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2016 Year in Review: Trade Secrets and Non-Compete Laws and Developments

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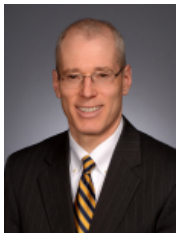

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AGENDA

- Top 10 Reasons Why the Defend Trade Secrets Act (DTSA) Matters to Employers
- New State Non-Compete Statutes
- What Courts Found Dispositive In Significant Recent Trade Secret Cases
- What Is Now Adequate Consideration for a New Or Modified Non-Compete?
- The Latest Regarding Choice of Law and Forum Selection Clauses
- Agency Developments Which Impact Confidentiality Agreements

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What Employers Need to Know About the Defend Trade Secrets Act (DTSA)

Top 10 Reasons Why DTSA Matters to Employers

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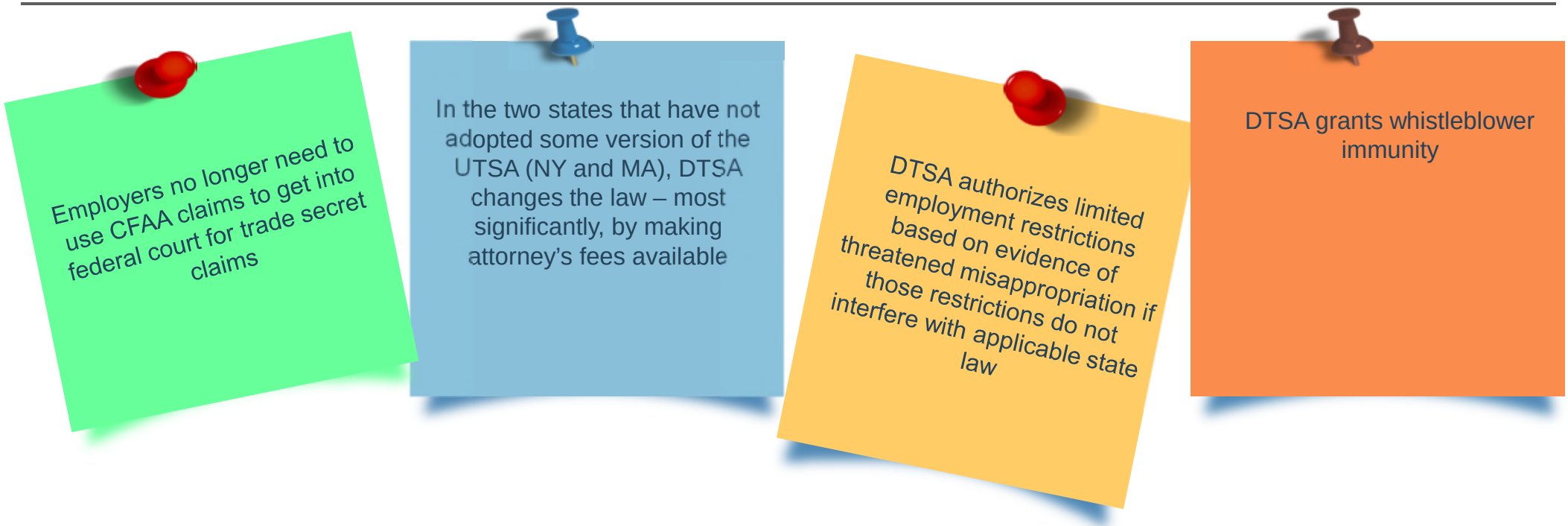
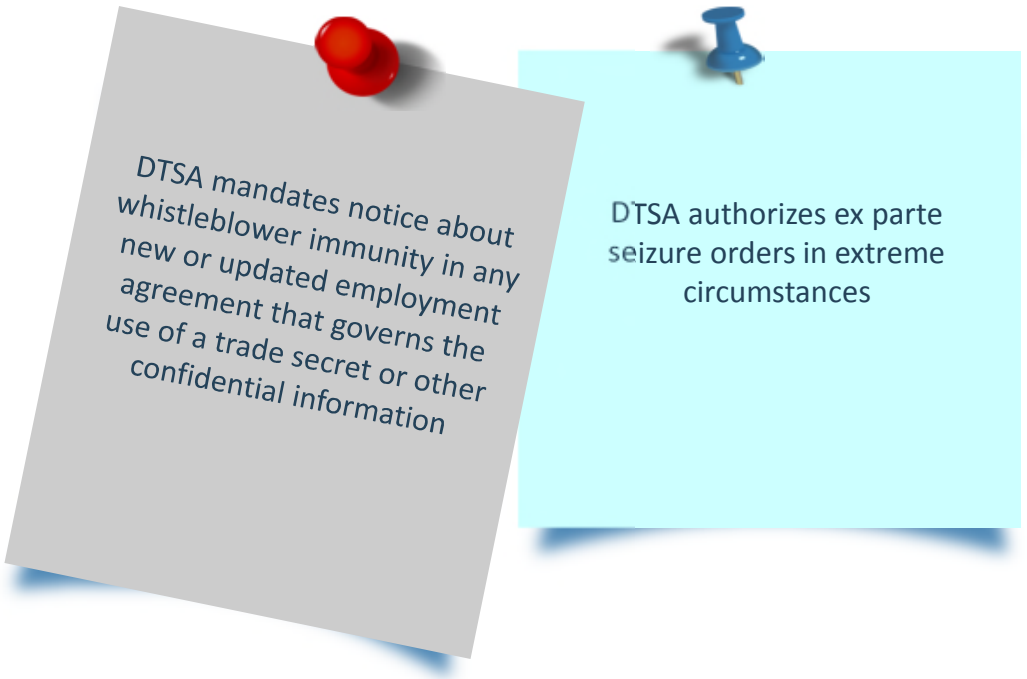


