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# LABOR AND EMPLOYMENT LAW UPDATE

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## TITANS V. TROJANS: TORTIOUS INTERFERENCE WITH CONTRACT IN THE SPOTLIGHT!

On July 24, 2010, Kennedy Pola was hired as the new offensive coordinator for the University of Southern California's football team. Pola had been the running back's coach for the NFL's Tennessee Titans. Two days later, the Titans sued USC and its head football coach, Lane Kiffin, for treble and punitive damages and attorney's fees.

So what did USC do to invite a lawsuit? After all, the school did not have a contract with the NFL or the Titans which precluded it from hiring Pola.

The answer lies in the contract which Pola signed with the Titans. The contract was for a one-year "Term" and included the following restriction:

You agree that You will not under any circumstance solicit discussions or entertain employment with any other person or entity during the Term unless You are granted permission to do so by Titans or by the [NFL] Commissioner in accordance with NFL Rules.

The suit alleges that USC and Kiffin knowingly induced Pola to breach this restriction and thereby tortiously interfered with the contract in violation of Tennessee law. While the merits of this claim have yet to be tested, employers should heed its valuable lesson – inducing an employee to breach a contract with an employer can have expensive consequences.

### TORTIOUS INTERFERENCE WITH CONTRACT:

One count of the Titans lawsuit against USC alleges tortious interference with contract. Most states have recognized some version of this common law tort. In an employee-raiding case, the elements of the tort generally entail the following:

1. A valid contractual obligation existed between an employer and an employee;
2. The prospective employer knew of the existence of the contractual obligation;
3. The prospective employer intentionally (or maliciously) interfered with the contract by inducing the employee to breach the contractual obligation;
4. The prospective employer's interference caused the employee to breach the contractual obligation; and
5. The original employer suffered harm.

Most states allow the recovery of consequential damages caused by the tort as well as punitive damages.

**STATUTORY TORT:** Another count of the Titan's lawsuit against the Trojans seeks relief under the Tennessee Code, which provides:

It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto...

Other states have similar statutes which can provide for relief unavailable under the common law tort of tortious interference with contract, such as treble damages and attorney's fees.

**NO CLAIM AGAINST POLA:** Significantly, it is not a requirement of either of the tort claims brought against USC that Pola also be sued for breach of contract. The Titans, in fact, chose not to sue Pola. Accordingly, USC alone must answer for the breach of Pola's employment contract with the Titans.

**RESTRICTIONS ON RESIGNATION:** Generally, an employer cannot legally compel an employee to continue employment against his will. An employer may still sue for damages, such as the cost of locating and training a replacement, if an employee is induced to resign in breach of a contract which includes:

1. Employment for a specified term;
2. A specified notice period for resignation;
3. A requirement that an employee be available to assist with locating and/or training his replacement;
4. An opportunity to exceed or match an offer by a prospective employer; or
5. A requirement of prior notice to or permission from the employer regarding discussions with a prospective employer.

Such contractual provisions must be valid under the governing state law to support a claim for tortious interference with contract.

**RESTRICTIVE COVENANTS:** An employer may also sue for damages if an employee is induced to breach restrictive covenants with the employer during or after his employment relationship. Typical restrictive covenants address:

1. Unauthorized moonlighting for another employer;
2. Unauthorized employment by an existing or former customer of the employer;
3. Competition with the employer;
4. Competitive solicitation of the employer's customers which the employee serviced;
5. Unauthorized use or disclosure of the employer's trade secrets or confidential information;
6. Unauthorized solicitation or hiring of the employer's employees; or
7. Negative or disparaging comments regarding the employer.

Such contractual provisions must likewise be valid under the governing state law to sustain a claim for tortious interference with contract.

**BEST PRACTICES FOR EMPLOYERS:** Employers should adopt recruiting and hiring protocols which endeavor to minimize the risk of a lawsuit for job candidates with contractual obligations to existing or previous employers. Legal counsel should be consulted not only in adopting and implementing such protocols but also in assessing the risks presented by relevant contractual obligations of individual candidates for employment.

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