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**EXECUTIVE SERIES:**  
LABOR & EMPLOYMENT



## The Ever-Changing Non-Compete Landscape

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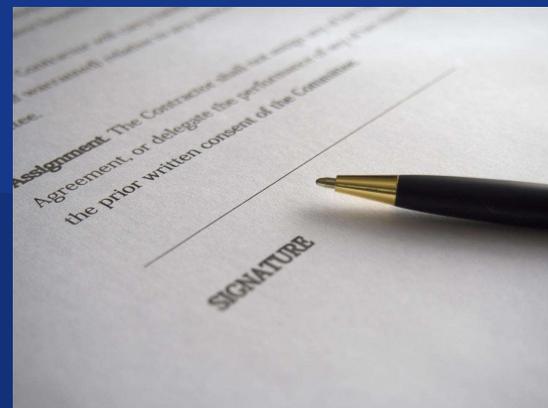
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## Restrictive Covenants

1. Definitions.
2. Legal Theory.
3. Confidential Information & Trade Secret Primer.



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## Restrictive Covenant Law

- **Terminology.**

- **Restrictive Covenant** – Any contractual device that limits an employee’s ability to compete against his or her employer, either during employment or after.
- **Non-compete** – A specific form of restrictive covenant traditionally viewed as prohibiting an employee from joining a competitor completely or in a specific role.
- **Non-solicit** – Another form of restrictive covenant traditionally used to prohibit an employee from soliciting either customers or other employees of the company.

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## Legal Theory Behind Restrictive Covenants

- General test for enforceability of a restrictive covenant: “narrowly tailored to protect a legitimate business interest.”
- What is “narrowly tailored?”
  - Has geographic and temporal limitations.
  - Activity restrictions can be substituted for geographic limitations.
- Courts will ask the question of whether the restrictions are no more burdensome than necessary to protect the company’s legitimate interests.

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## Legal Theory Behind Restrictive Covenants (Cont.)

- Requires a legitimate business interest.
- Traditional legitimate business interests:
  - Protecting confidential information.
  - Protecting long-standing, near permanent customer relationships.
  - Protecting company or customer goodwill (lynchpin for non-compete agreements in sale of business context).
- “Newer” legitimate business interests:
  - Maintaining a stable workforce (leading to need for employee non-solicits).
  - Protecting investments in specialized training or unique or extraordinary skills.

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## The Changing Landscape



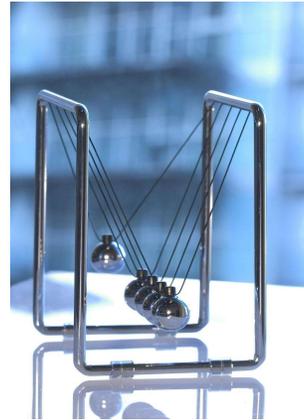
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## Cause & Effect

- 2008 - California's *Edwards v. Arthur Anderson* decision banning customer non-solicits.
- 2008-2020 - Emergence of single-state non-competes with favorable choice-of-law and venue provisions.
- 2017 - Pushback from states to protect in-state employees.
- 2019 - Emergence of income thresholds to protect low-wage earners.
- New states banning (or contemplating banning) non-competes like California.
- 2025 - Florida reverses course and enacts broad, employer-friendly legislation.



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## What We Are Seeing

- Extensive legislation (frequently successful) to define limits of non-competes.
- Federal consideration of same (FTC/NLRB and Congress).
- Wide swaths of solutions to perceived “problems.”



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## Emerging Trends

### Low Income Bans

- Maine
- Maryland
- Nevada
- New Hampshire
- Rhode Island

### Advanced Notice of Restrictions

- Colorado
- D.C.
- Illinois
- Maine
- Massachusetts
- New Hampshire
- Oregon
- Washington

### High Income Thresholds

- Colorado
- D.C.
- Illinois
- Oregon
- Virginia (until 6/30/25)
- Washington

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## Emerging Trends (Cont.)