Top 10 Reasons Why DTSA Matters to Employers



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New State Non-Compete Statutes

White House and Treasury Release Reports on Non-Competes

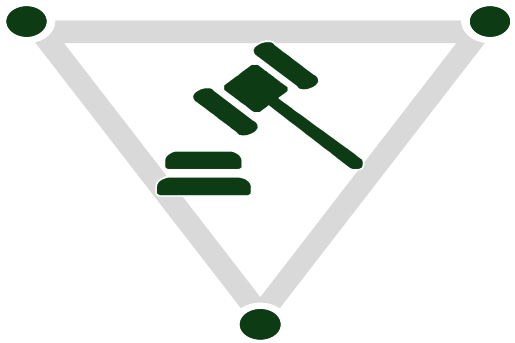
A March 2016 report by the U.S. Department of the Treasury found that non-compete agreements cause various harms to "worker welfare, job mobility, business dynamics, and economic growth more generally."

A May 2016 report published by the White House similarly questioned whether non-compete agreements for low-wage workers protect legitimate business interests or, instead, merely hamper labor mobility.

In sum, the political winds are clearly blowing against non-compete agreements for low-wage workers. Employers should therefore make sure that their non-compete agreements with low-level employees protect legitimate business interests, such as safeguarding trade secrets and/or customer relationships.

Illinois Bans Non-Competes for Low-Wage Workers

Illinois recently banned non-compete agreements for low-wage workers when it passed the Illinois Freedom to Work Act.



The law, which takes effect on January 1, 2017, and applies to agreements signed after that date, bars non-compete agreements for workers who earn the greater of
(i) the federal, state, or local minimum wage or
(ii) $13.00 an hour.

While Illinois is one of the first states to enact this type of blanket ban on non-competes based on the employee's salary status, in other states, including New Jersey and Maryland, legislation based on eligibility for unemployment compensation has been proposed.

Utah Restricts Post-Employment Restrictions

Post-Employment Restrictions Act (Utah Code § 34-51-101, et. seq.) (effective May 10, 2016)

- Imposes time limits on restrictive covenants entered into on or after May 10, 2016 to a 1-year period from termination.
- Allows employees to recover attorneys' fees where an **employer** seeks to enforce a post-employment restriction which is found unenforceable.

