

Preface

This treatise is a companion volume to *Covenants Not to Compete: A State-by-State Survey*, *Trade Secrets: A State-by-State Survey*, and *Employee Duty of Loyalty: A State-by-State Survey*. It examines, by state, two closely related main types of actions that arise in employment lawsuits in the course of litigation over the topics discussed in the other three treatises, but that are not extensively discussed in those volumes. The two actions are:

1. where there is a contract, tortious interference with contract (as limited to/focusing mostly on contracts that are or contain postemployment covenants not to compete); and
2. where there is no contract or the contract is unenforceable, tortious interference with commercial relationships or prospective economic advantage/expectancies (as limited to/focusing mostly on an employer's commercial relationships or prospective economic expectancies with its customers that are jeopardized by a former employee's entering into competition with the former employer).

The first main type of action examined, an action for tortious interference with contract/covenant, allows recovery by a party to a contract against a third party who, without legal justification, interferes with the contractual/covenant relationship or the terms of the contract/covenant. On an employment contract, such an action cannot be brought against the employee who has executed the underlying contract with his or her prior employer, because it is deemed legally impossible for the employee to "interfere with" his or her own contract with the prior employer. Instead, such an action is brought by a former employer against a former employee's new employer—not as an action on the prior contract, to which the new employer was not a party, but as a tort claim.

The other main type of action examined here, tortious interference with commercial relationships or prospective economic advan-

tage/expectancies, is brought where there is either no contract (i.e., restrictive covenant), or where, for one reason or another, the existing contract is not enforceable (e.g., lack of consideration, overbroad and not modifiable, statutorily prohibited). This action can be brought by a former employer against both a former employee and that employee's new employer. Such an action may be brought as well by an employee against his or her former employer for interfering with future employment with a competitor.

As noted above, tortious interference claims are often lodged in suits alleging breach of covenants not to compete, breach of the employee duty of loyalty, and/or misappropriation of trade secrets—topics addressed by the three companion state-by-state surveys which I have had the privilege of also publishing with BNA Books.

Using the uniform outline reproduced in the *List of General Questions* that follows this *Preface*, this treatise examines—for each state—the elements of these closely related causes of action, the defenses that may be successfully raised, and the types of relief available. This survey also discusses the impact of at-will employment, the effect of indemnification agreements, and the personal liability of a defendant's employees. In addition, it discusses hiring measures found acceptable in various states for screening employees bound by restrictive covenants, and digests relevant law review articles focused on this burgeoning area of the law.

Together, the four titles in this series provide comprehensive coverage of the issues that arise regarding competition in the employment context today. I sincerely hope you will find each of these titles an essential part of your library.

BRIAN M. MALSBERGER
Principal Author

December 7, 2010