

**2026 NATIONAL LABOR & EMPLOYMENT LAW SYMPOSIUM**

***TIPS ON LITIGATING RESTRICTIVE COVENANTS  
AND TRADE SECRET THEFT***

**STEAMBOAT SPRINGS, COLORADO**

---

**GARY B. EIDELMAN, ESQ., SAUL EWING LLP**

**STEPHEN E. FOX, ESQ., SHEPPARD, MULLIN, RICHTER & HAMPTON LLP**

## NON-COMPETES – SOME RECENT HISTORICAL CONTEXT

---

- **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.**
- **May 2024 – FTC issues rule prohibiting most employers from entering into or enforcing non-compete agreements, declaring them an “unfair method of competition”.**
- **2025 - Florida reverses course and enacts broad, employer-friendly legislation.**

# CURRENT LEGAL LANDSCAPE

---



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

# UPDATE ON FTC RULE-MAKING BAN

---

- In May 2024, FTC issued rule prohibiting most employers from entering into or enforcing non-compete agreements, declaring them an “unfair method of competition”.
- In August 2024, NDTX struck down the Rule, finding FTC lacked clear statutory authority.
- FTC appealed ruling to multiple federal appellate courts.
- Describing the Rule’s illegality as “patently obvious” and citing absence of clear congressional authorization and Rule’s sweeping scope, Trump’s FTC dismissed its appeals.

# UPDATE ON FTC RULE-MAKING BAN

---

- **But FTC's interest in non-competes still very much alive.**
- **Rather than pursuing sweeping rulemaking, FTC is pivoting to targeted enforcement – evaluating noncompete agreements on a case-by-case basis.**
  - **Particular focus on industries where restrictions may harm consumers or competition.**
- **Healthcare sector is at top of list.**
  - **In September, FTC issued warning letters to several large healthcare employers and staffing firms, urging a comprehensive review of restrictive covenant agreements for compliance with applicable law.**
  - **Concerned about patient choice.**

# UPDATE ON FTC RULE-MAKING BAN

---

- **FTC's renewed enforcement push aligns with wave of recent state-level reforms tightening noncompete rules for healthcare professionals.**
- **Several states already restricted physician and healthcare provider non-competes:**
  - **Colorado, Connecticut, Delaware, the District of Columbia, Florida, Illinois, Iowa, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, Rhode Island, South Dakota, Tennessee, and West Virginia.**
- **Since early 2025, that group has proliferated, with additional eight states:**
  - **Arkansas, Louisiana, Maryland, Pennsylvania, Utah, Texas, Indiana, and Wyoming.**

# UPDATE ON FTC RULE-MAKING BAN

---

- **FTC's focus not limited to healthcare.**
- **In August 2025, FTC filed complaint against national pet cremation company.**
  - **Complaint alleges employer required all employees—from hourly workers to executives—to sign sweeping noncompete agreements prohibiting employment in pet cremation industry anywhere in US for 1 year after separation.**
  - **FTC's proposed consent order rescinds all existing noncompete agreements and prohibits similar restrictions going forward**
  - **Underscores FTC's continued willingness to police “unfair methods of competition” even after abandoning its nationwide ban.**

# SPOTLIGHT ON FLORIDA CHOICE ACT

---

- **Effective 7/3/25.**
- **Does not replace or repeal Fla. Stat. §542.335 (governing Florida non-competes since late 1990s).**
- **Essentially rewrites Florida non-compete law for “covered employees”.**
- **Substantial changes to TRO procedures.**
- **Greatly broadens permitted temporal scope of non-competes.**

# KEY FEATURES OF CHOICE ACT

---

- **Substantial expansion of permissible NON-COMPETE TERM (up to four years).**
- **Heightened administrative requirements upon presentment.**
  - **At least seven days' written notice before execution of agreement.**
  - **Mandatory written notice informing employee of right to consult counsel.**
  - **Employee must acknowledge, in writing, receiving confidential information or access to customer relationships.**
- **Act offers program choices to employers (garden leave versus none).**
- **Applies to “covered employees”, who are defined to earn two times the annual mean wage of all occupations in Florida, currently \$62,990 (meaning CHOICE Act only applies to employees earning \$125,980 or more).**
- **Almost guaranteed employer “win” if required to enforce.**