- Law is **NOT** retroactive.
- Law does **NOT** apply to:
  - a "reasonable severance agreement;"
  - any restrictive covenants stemming from the sale of a business;
  - non-solicitation agreements;
  - nondisclosure agreements; or
  - confidentiality agreements.

Alabama Codifies "Middle of the Road" Approach to Non-Competes

Restrictive Covenants Act (Ala. Code 1975, § 8-1-1) (effective January 1, 2016)

- Allows non-compete and non-solicitation clauses for many employees provided they contain reasonable restrictions:
  - Limited to the geographic area where the company operates a similar business.
  - Non-competes are presumptively reasonable if for 2 years or less.
  - Customer non-solicits are presumptively reasonable for the longer of:
    - 18 months or less; or
    - time period for which post-separation consideration is paid for the agreement.
- Codifies the concept of equitable modification, permitting a court to modify restrictions that are overly broad or unreasonably long to preserve the protectable interest at issue.

Rhode Island Restricts Physician Non-Competes

An Act Relating to Businesses and Professions – Board of Medical Licensure and Discipline (R.I. Gen. Laws § 5-37-33) (effective July 12, 2016)

- Renders **void and unenforceable** "any restriction on the right to practice medicine" found in virtually any contract creating the terms of employment, partnership or other professional relationship involving a state-licensed physician.
- Law invalidates **non-competition** and patient **non-solicitation** provisions for Rhode Island physicians.

Carve-out:

- BUT, it does **NOT** apply in connection with the purchase and sale of a physician practice, if the restrictive covenant is less than 5 years in duration.

Connecticut Restricts Physician Non-Competes

(Conn. Gen. Stat. Ann. P.A. 16-95, § 1) (effective on July 1, 2016)

- Not as sweeping as new Rhode Island law.
- Creates bright-line limits for enforceability in any new, amended, or renewed physician agreement:
  - Allows duration of up to 1 year.
  - Geographical scope allowed up to 15 miles from the primary site where the physician practices.
- Physician non-competes are unenforceable if the physician's employment or contractual relationship is terminated without cause, but:
  - "Cause" is not defined.
  - Issue likely to be litigated.
- **NOTE**: If part of the agreement is invalidated because it violated this law, the remainder of the agreement may still be enforced.

Hawaii Bans Non-Solicits and Non-Competes for Employees of Technology Businesses

(Hawaii Act 158) (effective on July 1, 2015)

- Voids any non-compete or non-solicitation clause in an employment contract "relating to an employee of a technology business."
- The Act defines "technology business" as one that "derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both."
- This law does not affect any restrictive covenants implemented before July 1, 2015.

Idaho Creates a Rebuttable Presumption of Irreparable Harm for Key Employees or Key Independent Contractors

(Idaho Code Ann. § 44-2704) (effective on July 1, 2016)

- Establishes a **rebuttable presumption** of irreparable harm if a key employee or key independent contractor breaches a non-compete.
  - Limits duration for key employees to **18 months**, unless employer provides consideration in addition to employment or continued employment.
  - BUT, creates rebuttable presumption that duration of 18 months or less is reasonable.
- Establishes a rebuttable presumption that an employee or independent contractor who is among the **highest paid 5%** of the employer's employees or independent contractors is a "key" employee or independent contractor.

Massachusetts Again Fails To Limit Non-Competes

- Massachusetts legislature has wrestled with non-compete limitations for years.
- Effort failed again in 2016.

Stay tuned!

