Seyfarth

Trade Secrets & Non-Competes Year in Review and What to Expect in 2024

January 30, 2024

Seyfarth Shaw LLP

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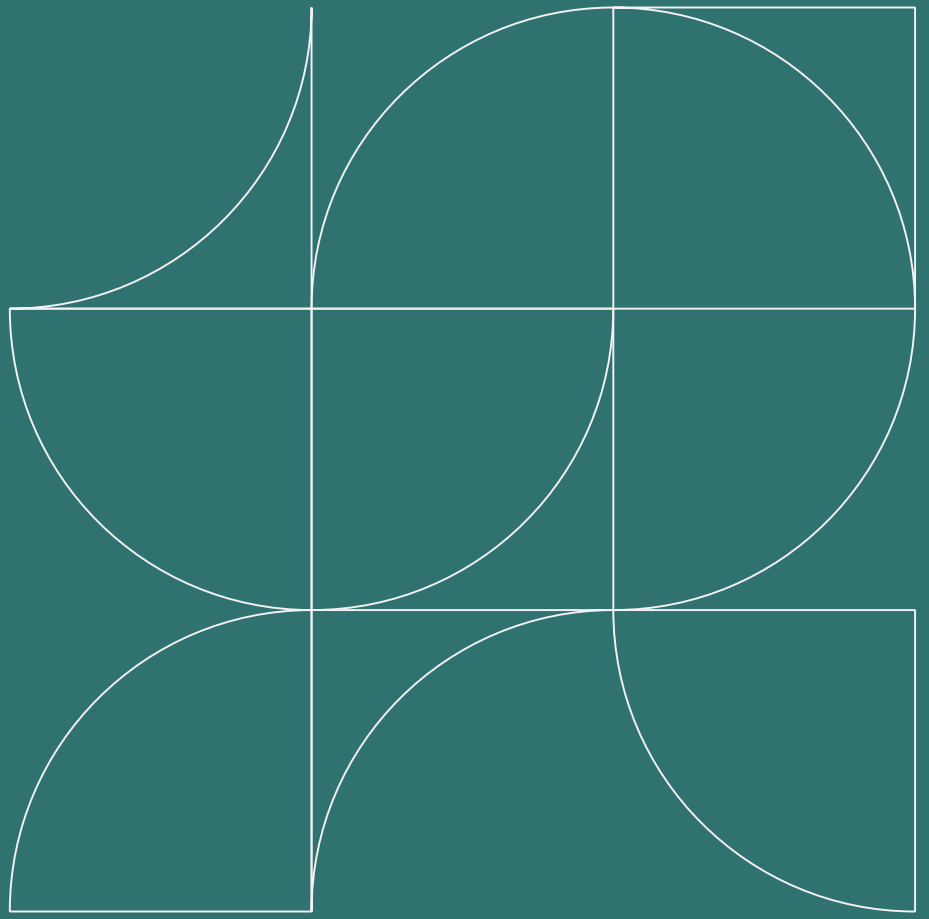
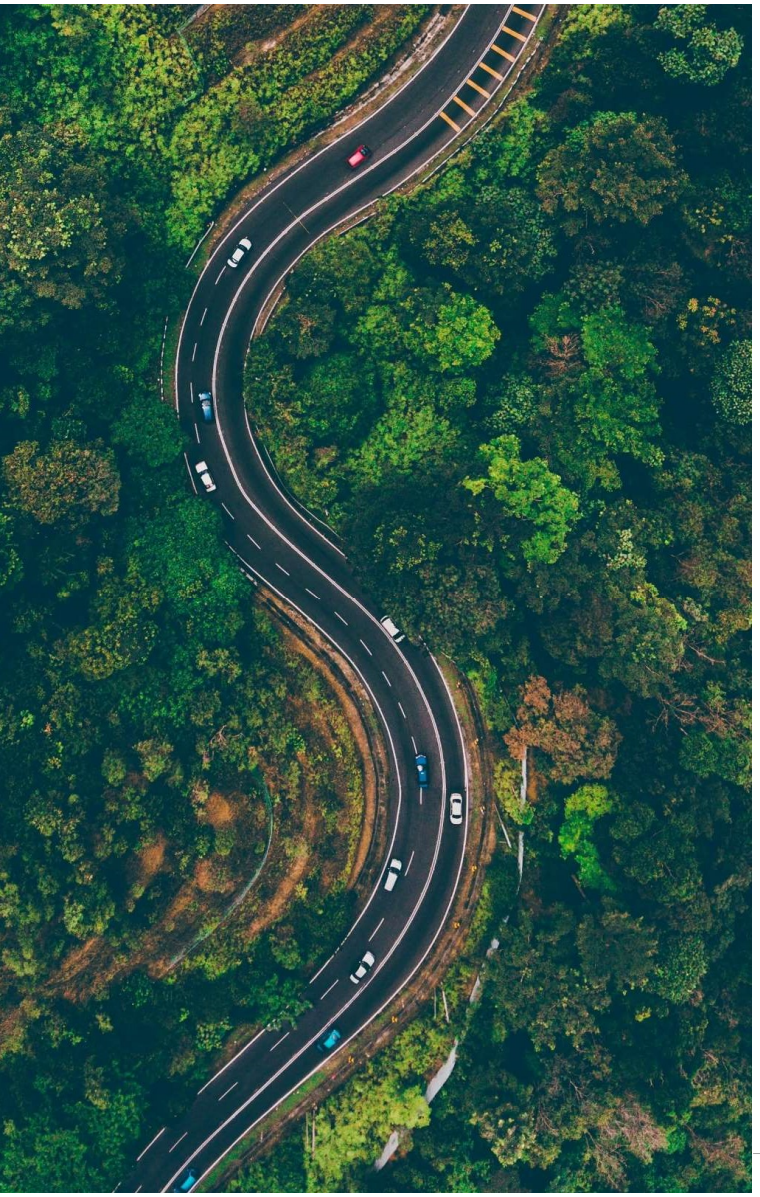
Introduction & Overview





