



Analysis

Employment Pact Seen As Paper Tiger In Trump-Bannon Feud

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Law360, New York (January 5, 2018, 7:58 PM EST) -- President Donald Trump's recent threat to use an employment agreement to muzzle former chief strategist Steve Bannon after he slammed the administration in a controversial tell-all book is an unusual move for a sitting president, even though the tactic is commonplace in the business world and puts the dispute in familiar territory for employment attorneys.

Every day, employers around the country invoke pacts that they say bar current or former workers from disclosing sensitive information or criticizing the company. But that employer isn't usually the chief executive of the United States.

"We're talking about the president, who is very much a public figure and very much exposes himself to the public spotlight every minute of every day," said [Littler Mendelson PC](#) shareholder Philip Berkowitz. "It's going to be very different from a company that's going to be trying to protect its trade secrets and confidential information."

The Guardian on Wednesday published snippets from the book "Fire and Fury," which purports to tell the inside story of the Trump White House and features incendiary comments from Bannon about his old boss. Bannon viewed it as "treasonous" and "unpatriotic" for key campaign figures, including Donald Trump Jr., to accept a Trump Tower meeting with a Russian attorney who had offered dirt on Hillary Clinton during the 2016 election, according to the book, which was set to be published Jan. 9 but came out Friday after Trump threatened to block its release.

After the comments leaked, Trump attorney Charles Harder, who represented wrestler Hulk Hogan in his libel trial win against Gawker.com, reportedly sent Bannon a cease-and-desist

letter threatening to sue him for defamation and breach of a confidentiality and nondisparagement agreement with Trump.

That first cause of action faces a high bar that is only made higher when the plaintiff is a public figure, attorneys say. Because there is no figure in the country more public than its president, Trump will have a tough time alleging he was defamed, they say, although the contract claims might have a better shot.

"Maybe on the confidentiality, they could have, somehow, some sort of argument," said [Joseph Greenwald & Laake PA](#) principal Brian Markovitz, who represents workers in whistleblower suits. "The rest of it is utter garbage."

Many employers sign workers to a series of contracts aimed at protecting the company during the work relationship and after it ends. A confidentiality, or nondisclosure, agreement blocks workers from publicly sharing information they learn in the workplace under threat of financial damages and possible injunction.

Courts have found employers can use these deals to shield private information that could hurt the enterprise if it became public, like the formula for Coca-Cola or the algorithm that powers [Google](#). But Bannon's opinion is likely outside the scope of the information Trump can protect, said [Gardere Wynne Sewell LLP](#) partner Jessica Glatzer Mason.

"Let's say Trump was trying to have an NDA saying 'you can't tell our state secrets, our strategy for resolving the Middle East peace crisis' — that could be totally fair," said Mason, whose practice involves drafting and enforcing employment agreements. "I've not seen Bannon's agreement ... but the way I see it is, I think it's going farther than an NDA really allows."

Trump may have more luck alleging Bannon breached his nondisparagement agreement, Mason said. Such deals stop their signers from speaking ill of their subject, and could arguably cover Bannon's statements, though Trump would probably only be able to extract cash from Bannon, rather than get the book pulled.

"You can use a nondisclosure obligation to prevent disclosure, get an injunction that says you can't tell anyone our secret recipe," Mason said. "For things like disparagement, you've really got to sue for damages later. It's hard to get the injunction I think they're suggesting

they want."

And for Trump, a court win would still be a long shot, attorneys say. Whether he's suing under contract or libel law, the president would have to show he was harmed by Bannon's speech to win relief.

But with a sub-40 percent approval rating, the president may find reputational harm a hard sell.

"How on earth is President Trump going to be able to demonstrate that his reputation has been damaged by a book like this?" Berkowitz said. "I think he may have to start from a pretty low bar in order to make that kind of showing."

Trump has many times threatened suits against his detractors, including his critics in the media and the women who have accused him of sexual assault, but has not lately followed through on them.

Especially with the book already out, the president's cease-and-desist letter may join that list of unsubstantiated warnings. But Trump's recent history of lobbing empty threats may, in this case, be less informative than his history of doing as he pleases, Mason said.

"I don't think the historical or traditional confines of the office of the president are going to tell us what he's going to do," Mason said. "He's made it very clear he's going to do things his own way, he's the president and he gets to."

"He might do something completely unexpected, or he might decide this is not appropriate or something he can prevail on ... I think this is going to give a lot of insight into how he's going to address these issues going forward."

--Editing by Pamela Wilkinson and Catherine Sum.