burdensome injunctions. "The district court has wide discretion in setting the amount of the bond." *Tonna Heating Cooling, Inc. v. Waraxa*, No. CX-02-368, 2002 WL 31687601, at *4 (Minn. Ct. App. Dec. 3, 2002) (setting bond at \$2,000); *see also Sch. of Comm'n Arts, Inc. v. Acad. Educ. Ctr., Inc.*, No. C7-98-483, 1998 WL 644119, at *2 (Minn. Ct. App. Sept. 22, 1998) (setting bond at \$538,000).

The entirety of the applicable court rules are as follows.

Fed. R. Civ. P, Rule 65(c)

The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to

pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

Minn. R. Civ. P., Rule 65.03

No temporary restraining order or temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

F. Proof of Immediate and Irreparable Harm – The Key Factor

The key factor when seeking early injunctive relief, whether in federal court or state court, is plaintiff's ability to identify and provide evidence of an immediate and irreparable harm unless the injunctive relief is granted. This is often the pivotal factor in a court's analysis under either the *Dataphase* factors (federal court) or the *Dahlberg* factors (Minnesota state court). Although plaintiffs' counsel routinely focus heavily in their motion papers on evidence of supposed nefarious conduct of defendants, regardless of the strength of evidence on that point, the inability to identify looming irreparable harm is almost always fatal to a motion seeking early injunctive relief.

“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07, 79 S. Ct. 948, 954 (1950); *see also Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003); *Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986). “[T]he failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction.” *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987); *see also Dataphase*, 640 F.2d at 114, n. 9; *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996); *McCabe v. Air-Serv Group, LLC*, 2007 WL 4591932, *8 (D. Minn. Dec. 28, 2007).

To establish irreparable harm, “the injury must be both *certain and great*; it must be actual and not theoretical ... [T]he party seeking injunctive relief must show that “[t]he injury complained of [is] of such imminence that there is a ‘clear and present’ need for equitable relief to prevent irreparable harm.” *See Packard Elevator*, 782 F.2d at 115 (emphasis added). As further noted by the Eighth Circuit in *Packard Elevator*:

It is also well settled that economic loss does not, in and of itself constitute irreparable harm ... Implicit in each of these principles is the further requirement that the [movant] substantiate the claim that irreparable injury is “likely” to occur. Their allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.

782 F.2d at 115 (emphasis in original).

Moreover, when money damages can adequately remedy the alleged harm, injunctive relief is inappropriate. See e.g. *Packard Elevator*, 782 F.2d at 115. “[T]he availability of money damages negates any presumption of irreparable harm.” *Best Vendors, Co. v. Win Stuff, LLC*, No. 00-523, 2000 WL 34240391, at *3 (D. Minn. Mar. 13, 2000) (citing *Pacific Equipment and Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. Ct. App. 1994)). “Damages resulting from a possible breach of contract are quantifiable,” and thus are not proper grounds for injunctive relief. *Cargo Protectors, Inc. v. American Lock Co.*, 92 F. Supp. 2d 926, 935 (D. Minn. 2000); see also *Hinz v. Neuroscience, Inc.*, 538 F.3d 979, 986 (8th Cir. 2008) (affirming denial of preliminary injunction where plaintiff failed to show any injury other than lost profits, which were compensable with money damages).