Agenda

1 | Federal Landscape

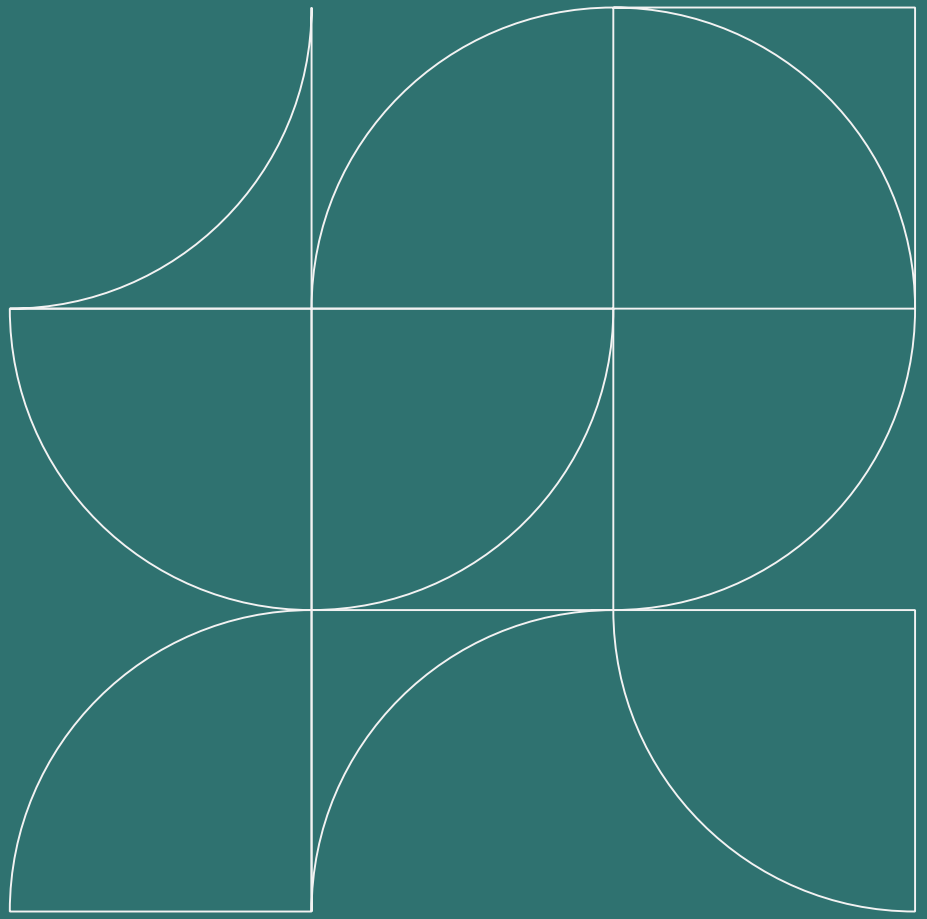
2 | New State Legislation, Key Judicial Decisions, and Regional Changes