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What Courts Found Dispositive in Significant Recent Trade Secret Cases

Notable 2016 DTSA Decisions

First written DTSA decision illustrating interplay between DTSA and state law

Henry Schein, Inc. v. Cook, 2016 U.S. Dist. LEXIS 76038 and 2016 U.S. Dist. LEXIS 3212457 (N.D. Cal. June 10 and 22, 2016)

- Former HSI sales rep joined competitor. She acted badly by:
  - emailing herself large amount of data before resigning;
  - keeping and trying to scrub her company laptop for 2 weeks *after* resigning; and
  - accessing HSI data from an iPad app *after* resigning.
- HSI sued in federal court alleging 8 counts including misappropriation claim under DTSA.
- Court granted *ex parte* TRO and then preliminary injunction under DTSA, restraining Cook from accessing, using or disclosing HSI's "confidential, proprietary, or trade secret documents, data, or information."
- Court found:
  - Customer histories were protectable as a trade secret under DTSA; and
  - Cook took materials using "improper means," even if her purpose was to estimate her commissions or answer customer questions.
- **BUT**, Court did not enjoin solicitation of customers because of California law's prohibition on non-solicits and injunction was not necessary to protect trade secrets.

Notable 2016 DTSA Decisions (cont.)

Decision interpreting DTSA's statute of limitation provision

Adams Arms, LLC v. Unified Weapon Sys., 2016 U.S. Dist. LEXIS 132201 (M.D. Fla. Sep. 27, 2016)

- UWS entered into a solo contract with foreign government to manufacture rifles using AA's *own* rifle technology.
- AA sued in federal court alleging 8 counts, including misappropriation claim under DTSA.
- UWS moved to dismiss the DTSA clam, relying on its statute-of-limitation provision, arguing that:
  - the DTSA did not become effective until May 11, 2016, *after* the relevant events at issue; and
  - AA's claim should be treated as a **"continuing misappropriation**," or a single claim of misappropriation
- Court said that the provision addresses only when a claim accrues; it does *not* address whether an owner may recover under the DTSA when the misappropriation occurs before *and* after the effective date.
- Instead, the Court looked to Section 2(e), which specifies that the DTSA applies to:

  "any misappropriation . . . for which ***any*** act occurs after the effective date."

- Court held that AA sufficiently alleged a prohibited act after May 11, 2016 for UWS's disclosure of AA's trade secrets, **BUT** dismissed the claim to the extent it was based on UWS's acquisition of the trade secrets ***prior to*** May 11, 2016.

Notable 2016 DTSA Decisions (cont.)

The Inevitable Disclosure Doctrine in a Post-DTSA World

Panera LLC v. Nettles and Papa John's Int'l, Inc., 2016 U.S. Dist. LEXIS 101473 (E.D. Mo. Aug. 3, 2016)

- Panera IT executive left to join Papa John's.
- Panera invoked federal court jurisdiction under DTSA and diversity jurisdiction.
  Central allegations were:
  - both companies competed with each other in the "food alternative" restaurant business, committed to using the freshest ingredients with minimal artificial components; and
  - the protectable information was proprietary technology to enhance the guest experience.
- Court found that Nettles "wiped clean" his personal computer which "suggests" that he may have breached his fiduciary duty regarding Panera's confidential information.
- Relying largely on the **inevitable disclosure** doctrine, the court enjoined Nettles from working for Papa John's, finding likelihood of success on the contract-based restrictive covenant claim and under the Missouri UTSA.
- Court did not discuss the merits of the DTSA claim, likely because "threatened" disclosure, rather than "inevitable" disclosure, is the touchstone under the DTSA.

Other Notable 2016 Decisions

Interplay between federal copyright law and state trade secret law

GlobeRanger Corp. v. Software AG United States of America, Inc., 836 F.3d 477 (5th Cir. Sep. 7, 2016)

- Software AG accessed GlobeRanger's RFID technology after taking over GlobeRanger's Navy subcontract.
- GlobeRanger won a **$15 million verdict** at a jury trial based on 5 asserted state law counts, including misappropriation of trade secrets.
- Software AG appealed, arguing that federal copyright law preempted GlobeRanger's trade secret claim.
- The 5th Circuit **affirmed**, stating that the Copyright Act preempts a state law claim upon two conditions:

  (1) The work in which the right is asserted must come within the subject matter of copyright; *and*

  (2) The right the author seeks to protect is equivalent to any of the exclusive rights within the scope of copyright.
  - Ask, is the state law protecting the same rights as the Copyright Act?
- The 5th Circuit held that (1) was met, but (2) was NOT.
  - Trade secrets law protects against any taking through breach of a confidential relationship or other improper means. There is an "**additional element**" needed for a trade secret claim.
- Note: **10 circuit courts** agree that trade secret misappropriation is not preempted by copyright law.

