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Non-Competes: Michigan Decision Highlights Two Critical Decisions With Cease And Desist Letters

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A decision out of the Eastern District of Michigan caught the attention of commentators last week. The pattern was straightforward and familiar – employee has noncompete, employee leaves and goes to work for a competitor, old employer sends new employer a copy of a letter to the employee telling the employee to cut it out because he has a non-compete. Things can go various directions from there. In this case, *Bonds v. Phillips Electronic*, the new employer fired the employee (Bonds), who in turn sued the old employer (Phillips) for tortious interference with his relationship with his new employer. The Court dismissed Bonds' case, saying that Phillips acted without malice and had a legitimate business reason for sending the letter. Good news for the enforcing employer and seemingly the right result.

But the general tone of the takeaways in the various articles last week was, to quote one such article, employers can "rest easy" in sending the new employer such a letter. I would like to dig a little more deeply, because whether to copy the new employer is one of two important strategic decisions in whether and how to send a cease and desist letter to an employee violating a non-compete and other restrictive covenants. The first decision is whether to send a cease and desist letter rather than simply filing a lawsuit. There are many reasons to send the letter first:

1. It costs a lot less in legal fees to send a letter than to file a lawsuit.
2. Often a lawsuit is not necessary because the matter can be worked out in some fashion short of a lawsuit. (Certainly things worked out well for Phillips in this case, other than the legal bill for defending this lawsuit.)
3. Where there is litigation, being able to portray oneself as the reasonable party to the court is often critical. If an employer jumps straight to litigation, the former employee's lawyer in some circumstances can portray the former employer as overly aggressive. "Gee, why didn't you just send us a letter?"

But the reason NOT to send the letter is that, where there is more than one state where the case could be litigated, and those states' non-compete laws are different, a cease and desist letter can be a "heads up" that allows the former employee and/or the new employer to run to court on their home turf, where the laws may be more favorable.

Let's assume the enforcing employer does decide to send the letter, which I

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think is often (but not always) the right approach. Almost without exception, the letter will be sent to the former employee of course. Should you send it to his/her employer as well? Like so many strategic decisions in the non-compete, that is a case-by-case decision. Why do it? It is the aggressive move, and may solve the issue immediately.

It is not uncommon for the employee not to have told the new employer he/she even has a non-compete, even if the new employer asked, and if that's the case the new employer will often wash its hands of the new employee immediately.

Why not send a letter? Well, for one thing, you may have to pay to defend a tortious interference lawsuit like this one (even if you win). Those claims by the former employee without the backing of the new employer are uncommon, but that is one consideration. I think a more common consideration is that you are more likely to get the new employer invested in the matter, likely resulting in higher priced opposing counsel tending to increase the enforcing employer's legal costs as well.

As always, there is no cookie cutter answer; these situations are like snowflakes with numerous distinctive considerations that need to be taken into account in formulating the strategy. The recent decision is a good example of one set of decisions and results about a cease and desist letter.