On the other hand, some support can be found in Minnesota appellate court case law for the position that breaches of restrictive covenants in employment agreements may satisfy the required showing of irreparable harm. Indeed, in a decision issued 36 years ago, the Minnesota federal district court stated: “[U]nder Minnesota law, a threat of irreparable harm can be inferred from the breach of a valid and enforceable restrictive covenant.” *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1091 (D. Minn. 1981), *aff’d*, 684 F.2d 565 (8th Cir. 1982). The district court relied upon several decisions of the Minnesota Supreme Court on this point, some of which may be considered dicta. See *Alside, Inc. v. Larson*, 220 N.W.2d 274, 278 (Minn. 1974) (“unless defendants are restrained as requested, plaintiff will suffer irreparable injury in that it will lose customers for which it would be most difficult, if not impossible, to prove damages.”) *Eutectic Welding Alloys Corp. v. West*, 160 N.W.2d 566 (Minn. 1968) (suggesting in dictum that the mere breach of a restrictive covenant can create an inference of irreparable harm); *Thermorama, Inc. v. Buckwold*, 125 N.W.2d 844 (Minn. 1964) (similar observation by the court). In *Cherne Industrial, Inc. v. Grounds & Associates, Inc.*, 278 N.W.2d 81 (Minn. 1979), the Minnesota Supreme Court relied on the dicta from those earlier decisions when affirming the trial court’s issuance of a permanent injunction, after a trial on the merits, predicated on the threat of irreparable injury posed by breaches of a restrictive covenant in an employment. Older Minnesota Supreme Court decisions have similarly held that the possible disclosure or use of confidential information such as customer information, is relevant in determining the potential harm to the former employer. See *Davies & Davies Agency v. Davies*, 298 N.W.2d 127, 131 (Minn. 1980); and *Cherne Industrial, Inc. v. Grounds & Assocs.*, 278 N.W.2d 81, 90 (Minn. 1979).

This body of case law is certainly subject to attack by defendants and does not appear to represent clear Minnesota precedent on this topic. Nor do those cases necessarily provide a showing of irreparable harm supposedly posed by actions of the new employer of a plaintiff’s former employee.

Focusing on weakness in this area in a plaintiff’s motion is, therefore, often a very fruitful strategy. A district court should find that there is no irreparable harm, and that an injunction is not legally warranted where there exists an adequate remedy at law in the form of recoverable money damages.

G. Who Do You Sue: Employee, New Employer or Both?

Another issue for consideration by a plaintiff is how many defendants it should name; just the former employee(s), just the new employer, or everybody. The best answer is not always the same in every case.

1. Former Employee Only

Suing just the former employee(s) may make sense if a plaintiff has reason to believe that the new employer was truly uninvolved and unaware of the unlawful conduct of the employee and that the new employer is likely to distance itself from its nefarious new hire. Not including the new employer as a defendant may increase the likelihood that the new employer will simply “cut and run” by terminating their new employee (while suing them may increase emotions and cause the new employer to want to fight to “protect its honor”). Plaintiff could also pursue early discovery to determine contrary evidence suggesting active involvement by the new employer and then amend its complaint to add them as a new defendant. In addition, former employees are less likely to be able to afford legal representation in a lawsuit.

2. New employer only

This approach, suing only the new employer, is the least common approach. In the right case, such an approach could possibly underscore for the judge that plaintiff’s motivation is truly to protect against improper and unfair competition posed by the new employer. This scenario can also arise later in a suit, after an arbitration agreement or other complication arises with respect to the former employee, but not the new employer. *See, e.g., Am. Teleconferencing Servs., Ltd. v. Intercall, Inc.*, No. CIV.08-5967 (JNE/RLE), 2009 WL 982236, at *2 (D. Minn. Apr. 13, 2009) (discussing possible stay, employee defendant was later dismissed to allow the district court litigation to proceed).

3. Both

Including both the former employee(s) and the new employer as defendants is the most common and safest, approach. In doing so, plaintiff’s counsel needs to be sure to draft the complaint clearly and in detail, differentiating between the former employee and the new employer, and clearly articulating separate legal claims against the defendants. This approach should almost always be used when a plaintiff has evidence (whether direct or circumstantial) of active involvement by the new employer in the unlawful competition (including possible use of misappropriated business information to compete against plaintiff).

H. Request Expedited Discovery or Other Lesser Relief?

A common and often effective approach is to seek in a motion for the right to engage in early/expedited discovery in order to develop and preserve further evidence of wrongdoing by defendant(s) that may be relied upon in bringing a later or renewed motion for injunctive relief. Judges seem to be fairly open to this type of “baby-splitting” solution in cases where a plaintiff has at least some supporting evidence for the motion and is not merely relying upon speculation. In the absence of an order granting such relief, the start of discovery is typically delayed for several weeks, in both federal court and Minnesota state court, while the customary administrative/scheduling process unfolds. It is typical for at least 75 to 90 days to pass from initial lawsuit filing to receipt of the first formal discovery responses, with depositions usually being conducted even later in the process. That is a significant delay where a plaintiff has legitimate concerns about potential damage to its business if unlawful competition continues unabated.