Other Notable 2016 Decisions (cont.)

Big verdicts against bad leavers

Epic Sys. Corp. v. Tata Consultancy Servs. Ltd., Case No. 14-cv-00748-wmc (W.D. Wisc. Apr. 15, 2016) (Docket No. 871)

- $940 million jury verdict for misappropriation of trade secrets, breach of contract, unfair competition, and unjust enrichment:
  - $240 million in compensatory damages; and
  - **$700 million** in punitive damages.
- Discovery sanction of adverse inference likely drove verdict.
- Defendant's motion for judgment as a matter of law as to damages is pending.
  - Punitives likely to be reduced to $480 million due to Wisconsin statutory cap (double the amount of compensatory).

Other Notable 2016 Decisions (cont.)

Big verdicts against bad leavers (cont.)

B.G. Balmer & Co., Inc. v. Frank Crystal & Co., Inc., 2016 Pa. Super. LEXIS 516, 148 A.3d 454 (Pa. Super. Sept. 9, 2016)

- Appeals court upholds bench verdict of $4.5 million punitive damages and $2.39 million compensatory damages (ratio of only 1.88 to 1).
- Verdict driven by bad conduct of former employees, including:
  - breaching their non-solicitation agreements;
  - compiling their former employer's various client lists and trade secret info and using it at their current employer; and
  - attempting to destroy the former employer's business relationships.

Other Notable 2016 Decisions (cont.)

More big verdicts

Nedschroef Detroit Corp v. Bemas Enters. LLC, 646 Fed. App. 418 (6th Cir. Apr. 22, 2016)

- 6th Circuit affirmed $3.7 million award and permanent injunction in trade secret/ breach of duty of loyalty case
- Very bad actors: two of Nedschroef's employees formed a competing business, **under their wives' names**, to do exactly what Nedschroef did (service and provide replacement parts for fastener machines)
- District court granted summary judgment to Nedschroef on nine separate counts
- On appeal, defendants argued that they did not compete with Nedschroef, but 6th Circuit said the argument "ignor[ed] both common sense and the undisputed evidence."

Other Notable 2016 Decisions (cont.)

More big verdicts (cont.)

Tesla Wall Systems, LLC v. Budd, Case No. 14-cv-08564 (S.D.N.Y. Nov. 29, 2016) (Docket No. 87)

- $14.5 million jury verdict in case asserting claims for breach of contract, breach of fiduciary duty, violation of Delaware Uniform Trade Secrets Act, and others.
- Verdict driven by bad conduct of former Tesla Wall president Budd, who was president of Tesla Wall for 2 years when he resigned in 2014.
- Despite non-compete and non-solicit contractual provisions, he was accused of:
  - organizing a competing curtain wall company (based on Tesla Wall's business plan for future operations) and hiring all of Tesla Wall's employees to work for the new venture
- Defendant filed motion for judgment as a matter of law or for a new trial on December 22

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What Is Now Sufficient Consideration for a New or Modified Non-Compete?

Sufficient Consideration for Non-Compete: Minority Rule

MINORITY RULE:

- Continued at-will employment, by itself, is insufficient consideration for a non-compete
- In those minority jurisdictions, what ***is*** sufficient consideration?
  Not much news this year.
- ***XPO Logistics Inc. v. Anis***, 2016 NCBC 52 (N.C. Super. Ct. Jul. 12, 2016)

– Recognizes North Carolina rule that an employer must provide an employee with **new consideration** for a covenant not to compete **after** the employment relationship begins.

– But, employer's contractual promise to provide severance payments during a non-compete period after termination without cause in exchange for a release is sufficient consideration.

