

Reminder From the 7th Circuit: Don't Put the Cart Before the Horse (Establish your Legitimate Interest in Need of Protection Before you Complain About the Breach of a Non-Compete)

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In the rush to the courthouse after an executive leaves, takes people with her, and opens a competing business, the spurned employer often relies on the promise that executive made—the noncompete agreement—and the undisputed breach of that promise and believes the court will provide a remedy. “Not so fast,” is the takeaway from the 7th Circuit Court of Appeals decision in [Instant Technology LLC v. DeFazio, et al.](#), in which it applied Illinois law.

Instant Technology recruits and then seeks to place I.T. workers at companies in need for such workers. DeFazio was a V.P. of Sales and Operations at Instant Technology. She was terminated, opened a competing business, and solicited away several of her former colleagues from Instant Technology. They began seeking to place candidates at companies with which they had done business at Instant Technology; and some of the candidates they were trying to place were candidates who were in Instant Technology’s database. All of the defendants had signed restrictive covenant agreements at Instant Technology in which they had promised not to recruit Instant Technology employees to leave Instant Technology, not to solicit business from Instant Technology’s clients, and not to disclose Instant Technology’s confidential information. Instant Technology sued the defendants for breach of each of these contractual promises.

DeFazio admitted she poached the other defendants away from Instant Technology; and all defendants admitted to pitching candidates to clients who also did business with Instant Technology—but they denied that the restrictions were enforceable. They also denied using Instant Technology’s information, claiming that they obtained the names of the candidates from public sources, such as LinkedIn.

Following a bench trial, the trial court concluded that the defendants were not liable, because (1) there was no evidence that the defendants took information from Instant Technology or that they did not obtain it themselves from public sources or from cold calls, and (2) the no-solicitation of employees and client restrictions were unenforceable. The 7th Circuit affirmed. The ruling as to the unenforceability of the no-solicitation restrictions is what makes this case instructive.

The trial and appellate courts agreed that Instant Technology had not established a legitimate interest that was supported by the no-solicitation restrictions. The courts reminded Instant Technology that,

before discussing the reasonableness of the restrictions themselves, it must first establish that the restrictions supported a legitimate business interest—without which the restrictions are naked (and unenforceable) restraints of trade.

Instant Technology argued that, in fact, it had proposed three legitimate business interests which the no-solicitation restrictions were designed to protect: confidential information; client relationships; and workforce stability. But it was not enough to simply identify the legitimate interests; Instant Technology was required to prove they existed. The courts ruled it had not done so.

First, the court reiterated that there was no confidential information at issue, as the defendants appeared to have obtained the information on candidates from public sources and cold calls. So this purported interest did not exist.

Second, the asserted interest in protecting client relationships was not valid because Instant Technology's client were not loyal to it. The evidence demonstrated that the larger clients requested candidates from 5 to 10 staffing agencies at once. Moreover, Instant Technology placed only about 10% of the candidates it pitched to the clients. Thus, there were no protectable client relationships to support the no-solicitation-of-clients restriction.

Third, the asserted interest in workforce stability also was belied by the evidence. Of the employee complement that existed two years prior to trial, 77% had left Instant Technology by the time of trial. Thus, there was not a stable workforce that could be protected by the no-solicitation-of-employees restriction.

The takeaway here is that it is not enough merely to proclaim the existence of legitimate business interests that underpin restrictive covenants. You must be able to prove them. And before filing that complaint based on undisputed breaches of a noncompete agreement, it is prudent to take a moment and evaluate the evidence that will be used to support the claimed legitimate business interests that the restrictions are designed to protect.

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