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# Sixth Circuit Greenlights Employer's Broad Attorney Fee Provision

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Employee restrictive covenant agreements often contain fee-shifting provisions entitling the employer to recover its attorneys' fees if it "prevails" against the employee. But "prevailing" is a term of art in this context. Obtaining a TRO or preliminary injunction is not a final decision on the merits, so does obtaining a TRO or preliminary injunction trigger a fee-shifting provision? A recent case illustrates that an employer can sidestep this potentially thorny issue by using careful and thoughtful drafting.

In *Kelly Services, Inc. v. De Steno*, 2019 U.S. App. LEXIS 875 (6th Cir. Jan. 10, 2019), a Sixth Circuit panel upheld the lower court's decision to enforce a broad attorneys' fee provision and award Plaintiff Kelly Services over $72,000 in attorneys' fees. In the lower court, Plaintiff sought attorneys' fees after obtaining a preliminary injunction prohibiting Defendants from competing. The underlying provision did not require Plaintiff to 'prevail' before seeking fees. Rather, the provision required Defendants to pay Plaintiff's attorneys' fees "incurred by" enforcing the employment agreement.

The District Court interpreted the fee provision by its plain language and awarded Plaintiff attorneys' fees "incurred" in seeking a preliminary injunction to enforce the employment agreement. The Sixth Circuit affirmed.

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6th Circuit (incl. bankruptcy)

While the Sixth Circuit accepted the broad language of Plaintiff's attorneys' fee provision, it cautioned against potential abuse. The court noted, for example, that a fee award would be unreasonable in cases "made with little or no basis, or made for purposes of oppression or harassment ..." under the guise of "enforcement." Following the court's ruling, employers should consider creating or revising attorneys' fee provisions to broaden the scope and eliminate "prevailing party" language.



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