

List of General Questions

- I. What are the elements of a claim for tortious interference in the context of recruiting or hiring an employee with a restrictive covenant (e.g., noncompete, nonsolicitation, or nondisclosure)?
 - A. Former employer's claim against new employer for tortious interference with the restrictive covenant itself.
 - B. Former employer's claim against new employer for tortious interference with the former employer's business contracts or expectancies.

- II. Tortious interference in the context of the restrictive covenant itself.
 - A. Will a claim lie against the new employer where the restrictive covenant involves an employee who had an at-will employment relationship with the former employer?
 - B. Will the claim against the new employer be any different if the employee was employed for a definite term by the former employer?
 - C. What defenses to this type of tortious interference claim are generally available?
 - 1. Invalidity or unenforceability of the restrictive covenant.
 - 2. Breach of contract by the former employer.
 - 3. Unclean hands, estoppel, or other equitable defenses.
 - 4. What are the parameters of the affirmative defense of justification or the competitor's privilege?
 - 5. Preemption.

6. Absence of damages.
7. Gist of the action doctrine.
8. Failure to establish breach of covenant.
9. Failure to prove causation.
10. Statute of limitations.

D. What relief is available to the former employer?

1. What damages are available, and how are they measured?
2. What type of injunctive relief is available?
3. Are there circumstances where attorney's fees may be recoverable?

E. What similar claims does the state recognize (e.g., unfair competition, conspiracy, etc.)?

III. Issues common to tortious interference claims in the employment context generally.

A. What, if any, hiring measures should be adopted by a new employer for screening new employees with restrictive covenants?

1. Is a potential employer better off not asking whether a prospective employee has a restrictive covenant?
2. If a new employer hires a new employee without knowledge of a restrictive covenant, is the new employer at risk if it continues to employ the new employee after learning of the restrictive covenant?
3. Does consultation with outside counsel provide a defense to a claim of tortious interference?

B. What practical advice should be given to a company that is considering hiring an employee who may have a restrictive covenant with his former employer?

- C. What about indemnification?
 1. Does the new employer have to indemnify the employee?
 2. Can the new employer indemnify the new employee?
 3. Can or will indemnification affect liability or damage?
- D. When will individual officers or employees of the new employer be held personally liable for tortious interference?
- E. When may the former employer be found liable for tortious interference with a former employee's relationship with his new employer?
- F. Law review articles and other resources that examine tortious interference with restrictive covenants or tortious interference generally in this state.

