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Confidentiality & Nondisclosure Agreements Are No Substitute For Noncompetes

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Employers that want to ensure key workers do not jump ship to work for the competition have just one realistic option: a non-competition agreement. Given the intense scrutiny that courts have given to noncompetes in recent years, many employers have tried to down-shift to confidentiality or non-disclosure agreements, based on the idea that this will enable them to secure their trade secrets and other sensitive information without having to muck about with the difficulties of enforcing a non-compete. While this seems like a good solution in concept, the inherent problem is that in almost all cases, it will not prevent an employee from working for a competitor. Take, for example, a situation where an employee – who is a signatory to a confidentiality agreement but not a noncompete – leaves her employer to work for a competitor. After the employee leaves, the employer discovers that she downloaded confidential company data to an external hard drive on her way out the door. Lacking a noncompete, the company's options for prohibiting the employee from working for the competitor are *extremely* limited. In some states, the "inevitable disclosure doctrine" allows a court to enjoin the employee from working for a competitor because of the threatened misappropriation of trade secrets. In order to pursue such a claim, the employer typically must show (1) that it has trade secret information, (2) that the employee in question had access to the trade secrets, and (3) the employee's responsibilities at her new employer make it "inevitable" that she will use or disclose those trade secrets in the performance of her job for the new employer. This typically is a steep hill to climb. Added to that, not all states recognize the doctrine and in many of those that do, its application has been inconsistent. In most situations, employers send out letters to employees demanding that they immediately return any confidential or trade secret materials they took with them when they left the company. If the employee does as asked and returns the items, there is not much more an employer can do – particularly if the employee or her new employer represent that no confidential or trade secret information has or will be divulged. Without evidence of misappropriation or that the disclosure of information will be inevitable, a lawsuit seeking to enjoin the employee from working for the competitor likely will fail. That leaves the employer with attempting to sue the employee for breach of the confidentiality agreement or asserting other tort claims, such as breaching their fiduciary duties. While these claims ultimately may be successful, they will not bar the employee from working for a competitor. In short, if an employer wants to prohibit key employees from working for the competition, there really is no substitute for a noncompete agreement.

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