## KEY FEATURES – NON-COMPETES

---

- **Allows restrictions of up to 4 years**
- **Either through a garden leave provision or a traditional non-compete.**
  - **Garden leave is geography agnostic. Essentially employee provides extended notice so employee never leaves employer's employ.**
  - **Traditional non-compete requires geography be defined in agreement.**
- **Certain notice requirements exist (failing to provide renders agreement unenforceable).**
- **Open questions**
  - **How do CHOICE Act and §542.335 coexist?**
  - **Does the CHOICE Act apply to independent contractors?**

# OLD V. NEW: §542.335 & CHOICE ACT

---

- **Presumptions of validity different**
  - §542.335 presumed agreements “<” six months valid and “>” two years invalid.
  - CHOICE Act – silent regarding term length but finding that NDAs and non-solicitation restrictions are “inadequate to protect” “confidential information and client relationships.”
- **Jurisdictional requirements different**
  - §542.335 – burden on the party seeking to enforce to plead and prove a legitimate business interest; TRO dependent on traditional equitable evaluation by court.
  - CHOICE Act – court is required to preliminarily enjoin employee upon application by employer; burden on employee seeking to dissolve TRO to show by clear and convincing evidence application of limited considerations.
- **Award of attorney’s fees (§542.335 – prevailing party; CHOICE Act – prevailing party, but odds stacked heavily in employer’s favor).**
- **Who it applies to (§542.335 – a host of scenarios; CHOICE Act - only “covered” employees).**

## KEY FEATURES – GARDEN LEAVE

---

- **Garden leave requires employer to pay employee to sit on sideline but does not include discretionary incentive compensation.**
- **Act is ambiguous on whether benefits must be provided.**
- **Employee need not continue to provide work for employer after first 90 days of notice period.**
- **Employee may engage in “nonwork activities” during notice period, but term not defined.**
- **Employee may work for another employer during notice period, with the permission of the employer.**
- **Notice period may be reduced at employer’s discretion and upon written notice, but noncompete restriction only lasts so long as leave is paid.**

## KEY FEATURE – JUDICIAL DISCRETION

---

- Court **required** to enjoin employee where employer seeks to enforce a “covered” agreement.
- Court may only modify or dissolve preliminary injunction where employee or new employer prove by clear and convincing evidence, without providing any confidential information that:
  - Employee will not provide any services similar to ones provided to former employer during three years prior to garden leave beginning or noncompete starting;
  - Will not use former employer’s confidential information;
  - New employer not engaged in or planning on business similar to prior employer; or
  - Former employer not paying garden leave salary and benefits and failed to cure.
- Employer can also prospectively withhold or reduce garden leave salary/benefits for “gross misconduct” but term undefined.
- Fee shifting still available (like §542.335), but very hard for employee to “prevail.”

## KEY FEATURE – CHOICE-OF-LAW & VENUE

---

- **Act purports to eliminate conflicts of law in favor of application of this statute**
- **Many states have statutorily voided out-of-state choice-of-law and venue provisions impacting employees in those states.**
  - **California, Massachusetts, Minnesota, Colorado, Washington.**
  - **How does CHOICE Act square with these prohibitions? Does this reward first-to-file litigation?**
  - **How does CHOICE Act square with choice-of-law and venue analysis?**

# EXPECTED IMPACT ON BUSINESSES

---

- **Impact on current non-compete agreements?**
- **Potential impact on recruitment?**
- **Potential ambiguities in the statute**
  - **§542.335 remains good law; how does presumption of invalidity for agreements over two years square with new statute?**
  - **Salary threshold definition differs in statute (some places county, some places state). How do employers respond?**
  - **Statute applies to covered employees, defined as meeting a “salary” threshold. How do employers respond to independent contractors?**

## SOME FLORIDA KEY TAKEAWAYS & RECOMMENDATIONS

---

- **Act appears ripe for judicial challenges due to ambiguities and scope. It may necessitate employers to proceed with caution in reformulating restrictive covenant program.**
- **Employers adopting new programs reliant on CHOICE Act must ensure they comply with notice provisions for covered employees.**
- **Due to county-versus-state ambiguities regarding pay figure, adopters should err on higher income number.**
- **Despite removal of legitimate business test, employers may still want to craft program to fit legitimate business test and four-years may be longer than necessary to protect interests.**
- **Employers should consider the impact on employee recruitment and morale if deciding to adopt CHOICE Act prohibitions.**