– Employer's discretion to draft required release does not make promise illusory, as the employer is obligated to act in good faith.

– By contrast, court noted that the arbitration provisions of the contract did not provide valid consideration: the contract did not indicate that employee sought employer's promise to submit to binding arbitration in exchange for her promise not to compete

Sufficient Consideration for Non-Compete: Minority Rule (cont.)

Durrell v. Tech Elecs., Inc., Case No. 16-cv-01367-CDP, 2016 U.S. Dist. LEXIS 157689 (E.D. Mo. Nov. 15, 2016)

- Employee sought declaration that 1-year non-compete agreement signed at time of hiring was unenforceable for lack of consideration because he was only an at-will employee
- In reaching its decision, the court relied on the recent string of Missouri cases holding that at-will employment is not valid consideration in the context of arbitration agreements.
- Court denied employer's motion to dismiss declaratory judgment claims.
- **Twist**: Previous Missouri cases enforced non-competes based on mere at-will employment as consideration. Given procedural posture (on MTD), unclear if case will have broad impact.

Stay tuned!

Sufficient Consideration for Non-Compete: Minority Rule (cont.)

What consideration is necessary for a non-compete in a post-employment severance agreement?

- ***U.S. Sec. Assoc. v. Cresante***, Index No. 161144/2015, 2016 N.Y. Misc. LEXIS 3662 (Sup. Ct. N.Y. Co. Oct. 7, 2016)
  - Case applies New York law, where courts routinely hold that non-competes are unenforceable where the employee is terminated without cause
  - Where post-termination severance agreement imposed 18-month non-compete, additional seven weeks severance over what was available under prior employment agreement constituted sufficient consideration to render the non-compete enforceable.
  - The implication is that a non-compete in a severance agreement requires consideration beyond that which employee would otherwise have been entitled upon termination.

Sufficient Consideration for Non-Compete: Majority Rule

MAJORITY RULE: Continued at-will employment, by itself, is sufficient consideration for a non-compete.

- New York and New Jersey both consider continued employment to constitute adequate consideration for a restrictive covenant signed by a current employee, ***provided*** that the employer restrains from discharging the employee for a "substantial" period of time.
- Exactly how much continued employment will suffice?
- Courts asking this "how much" view appear to contravene the well-settled contract principle that "any" consideration will support a contract promise (*i.e.*, it is the existence of consideration, not the amount, that is determinative).
- ***Fifield* redux**?
  - In *Fifield v. Premier Dealer Services, Inc*., 2013 IL App. (1st) 120327 (June 24, 2013), the Illinois First District Appellate Court held that, absent other consideration, at least two years of continued employment are required to constitute adequate consideration for a restrictive covenant.
  - Since *Fifield*, **Kentucky, North Carolina, and Pennsylvania** courts have each issued decisions requiring some consideration beyond mere continued employment.

Consideration for Non-Competes in Business Transactions

Wharton Physician Servs. v. Signature Gulf Coast Hosp., 2016 Tex. App. LEXIS 348 (Ct. App. Tex. Jan. 14, 2016)

- A non-compete clause included in a business-to-business services contract was not enforceable.
- Term of the contract was two years (but could be terminated with 6 months' notice) and included a non-compete clause that allowed Wharton to seek liquidated damages if Gulf Coast violated it.
- Prior to the end of the contract's term, Gulf Coast entered into a service agreement with a new counterparty and two of its affiliated employees signed contracts with that counterparty.
- Court held:
  - Gulf Coast's contractual obligation to pay Wharton for its services under the contract constituted the full exchange of consideration.
    - **No evidence of additional consideration** offered by Wharton for the non-compete aside from the fees paid, making that provision of the contract unenforceable.
    - Stated another way, there was no consideration for Gulf Coast's promise not to hire any physicians if the contract between Wharton and Gulf Coast was terminated.
  - Non-competes did not cover a "protectable interest" and were an unlawful restraint of trade.