A district court may order expedited discovery for “good cause.” *Nilfisk, Inc. v. Liss*, No. 17-CV-1902 (WMW/FLN), 2017 WL 7370059, at *7 (D. Minn. June 15, 2017). To establish good cause, the party seeking discovery must demonstrate that “the need for expedited discovery, in consideration of [the] administration of justice, outweighs prejudice to the responding party.” *Id.* (citing *Oglala Sioux Tribe v. Van Hunnik*, 298 F.R.D. 453, 455 (D.S.D. 2014)). A district court then will “examine the entirety of the record to date and the reasonableness of the request [for expedited discovery] in light of surrounding circumstances.” *Id.* (citing *Dorrah v. United States*, 282 F.R.D. 442, 445 (N.D. Iowa 2012)).

Other similar relief that plaintiffs should consider seeking include:

- Computer Forensics: Ordering the right to early access to defendant’s computer devices by outside computer forensics experts, possibly at defendant’s expense.
- Cease & Desist: Ordering a defendant to promptly search its computer system for plaintiff-created files and to fully preserve that evidence.

In order to have any meaningful chance to obtain this type of relief from a court, however, a plaintiff would likely need to already possess fairly incriminating evidence of unlawful conduct by the defendant(s).

I. Unique Issues with Arbitration Provisions/Agreements.

Even when an employer has elected to include an arbitration clause in an employment agreement or other contract, drafters often include language allowing the employer to seek interim injunctive relief from a court. However, the Eighth Circuit has significantly limited the application of these carve-outs, requiring specific “qualifying language” that “provides the court with clear grounds to grant relief without addressing the merits of the underlying arbitrable dispute.” *Andersen Windows, Inc. v. Garfield*, No. 17-CV-826 (JNE/KMM), 2017 WL 1273989, at *2 (D. Minn. Apr. 5, 2017) (quoting *Manion v. Nagin*, 255 F.3d 535, 539 (8th Cir. 2001)).

To allow a court to hear a TRO or preliminary injunction motion in advance of arbitration, the Eighth Circuit requires that the arbitration clause explicitly state that: (a) the agreement requires continued performance during the dispute resolution process; (b) the party seeking the motion is entitled to injunctive relief pending the resolution; and (c) that granting such an injunction would not require the court to analyze the merits of the underlying dispute. *See Id.*; *RSM McGladrey, Inc. v. Epp*, No. CIV. 11-612 (ADM/SER), 2011 WL 1667957, at *3 (D. Minn. May 3, 2011).

Example of a contract clause that did not include sufficient qualifying language:

As the sole exception to arbitration, a Party shall have the right to obtain injunctive relief only from any court having jurisdiction so as to preserve such Party's rights for resolution in any pending or imminent arbitration proceedings and the injunction may be modified or vacated as a result of the arbitration award."

Signus Med., LLC v. Ilion Med., LLC, No. CV 12-2916 (DWF/TNL), 2012 WL 12884406, at *2 (D. Minn. Dec. 10, 2012).

Example of contract language that did have sufficient language:

The section of the contract that discusses arbitration states: "claims for alleged violations of . . . [the non-compete covenants] . . . may be brought immediately in court, without having to first file a mediation or arbitration, for the purpose of obtaining preliminary injunctive relief ... pending the outcome of the dispute resolution procedures". . . . In the section of the contract discussing the noncompete provisions, the parties agreed that [the employer] "shall be entitled to seek equitable relief against [Defendants] by way of injunction without having to first file a mediation or arbitration."

Further, the parties evinced an intent to have an injunction issue without addressing the merits of the dispute. In the very next subsection after the non-compete provisions, Defendants agreed to waive arguments relating to irreparable injury and with respect to enforceability of the contract.

RSM McGladrey, Inc. v. Epp, No. CIV. 11-612 (ADM/SER), 2011 WL 1667957, at *3 (D. Minn. May 3, 2011).