### Bans for Non-Exempt Employees

- Virginia (new) (post 7/1/25)
- Wyoming (new) (effective 7/1/25)

### Out-of-State Venue Bans

- California
- Colorado
- Minnesota
- Massachusetts
- Washington

### Bans for Terminated Employees

- Illinois (Covid-related termination)
- Washington (valid if paid during non-compete period)

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## Other Trends

- Physician and healthcare worker bans.
- Limitations on customer non-solicitation provisions based on initiation of solicitation.
- Continuing focus on who can be subject to a non-compete based on income thresholds.
- Continued consideration of state-level bans.

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## State Legislation Considerations

- Dozens of states considered non-compete law modifications in last legislative session.
- New York introduced broad non-compete ban several times over past few years.
- California passed bill, with January 1, 2024 effective date, requiring employers to notify past and current employees of void nature of agreements.
- Florida passed massive overhaul providing greater flexibility to employers to impose longer restrictions.
- Current focus appears to be healthcare and low wage worker bans, but may see Florida-style pushback on bans.

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## Other Strategies to Protect Business Assets



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## Alternative Legal Tools to Protect Confidential Information and Customer Goodwill

- Contracts.
  - Consider a multi-state strategy.
  - Utilize non-solicitation and confidentiality agreements.
- Trade secrets.
  - Protect secrecy of non-public information.
- Other Unfair Competition Claims.

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## Drafting Best Practices

1. Confidentiality Agreements.
2. Non-Solicitation Agreements (Customers).
3. Non-Solicitation Agreements (Employees).



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## Confidentiality Agreements

- Used widely with virtually every employee.
- Independent contractors and vendors who may have access to confidential information should also be subject to confidentiality agreements.

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## Confidentiality Agreements (Cont.)

- The agreement should:
  - Define what constitutes confidential information.
  - Prohibit the use or disclosure.
  - Contain federal Defend Trade Secrets Act whistleblower language.
  - Require return of confidential information and other company property:
    - on demand; or
    - on termination of employment.
  - Address logistics for return of property.
  - Contain a temporal limitation, if required by applicable law.

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## Customer Non-Solicitation Agreements Should...

- Be no broader than necessary to protect the employer's legitimate business interests.
- Not be more than 1-2 years in duration (generally).
- Be limited to customers with whom the employee had business contact or about whom the employee obtained confidential information.
- Be limited by geographic scope, if required by law in the jurisdiction.
- Be limited to solicitation for competitive purposes.
- Some states require a salary threshold for non-solicits.

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## Employee Non-Solicitation Agreements Should...

- Be no broader than necessary to protect the employer's legitimate business interest.
- Not be more than 1-2 years in duration (generally).
- Be limited to employees with whom the employee had direct or indirect business contact or about whom the employee obtained confidential information.
- Be limited by geographic scope, if required by law in the jurisdiction.

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## Trade Secrets and Confidential Information



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## Trade Secrets

- Law generally defined by two statutory schemes.
  - Uniform Trade Secrets Act (adopted by 49 of 50 states plus District of Columbia; New York sole exception, North Carolina adopted a modified version of the Act).
  - Defend Trade Secrets Act (enacted by Congress in 2016).
- Statutes define trade secrets to include formulas, patterns, compilations, programs, devices, methods, techniques, or processes.
- Reality is anything can constitute a trade secret if it fits the statutory definition.

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## Trade Secrets (Cont.)



### Independent Economic Value Derived from Information Remaining Secret

- Actual or potential value.
- Can be proven counterintuitively by showing how competitor wanted/used misappropriated information.



### Not Generally Known

- Weighed against others in the industry, not public at large.
- Independent discovery or reverse engineering does not violate Acts.



### Reasonable Efforts to Maintain Secrecy

- Agreements usually a necessity.
- Password protection.
- Need not be herculean but efforts must match size of company.

