

Preliminary Injunctions and Temporary Restraining Orders—What Are They?

Written By **Alexander C. Dale** (acd@wardandsmith.com) and **Jordan M. Spanner** (jmspanner@wardandsmith.com)

February 18, 2022



A preliminary injunction is a pre-trial court order that stops (or sometimes mandates) action by the opposing party in a lawsuit.

A party may seek a preliminary injunction when they will suffer irreparable harm—that is, he will be harmed in a way that a money judgment cannot fix—while he waits on a

final resolution of his lawsuit.

Because preliminary injunctions occur at the beginning of the case, before the facts are fully developed, they are considered an "extraordinary remedy." Courts do not grant them lightly. Preliminary injunctions may only be issued after both parties are noticed for hearing and given an opportunity to be heard either in a live hearing or through a briefing. To get the court to issue the preliminary injunction, the complaining party must establish, first, that he is likely to succeed on the merits of the claims in his lawsuit; and second, that he is likely to suffer irreparable harm unless the court enjoins the other party's conduct. *E.g., Town of Apex v. Rubin*, 2021-NCCOA-188, ¶ 20. If the lawsuit is in federal court, the complaining party also must show "that the balance of equities tips in his favor, and that the injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A temporary restraining order, or TRO, is similar to a preliminary injunction in that it is a pre-trial court order that enjoins or mandates another party's conduct. However, it is different in that TROs are more urgent and may be issued without notice to the other party. They are reserved for situations where the complaining party will suffer irreparable harm if the court does not intervene and stop the opposing party's conduct *immediately*. A TRO frequently is filed at the very outset of the case, prior to service of the lawsuit on the opposing party. As a result of the urgency and timing, a motion for TRO can be heard and issued without the other side's input, making it an even more extraordinary remedy than a preliminary injunction. But because TROs can be issued with only one party participating in the hearing, they have short lifespans—10 days or less in North Carolina state courts and 14 days or less in federal court, absent an agreement or extension. In other words, a TRO preserves the status quo for a brief period until the court can hold a hearing to determine whether it should enter a preliminary injunction.

State Court

In North Carolina's state courts, TROs and preliminary injunctions are governed by Chapter 1, Article 37 of the North Carolina General Statutes and by Rule 65 of the North Carolina Rules of Civil Procedure. These provisions should be read closely before filing a motion for a TRO or preliminary injunction. Importantly, a party that has decided to pursue this form of relief should take note of the following:

Where to File

In a rush to seek a TRO, a party must remember that he also has to file a lawsuit and be prepared to litigate the full case to conclusion. That is, the party first must file a complaint (that meets the requirements of Rules 8 and 9) and have a summons issued before the proper court and in the proper venue. Rushing through a complaint solely to get the TRO can be detrimental to the life of the case.

Service

A motion for a preliminary injunction must be filed and served in accordance with Rule 5. However, a motion for TRO does *not* need to be served on the opposing party until the court enters an order on the motion or otherwise directs the complaining party to do so. See N.C. R. Civ. P. 5(a). After the court rules on the motion for TRO, the filing party will need to serve the court order, notice of hearing for the return on the TRO (if not included in the court order), and the complaint and summons on the opposing party.

Who Can Hear and Decide the Motion

Keeping in mind jurisdiction and proper venue, any superior or district judge who is "authorized to hear in-chambers matters" can hear a motion for preliminary injunction or the initial motion for TRO. N.C. Gen. Stat. §§ 1-485, 1-493.

Who Must Decide the Return TRO Hearing

If the initial TRO motion is decided in superior court, then the return hearing must be heard by "the resident judge of the district, a special judge residing in the district, or any superior court judge assigned to hold court in the district where the civil action . . . is pending." N.C. Gen. Stat. § 1-494. Similarly, if the TRO motion is in district court, it is "returnable before the judge granting such order or injunction or before the chief district judge or a district judge authorized to hear in-chambers matters in the district where the civil action is pending." *Id.* The parties may also file a stipulation as to which judge will hear the return on the TRO. N.C. Gen. Stat. § 1-495.

Bond

A party who successfully obtains injunctive relief will be required to post a bond. Rule 65 requires that the bond be "in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." A party needs to be prepared to argue over the amount of the bond and to ultimately post a bond. If the facts of the case suggest that a sizable bond may be required by the court, a party needs to consider whether it is prudent to seek an injunction, especially if the party will struggle to be able to post the anticipated bond.

Extensions, Modifications, and Vacations of TROs and Preliminary Injunctions

In certain circumstances, it may be appropriate for a party to seek an extension of a TRO (or a preliminary injunction, if the court's order sets an expiration date). Or a party may wish to modify the terms of the

court's order. And, of course, a party may move to vacate the TRO or preliminary injunction altogether. Section 1-498 of the N.C. General Statutes dictates which judges may hear a motion to extend, modify, or vacate a TRO or preliminary injunction.

Federal Court

For TROs and preliminary injunctions in federal court, the procedures and requirements are very similar to those in North Carolina state court. Federal court injunctions are governed primarily by Federal Rule of Civil Procedure 65, but various federal statutes may prescribe additional requirements, depending on the cause of action. (For example, 15 U.S.C. § 1116 provides specific rules and procedures for injunctive relief in trademark claims.) Another notable difference is that the motion for TRO or preliminary injunction is typically heard by the judge who is assigned to the case, or it may be referred to a magistrate in accordance with the district's local rules.

Other Practical Considerations

As with any other litigation tool or strategy, there are certain practicalities that a party considering seeking a TRO or preliminary injunction ought to consider.

The time and cost investment in seeking pre-trial injunctive relief is an important topic that should be addressed when the question of seeking an injunction arises. A full preliminary injunction hearing can be like a short trial, requiring extensive time and attention from the litigant, and the attorneys representing the litigant, in order to prepare for and to participate in a contested hearing. In addition, a party seeking injunctive relief will need to be prepared to post a bond. A court's willingness to grant an injunction is meaningless if the party cannot afford to post the bond, so these costs also need to be considered.

Further, a preliminary injunction hearing may require a litigant to lay out his case in great detail early in the litigation without the benefit of full discovery or investigation, and the strategy of such a preliminary presentation should be considered. A situation where a party wins a preliminary injunction, only to lose the overall case and the request for a permanent injunction, is rarely a success story for the litigant.

Finally, a litigant should also consider what could happen if he gets preliminary injunctive relief, but that relief is later dissolved. If the court determines that the opposing party was wrongfully enjoined, or that the filing party sought the injunctive relief maliciously, then the filing party may be ordered to forfeit the bond or to pay damages.

In summary, TROs and preliminary injunctions are extraordinary relief available to litigants in our state and federal court systems. They are useful tools for protecting a party's interests, but pre-trial injunctive relief should not be sought lightly. Careful consideration to the showing required to obtain a TRO or preliminary injunction, and the burdens that come with seeking this relief, should be given. Please consult with a member of our Litigation Team if you find yourself in need of stopping someone's wrongful actions. We would be happy to have that conversation with you, so you can consider whether legal action and injunctive relief provide good remedies for your situation.

--

© 2022 Ward and Smith, P.A. For further information regarding the issues described above, please contact Alexander C. Dale or Jordan M. Spanner.

This article is not intended to give, and should not be relied upon for, legal advice in any particular circumstance or fact situation. No action should be taken in reliance upon the information contained in this

article without obtaining the advice of an attorney.

We are your established legal network with offices in Asheville, Greenville, New Bern, Raleigh, and Wilmington, NC.