DEFENDANTS: STRATEGIES FOR SUCCESS

A. High Level Goals

Defendants are, of course, in a different position than plaintiffs in the context of motions for early injunctive relief. The decision whether and when to file has already been unilaterally made by the plaintiff. In all likelihood, the only possible pre-lawsuit decision that a defendant may have to make is how to respond to a possible pre-lawsuit cease and desist communication from the future plaintiff or their counsel. Many of the decision points and analyses are similar to those applicable to plaintiffs and adequately discussed above, including:

- Being mindful of significant swings in case momentum from defeating the motion or having to deal with an order granting injunctive relief;
- being prepared to commit adequate monetary resources towards opposing the motion (“you get what you pay for”); and
- analyzing the significance of any negative consequences to defendant’s business posed by the pendency of the lawsuit and the possible issuance of temporary injunction suggesting possible wrongdoing by the defendant.

1. Defeat the Motion

A defendant’s primary concern will usually be to defeat the motion and avoid the negative momentum swings and potential negative business consequences of an order for injunctive relief. A victory by a plaintiff at the motion stage greatly increases the likelihood that the plaintiff will be emboldened and that the litigation will become protracted (and expensive). It may also significantly reduce a defendant’s chances of obtaining summary judgment at a later date, depending upon the strength of the factual record presented by the plaintiff in obtaining the injunctive relief.

2. Peace with Honor

In some cases, the expense of effectively opposing such a motion may cause a defendant to opt to instead pursue a voluntary settlement, perhaps including termination of the newly hired employee(s). Or, in other cases, the evidence a plaintiff has been able to obtain early and present in support of the motion, usually in the form of retrieved electronic files (including email) and/or evidence of suspicious computer activity of the defendant(s), is so strong that it makes little sense to continue the fight. An early settlement, rather than fighting the motion, at least allows the defendant some input to shaping the outcome on terms that may be less harmful to its overall business.

3. Drive early settlement

As mentioned above, the outcome of motions for early injunctive relief tend to drive early settlement discussions. An unsuccessful motion by a plaintiff (particularly if the judge is critical of the plaintiff's claims and evidentiary support) should embolden the defendant and create the prospect for the plaintiff of much more protracted, and expensive, litigation. Plaintiffs often "take their best shot" at the motion stage and if they lose the motion and are unable to significantly change and augment the evidentiary record through the discovery process, they may have serious second thoughts about continuing to fund the litigation.

B. Important and Time-Sensitive Issues

1. Removal Available?

Where federal jurisdiction exists, a defendant may remove a case even while a motion for early injunctive relief is pending. So, a defendant must quickly analyze this issue and act within the time period for removal. Removal to federal court may decrease the chances of a motion being granted without adequate evidentiary and legal support.

2. Arbitration?

As discussed above, many employment-related agreements contain arbitration clauses. Depending upon how they are drafted and depending on whether the former employee was included as a defendant, plaintiff's claims may be required to be arbitrated – including requests for injunctive relief. Defendants need to analyze this issue quickly and then also raise it quickly, at the risk of waiving it.

C. Strategy and Tactics

1. Fight or flight?

The core question for a defendant is, of course, whether to vigorously fight the lawsuit and motion, or whether it is best to "cut and run." In the rare case, the plaintiff's complaint and motion papers make the decision obvious that the defendant must attempt to make peace in quick fashion. In most other cases, in order to be able to make an informed decision, the defendant needs to quickly get a grasp on the various points set out below.

2. Counterclaims?

Defendants may possibly have valid counterclaims and they should be analyzed early. Employer-defendant claims could possibly include tortious interference claims, among others. Former employee-defendants may have contract-based claims (such as for unpaid commissions or other compensation). The assertion of a valid counterclaim may effectively switch momentum in the lawsuit. On the other hand, the assertion of counterclaims merely for the sake of doing so, where the bases for the claims are weak, is oftentimes counterproductive and just adds needless expense.

3. How Much Investigation (Declarations, Experts, Forensics)?

If a plaintiff puts forth a weak effort in drafting the complaint and in its motion papers, the defendant may be able to effectively respond to the motion by just attacking the weaknesses in the motion (including any failure to identify irreparable harm). In most cases, defendants need to quickly perform an internal investigation as to the accuracy of plaintiff's allegations and any possible information to counter those allegations. If the plaintiff puts in strong motion papers, the defendant needs to be prepared to quickly start the investigation and to begin preparing witness affidavits/declarations setting out facts to counter those presented by the plaintiff. Most motions turn on the evidentiary record and not on points of law. In some cases, particularly of significant magnitude and possibly seeking the effective shut-down of a major part of defendant's business, defendants will want to consider further activity for use in opposing the motion, including possible retention of expert witnesses and possible computer forensic efforts (but see the caution set out in section 9, below).