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## Efforts to Maintain Secrecy – Confidentiality Policies

- An effective confidentiality policy:
  - Defines confidential information, including through examples.
  - Prohibits the use or disclosure of confidential information.
  - Requires the return of company property on termination of employment.
  - Provides that employees have no right of privacy in communications or activities.
  - Is consistently implemented and enforced.

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## Efforts to Maintain Secrecy – Confidentiality Policies (Cont.)

- An effective confidentiality policy restricts:
  - Discussion of confidential information with those who do not have a reason to know.
  - Transferring confidential information to removable storage media.
  - Transferring confidential information to personal or unauthorized third-party email, cloud or other accounts.
  - Printing confidential information.
  - Removing confidential information from company facilities.
  - Accessing and storing confidential information outside company premises.

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## Efforts to Maintain Secrecy – Confidentiality Policies (Cont.)

- Update confidentiality policies regularly.
- Recirculate confidentiality policies regularly.
- Uniformly enforce confidentiality policies.
- Ensure that employees acknowledge confidentiality policies.
- Maintain confidentiality policy acknowledgments, including in employee personnel files.
- **TRAIN** employees on confidentiality and security policies.

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## Efforts to Maintain Secrecy – Physical Security

- Ensure that the workplace is secure through:
  - Locking doors.
  - Limiting visitor access.
  - Requiring visitors to sign in and out.
  - Requiring visitor accompaniment.
  - Maintaining security cameras.
  - Retaining security guards.

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## Efforts to Maintain Secrecy – Information Technology Restrictions and Requirements

- Restrict or prohibit thumb drives or other storage media.
- Restrict or prohibit access to personal email accounts.
- Monitor employees' use of company accounts and servers.
- Restrict or prohibit employees' ability to print confidential information.
- Monitor external cloud-based repositories.

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## Efforts to Maintain Secrecy – Information Technology Restrictions and Requirements (Cont.)

- Ensure that printed materials are kept in secure, locked locations.
- Shred printed materials or maintain locked boxes for material to be shredded by a vendor.
- Require two-step authentication for employees to access information electronically.
- Ensure that employee access to company servers is limited to those who need access to do their jobs.
- Require regular password changes.

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## Efforts to Maintain Secrecy – Information Technology Restrictions and Requirements (Cont.)

- Roll out privacy and data security policies.
- Train employees in cybersecurity awareness.
- Retain vendors to audit the security of confidential information, and related policies and practices.
- Require employees, on termination of employment, to sign an acknowledgment indicating:
  - understanding of all of confidentiality obligations; and
  - return of all confidential information.

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## Key Takeaways



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## Key Takeaways for Own Program

- Days of One-State-Fits-All Model are over.
- Design restrictive covenant programs to fit needs of today and tomorrow.
- Stay abreast of changes in law.
- Programs must be nimble; scalability is key.
- Find a trusted advisor or develop a process to stay updated.
- Do not attempt to enforce unenforceable covenants.

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## Key Takeaways for Own Program (Cont.)

- Ensure widespread use of confidentiality agreements.
- Ensure widespread use of non-solicitation agreements for customer-facing employees.
- Ensure the protection of confidential information through:
  - Policies.
  - Security procedures.
  - Training.

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## Key Takeaways for Hiring

- Do not assume that just because a candidate has an agreement, it is enforceable.
- Pay attention to choice-of-law and venue provisions in evaluating enforceability.
- Wear the white hat.
- Make clear expectations in offer letter and own agreement(s).
- Follow-up with competitive hires to make sure they are abiding by restrictions.

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## Key Takeaways if Facing Litigation

- Collect facts quickly; interviews, main documents.
- Retain evidence; emails, text messages, metadata.
- Assess your weak points and address in initial pleadings; i.e., question enforcement of provision in agreement, then only enforce what you can win.
- Understand what constitutes a win; protecting customer base, protecting trade secrets, enjoining competitor from stealing same.

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