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"How Employers Use Confidentiality Agreements to Prevent Departing Employees From Competing"

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It is well-settled that New York courts disfavor noncompete agreements in the employment context. The mandate issued by the Court of Appeals half a century ago, warning that "no such restriction should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment," remains a key touchstone of any analysis of noncompete provisions. See *Reed, Roberts Associates v. Strauman*, 40 N.Y.2d 303, 307 (1976). New York courts closely scrutinize such provisions, enforcing them only if they are no greater than required to protect "a legitimate interest of the employer," do not impose "undue hardship" on the employee, and are not "injurious to the public." See *Palantir Technologies v. Jain*, 2026 WL 622007, at *10 (S.D.N.Y. Mar. 5, 2026) (quoting B*DO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89 (1999)).

Unsurprisingly, well-resourced employers with sophisticated lawyers have deployed strategies intended to circumvent these protections and prevent departing employees from working for perceived competitors, even in the absence of enforceable noncompetes. Such strategies include the use of broadly drafted confidentiality agreements that, in some circumstances, may tie a departing employee's hands as effectively as a noncompete. This article examines these efforts, highlights recent New York case law addressing them, and offers practical guidance for practitioners on both sides.

Beyond Trade Secrets: Confidentiality Agreements Generally

Employers often require, as a condition of employment, that an employee sign a confidentiality agreement prohibiting such employee from using or disclosing trade secrets and any other information that the employer deems "confidential."

New York courts are generally clear on what constitutes a "trade secret." A trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it." See *Schroeder v. Pinterest*, 133 A.D.3d 12, 27 (1st Dep't 2015). To assess whether information meets this

standard, New York courts consider "the extent to which the information is known outside of the business; the extent to which it is known by employees and others involved in the business; the extent of measures taken by the business to guard the secrecy of the information; the value of the information to the business and its competitors; the amount of effort or money expended by the business in developing the information; the ease or difficulty with which the information could be properly acquired or duplicated by others."

In contrast, "confidential information" is often unilaterally defined by employers in confidentiality agreements. Rather than tailoring these agreements to protect genuinely confidential information, employers often broadly define "confidential information" to cover virtually any information an employee might encounter on the job. See, e.g., *Palantir,* 2026 WL 622007, at *10 (defining "Proprietary Information" to include essentially any business information relating to the employer that the employee learned during her employment); *Vortexa v. Cacioppo*, 2024 WL 2979313, at *3 (S.D.N.Y. June 12, 2024) (defining "Confidential Information" to include "all nonpublic information that relates to the actual or anticipated business and/or products, research or development of [the company]"). The breadth of many confidentiality agreements – coupled with the fact that such agreements typically lack temporal or geographic limitations—can create complications for departing employees seeking employment with competitors.

How Employers Use Overbroad Confidentiality Agreements to Impair Employee Mobility—And How New York Courts Have Responded

When employers either do not have or cannot enforce a noncompete, they often invoke broad confidentiality provisions to justify requests for injunctive relief and other claims designed to achieve the same result: preventing departing employees from working for perceived competitors.

An employer might sue (or threaten to sue) a departing employee for breach of contract, misappropriation, unfair competition, unjust enrichment, and breach of the duty of loyalty, often on a theory that the departing employee will inevitably use or disclose the employer's confidential information if they work for a competitor, even absent any evidence of actual misappropriation. The employer might also sue (or threaten to sue) the departing employee's new employer for tortious interference with contract or aiding and abetting breach of the duty of loyalty, on the theory that the new employer offered the departing employee a position requiring use or disclosure of the former employer's confidential information.

The mere filing of such claims—regardless of their ultimate merit—can be costly for a departing employee. First, these claims often resist early resolution on a

motion to dismiss and require costly, time-consuming discovery into what information the departing employee possesses, and whether it is confidential. Second, even the threat of such claims can prompt a new employer to rescind a pending job offer in order to avoid litigation. Third, allegations that a departing employee has breached confidentiality obligations—even if false—may cause reputational harm and impair efforts to obtain future employment. Finally, New York courts have granted injunctive relief enforcing broad confidentiality agreements, which (in practice) can make it difficult for departing employees to work for perceived competitors.

For example, in *Palantir Technologies v. Jain*, 2026 WL 622007 (S.D.N.Y. Mar. 5, 2026), the court found that the noncompete provision binding Palantir's former employee was likely unenforceable, but granted Palantir a preliminary injunction enforcing an extremely broad confidentiality provision against her, (defining "Proprietary Information" to include "all other business, technical and financial information … the employee develops, learns or obtains during her employment that relate to Palantir, or the business or demonstrably anticipated business"). The court noted that "mere exposure" of the employee to Palantir's confidential information "does not, without more, create a threat of irreparable harm," and that the "operative question is whether there is a risk that such information will be used or disclosed in a way to cause harm." There was no evidence that the former employee had actually used or disclosed any confidential information. However, because the former employee had copied several documents that met the agreement's broad definition of "proprietary information" shortly before departing and without any legitimate purpose, the court concluded that Palantir had established a likelihood of irreparable harm and granted an injunction to "assure that the former employee does not use any confidential information covered by the confidentiality agreement." *See also Vortexa*, 2024 WL 2979313, at *13-14 (recognizing a threat of irreparable harm if "there is a risk that confidential information will be used or disclosed in a way to cause harm," but denying request for injunction where employer cited no evidence that former employee retained confidential information or acted in bad faith).

Given the breadth of Palantir's confidentiality provision, an injunction enforcing it as written could—depending on the requirements of the former employee's new job—affect her ability to render services to her new employer. Cases such as Palantir and Vortexa underscore that, while broad confidentiality agreements can serve as powerful tools for employers seeking to restrict employee mobility, New York courts will assess whether there is evidence suggesting a risk that confidential information will actually be used or disclosed to the employer's detriment—not merely a theoretical possibility that a departing employee could leverage information gained during their employment.

Practical Guidance

For employee-side practitioners, the lesson is clear: the absence of an enforceable noncompete does not mean that departing employees have carte blanche to join competitors. Employers often utilize broad confidentiality agreements to attempt to block departing employees from working for competitors—resulting in costly litigation, reputational harm, and the loss of job opportunities. Counsel should advise departing employees to closely scrutinize confidentiality agreements; to avoid sending themselves or copying any confidential information of their employer before their departures; and to ensure that they do not use or disclose any confidential information of their former employer after their departure.

For employer-side practitioners, confidentiality agreements should be tailored so that they protect only information that is truly confidential and would harm the employer if improperly used or disclosed. Employers should be forewarned that the "mere exposure" of a departing employee to confidential information will not justify efforts to obstruct that employee's future job mobility. Employers seeking to prohibit departing employees from working for competitors should do so through enforceable noncompete agreements—not overbroad confidentiality agreements.

Ultimately, the line between protecting legitimate business interests and improperly restraining employee mobility is one that New York courts continue to draw on a case-by-case basis. Practitioners on both sides would be well-served by ensuring that confidentiality agreements are drafted—and enforced—with that distinction firmly in mind.