Before getting deep into the investigation, however, defendants need to nail down the issues set out in the following sections 4, 5, and 6.

4. Two Firms or One?

New employer defendants must decide, in lawsuits where a plaintiff sues both the new employer and the former employee(s), whether to retain one law firm or two firms to handle the collective defense. Both approaches are common and joint representation is permitted under ethical rules.

Minnesota Rule of Professional Conduct 1.13(f)

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7 (conflict of interest). If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

If the decision is made to use one firm/lawyer, the company defendant needs to insist upon including language in the attorney retainer agreement/engagement letter that spells out the inherent potential conflict of interest and allows the attorney to continue to, if a conflict arises, represent the employer and effectively "fire" the employee client. In that case, the employee will need to then retain separate counsel. There may be concerns by the new employer, in situations where the new hire appears to have acted in questionable manner, but not to the degree where the employer believes termination is required, about using joint representation. In addition, if the employer-defendant is seriously considering terminating the newly hired employee, it would be much cleaner to insist on separate counsel.

5. Joint Defense Agreements

Joint defense agreements (JDAs) are commonly used between co-defendants, particularly in new employer/newly-hired employee situations. Although the common interest privilege may apply even in the absence of a formal, written agreement. Defendants should give strong consideration to executing a written agreement, to strengthen the privilege. *See, e.g., Nw. Airlines, Inc. v. Phillips*, No. CV 07-4803 (JNE/JJG), 2009 WL 10687754, at *2-3 (D. Minn. Nov. 20, 2009) (affirming common-interest privileged and noting parties asserting privilege had “executed a common interest letter”).

6. Indemnification

In some cases, a new employer may be obligated to indemnify a newly hired employee who is sued by their former employer. That obligation may be either statutory or contractual.

a. Statutory

Minn. Stat. § 181.970 provides:

An employer shall defend and indemnify its employee for civil damages, penalties, or fines claimed or levied against the employee, provided that the employee:

- (1) was acting in the performance of the duties of the employee's position;
- (2) was not guilty of intentional misconduct, willful neglect of the duties of the employee's position, or bad faith; and
- (3) has not been indemnified by another person for the same damages, penalties, or fines.

b. Contractual

Employment agreements may sometimes contain contractual obligations of an employer to indemnify and/or provide a defense to the employee. A carefully written indemnification clause will, however, make clear that failure of the new employee to be truthful and disclose actions that may create liability for the new employer will void the indemnification obligation, as will unlawful action (in which the new employer did not participate or encourage).

7. Early Mediation/Settlement Conference

Defendants should be open to suggesting early mediation (or settlement conference with a magistrate judge) in cases where the plaintiff has been able to present a forceful and compelling motion. This may help shape a better outcome for the defendant than a loss on the motion.

8. Possible Voluntary Actions

In cases where an employer-defendant is unaware of the alleged wrongful conduct of their new employee, including possible misappropriation of legally protectable business information, the

defendant should consider taking various voluntary actions to attempt to reach a quick resolution and minimize the damage from the lawsuit (and motion). Actions to be considered include:

- Return of Property: Returning any physical files or property (such as a smartphone) of plaintiff;
- Deeper Searches: Engaging in a more thorough search for information of plaintiff in defendant's possession or on its computer system (see comments below about computer forensic efforts);
- Stipulations/Negotiated "Rules of Engagement": Proposing a protective order or stipulation that would voluntarily provide some of the relief requested on plaintiff's motion.

9. Computer Forensics

Defendants may also want to consider undergoing computer forensic efforts on their computers and system, particularly if they were unaware of the alleged wrongful conduct of their new employee. Activity could include searching the employee's email and possibly analyzing their computer activity. There will be a litigation-hold requirement anyway and it must be assumed that if the case progresses any information would come out in discovery. The failure to undertake serious internal investigation efforts may look damning later in the case. Great care should be taken if this activity is done "in-house" by defendant.