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The Latest Regarding Choice of Law and Forum Selection Clauses

Choice of Law and Forum Selection: The Good and The Bad

Why It Matters?

- Enforceability of restrictive covenants varies greatly from state to state.
- Without a choice of law and forum provision, employers risk disputes over:
  - what forum should review the agreement; and
  - what law should apply.
- Choice of forum and choice of law clauses offer some predictability.
- **General rule**: Most courts honor choice of law and forum selection provisions if there is some reasonable connection with the designated state.

Supreme Court Doubles Down on Forum Selection Clauses

Atl. Marine Constr. Co., Inc. v. US Dist. Court for the W. Dist. of Texas 134 S. Ct. 568 (2013)

- Case resolves conflicting standards followed by district courts when reviewing forum selection provisions:
  - **1972 – Bremen v. Zapata Off-Shore Co.**, 407 U.S. 1 (1972): Forum selection clauses are "prima facie valid" and should not be set aside "absent a strong showing" that enforcement would be "unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching."
  - **1988 – Stewart Organization, Inc. v. Ricoh Corp.**, 487 U.S. 22 (1988): 28 U.S.C. 1404(a) controlled request to transfer venue pursuant to a forum selection clause and that the clause was merely a factor to be considered in deciding whether or not to transfer.

Conflict Resolved – Forum Selection Provisions Must Be Enforced Absent Extraordinary Circumstances

Atl. Marine Constr. Co., Inc. v. US Dist. Court for the W. Dist. of Texas
134 S. Ct. 568 (2013) (cont'd)

- "Contractual choice of forum should be enforced except in the most unusual cases."
- Party challenging forum-selection clause (i.e., the plaintiff who filed in a different court) bears the burden of establishing that public interests disfavoring transfer outweigh parties' choice of forum.
- District courts must enforce the chosen forum unless "extraordinary circumstances **unrelated to the convenience of the parties clearly disfavor a transaction**" (emphasis added).
- Supreme Court still kept the door partially open to challenge a forum selection provision.

What About State Court?

- The *Atlantic Marine Const.* decision creates more certainty in federal court, but does not govern disputes in state courts.
- Employers that do not have a jurisdictional basis to proceed in federal court must rely on state law.
- **Majority rule:** Most states treat forum selection provisions as presumptively valid…as long as there is some **reasonable nexus** to the designated forum.
- Acceptable nexus can be the state:
  - where the employee works;
  - where the employer is headquartered;
  - where the employer is incorporated.

New Law Limits Forum Selection Clauses in California – The Loophole That Is About to Be Closed

- It is well-known that California is particularly hostile to post-employment restrictions and has a statutory ban against most restrictive covenants (Cal. Bus. & Prof. Code § 16600).
- California courts generally do not honor choice of law provisions in non-compete agreements if the designated law permits enforcement of a post employment restriction.
- **The "Loophole:"** Employers had one tool that allowed them to enforce restrictive covenants against California employees:
  - Include a mandatory **forum selection clause** designating a forum state that is more friendly to restrictive covenants.
  - Some California courts were willing to enforce a forum selection clause even if the designated forum likely would enforce the restrictive covenant.

California Closes The Loophole – Passes Law Limiting Forum Selection Clauses

(Cal. Labor § 925) (effective January 1, 2017)

- The recent trend in California has been to close that loophole by rejecting forum selection provisions.
- One recent case held that a forum selection provision is not enforceable if it deprives an employee of a non-waivable statutory right.
- But California legislators went one step further by enacting California Labor Code section 925:

Employers shall not require employees, as a condition of employment, to agree to a provision that:

- **requires the employee to adjudicate a dispute outside California; or**
- **deprives the employee of the substantive protection of California law.**

Exception – contracts with employees who were individually represented by counsel when negotiating the agreement.

Do Employers Have Any Other Avenues to Enforce a Restrictive Covenant Against a California Resident?