# OTHER 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

# OTHER EMERGING TRENDS

---

## 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)

## OTHER EMERGING 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.**

# DISCOVERY FOCUS IN TRADE SECRETS CASES

---

- **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.**

# TS DISCOVERY - EFFORTS TO MAINTAIN SECRECY — CONFIDENTIALITY POLICIES

---

- **Does the company's confidentiality policy:**
  - **Define confidential information, including through examples;**
  - **Prohibit the use or disclosure of confidential information;**
  - **Require the return of company property on termination of employment; and**
  - **Provide that employees have no right of privacy in communications or activities.**
- **Is the company's policy consistently implemented and enforced?**

# TS DISCOVERY - EFFORTS TO MAINTAIN SECRECY – CONFIDENTIALITY POLICIES

---

- **Does the company's policy prohibit:**
  - **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; and**
  - **Accessing and storing confidential information outside company premises.**

# TS DISCOVERY - EFFORTS TO MAINTAIN SECRECY – CONFIDENTIALITY POLICIES

---

- **Does the company:**
  - **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;  
and**
  - **Train employees on confidentiality and security policies.**

# TS DISCOVERY - EFFORTS TO MAINTAIN SECRECY – PHYSICAL SECURITY

---

- **Does the company ensure that the workplace is secure by:**
  - **Locking doors;**
  - **Limiting visitor access;**
  - **Requiring visitors to sign in and out;**
  - **Requiring visitor accompaniment;**
  - **Maintaining security cameras; and**
  - **Retaining security guards.**

# **TS DISCOVERY - EFFORTS TO MAINTAIN SECURITY – INFORMATION TECHNOLOGY RESTRICTIONS AND REQUIREMENTS**

---

- **Does the company:**
  - **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;  
and**
  - **Require regular password changes.**

# **TS DISCOVERY - EFFORTS TO MAINTAIN SECURITY – INFORMATION TECHNOLOGY RESTRICTIONS AND REQUIREMENTS**

---

- **Does the company:**
  - **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;  
and**
  - **Require employees, on termination of employment, to sign an acknowledgment indicating:**
    - **An understanding of all of confidentiality obligations; and**
    - **Demand return of all confidential information.**

# KEY TAKEAWAYS IN TS LITIGATION

---

- **Quickly collect facts (conduct witness interviews and gather/review main documents).**
- **Retain evidence; emails, text messages, metadata.**
- **Assess 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.**

## ONE KEY QUESTION FOR LITIGATION – WHAT LAW APPLIES?

---

- Many companies incorporated in Delaware. Delaware choice of law often included in agreements even for companies with no operations in Delaware.
- Why is this important?
- It is well-settled that DUTSA “lacks extraterritorial effect” because “DUTSA lacks any indication that the legislature intended for it to apply outside the territorial jurisdiction of Delaware.” *Focus Fin. P’s, LLC v. Holsopple*, 250 A.3d 939, 970(Del. Ch. 2020). Importantly, “it has been uniformly held by both state and federal courts in Delaware that the DUTSA does not have extraterritorial effect.” *WIT Software v. Talkdesk, Inc.*, 2023 WL 3454193, at \*9 (D. Del. May 15, 2023).
- DUTSA does not provide a claim for conduct outside Delaware. In *Focus Financial*, Court held that “[o]ne thing is clear: Delaware law does not apply” to the plaintiff’s trade secret claim because the relevant facts occurred elsewhere; particularly, the defendant “primarily worked in California, so any misappropriation could be viewed as having occurred there.” 250 A.3d at 971.

# DETAILS MATTER - DAMAGES SNAPSHOT – DE VERSUS CA

---

## DUTSA

### § 2003. Damages.

(a) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. **In lieu of damages measured by any other methods**, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.

## CUTSA

### 3426.3.

(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.

(b) **If neither damages nor unjust enrichment caused by misappropriation are provable**, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.