- Employers can still seek enforcement against a California employee by filing a claim in another state pursuant to a forum selection provision, but the path is now much more complicated and risky:
- **The Risks**:
  - A forum selection provision that permits an employer to sue a California employee in another jurisdiction will be unlawful in California.
  - Courts in other states are less likely to honor forum selection and choice of law provisions against California residents that violate Section 925.
  - Employees can seek injunctive relief and attorneys' fees by filing a claim against employers that violate Section 925.
- **Bottom Line**:
  - While this is likely to be a litigated issue, it appears the door is closing tightly on an employer's ability to enforce restrictive covenants against California employees.

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Agency Developments That Impact Confidentiality Agreements

Equal Employment Opportunity Commission

- The EEOC has been challenging confidentiality provisions in severance agreements claiming that they deterred employees from filing a charge with the EEOC and therefore interfere with their rights under Title VII.
- Cases have had limited success but remain part of the agency's enforcement efforts:
  - ***EEOC v. Baker & Taylor****:* EEOC claimed that confidentiality provision in employee severance agreements prohibited employees from filing complaint with an administrative agency.

    Result: Case settled. As part of settlement the employer agreed to revise its severance agreement to include a disclaimer that the agreement is not intended to limit an employee's right or ability to file discrimination charges with the EEOC or its state and local counterparts as well as affirmative statements regarding these employee rights.
  - ***EOC v. CVS*****:** EEOC claimed disclaimer language in severance agreement was insufficient to cure other provisions (non-disparagement, cooperation clause, confidentiality) that interfered with employees' right to file charges of discrimination, **despite employer's use of disclaimer language previously approved by the EEOC**.

    Result: Case dismissed due to failure to conciliate and affirmed on appeal (809 F.3d 335 (7th Cir. 2015)).
  - ***EEOC v. CollegeAmerica***: EEOC claimed that broad release of all claims, cooperation, and non-disparagement provisions contained in severance agreements were too restrictive. Agreements had no carve-outs.

    Result: In June 2016, a 9-person jury ruled against EEOC and found no retaliation when the college sued a former employee for breach of a severance agreement.

Securities and Exchange Commission

- SEC brought several recent cease and desist proceedings challenging confidentiality and waiver provisions in the employer's standard severance agreements:
  - ***SEC v. KBR, Inc.*** (Apr. 1, 2015)
    - Confidentiality agreements signed during internal investigations prevented employees from reporting possible SEC violations.
    - **Result:** Settled for $130,000 penalty and inclusion of language clarifying employees' right to report possible violations to SEC.
  - ***SEC v. BlueLinx Holdings*** (Aug. 10, 2016)
    - Agreements preserved employees' right to file complaints or report to the SEC, but required them to waive the right to any monetary recovery.

    Result: Settled for $265,000 penalty, inclusion of mandatory disclaimer in all future agreements that preserved right to whistleblower recovery, and commitment to contact former employees who signed agreements with the offending provisions to clarify their rights.
  - ***SEC v. Health Net, Inc.*** (Aug. 16, 2016)
    - Same issues as BlueLinx.

    Result: Settled for $340,000 penalty and similar terms to BlueLinx.

National Labor Relations Board

- ***Banner Health System d/b/a Banner Estrella Medical Center*** 362 NLRB No. 137 (June 26, 2015)
  - Confidentiality policy used during the course of internal investigations was an unfair labor practice (ULP).
- ***American Baptist Homes of the West d/b/a Piedmont Gardens*** 362 NLRB No. 139 (Jun. 26, 2015)
  - Overruling 37-year precedent that witness statements obtained during an internal investigation will no longer be treated as confidential, unless employer can demonstrate a "legitimate and substantial" interest in maintaining confidentiality.
- ***Schwan's Home Service, Inc.*** 364 NLRB No. 20 (June 10, 2016)
  - Confidentiality agreement that prohibited employees from using "confidential information" that included information about wages, commissions, performance, or identities of employees, violated employees' Section 7 rights.

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Questions?

Thank you for participating.

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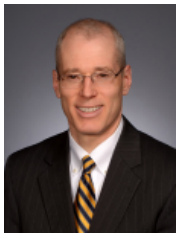

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