3 | California's New Non-Compete Laws

4 | Trade Secret Update

5 | Computer Fraud Update

Federal Update

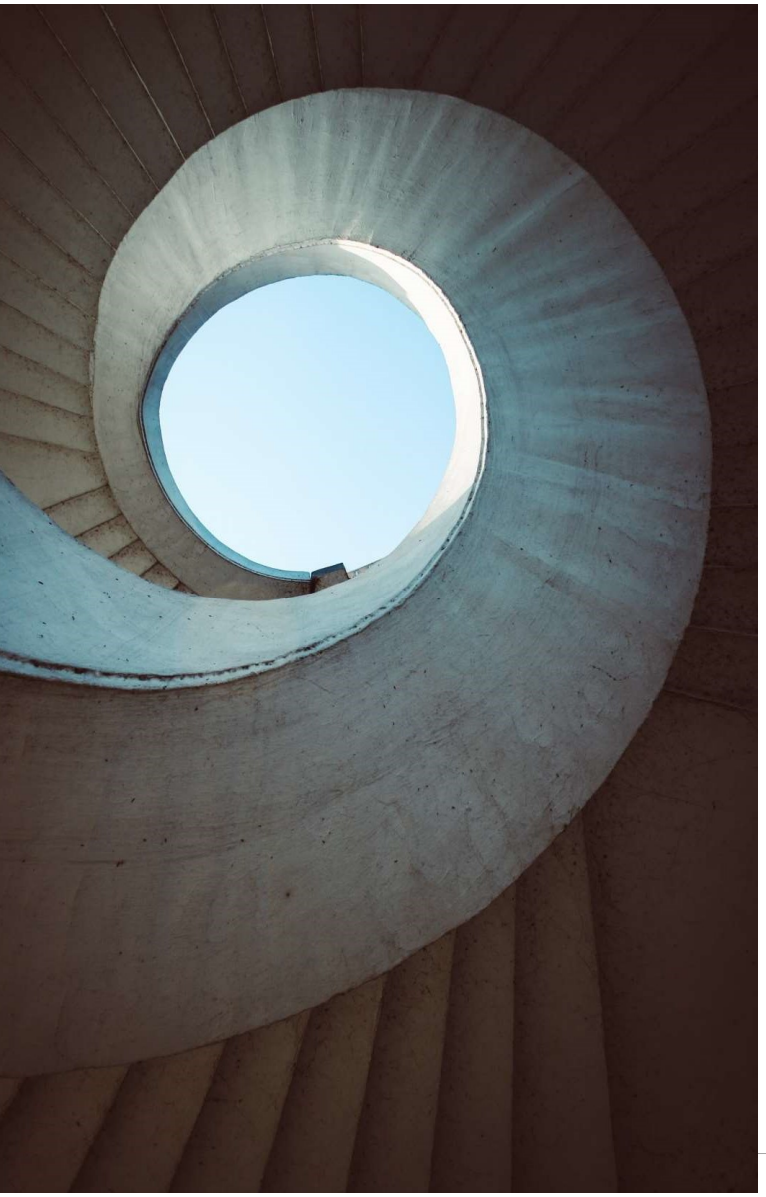


FTC Rulemaking

- **On January 5, 2023**, the Federal Trade Commission ("FTC") published a proposed rule banning all non-compete agreements
- Proposed ban unlikely to affect non-solicitation and non-disclosure covenants but "de facto" test
- Comment period was extended through **April 19, 2023**
- Received over 27,000 public comments
- Hosted public forum
- Employer protections vs. employee mobility
- Vote on proposed rule likely delayed to **April 2024**
- If passed, likely to face an immediate challenge
- Many expect that a rule will be issued likely in **spring 2024**.
- More information and analysis is available at www.tradesecretslaw.com

Federal Proposed Non-Compete Legislation

- In 2023, six bills to limit the use of non-competes or to ban them were introduced in Congress.
- On February 1, 2023, in a bipartisan effort, U.S. Senators Young and Murphy (along with the support of two other co-sponsors) again proposed **a ban on all employee non-competes with the "Workforce Mobility Act of 2023,"** and U.S. Representative Scott Peters (along with the support of two other co-sponsors) filed a House version of the same re-proposed ban.
- On February 9, 2023, in another bipartisan effort, U.S. Senators Marco Rubio and Maggie Hansen reintroduced the Freedom to Compete Act. Like the prior versions, **the bill would ban non-competes for anyone not exempt under the Fair Labor Standards Act.**
- On March 6, 2023, the Conrad State 30 and Physician Access Reauthorization Act was introduced. The Act primarily addresses immigration issues for physicians in certain communities but bans the use of non-competes for those covered by the Act.



NLRB GC Memorandum

- The May 30 memo claims that non-competes in employment and severance agreements interfere with workers' rights under Section 7 of the Act, which protects employees' right to self-organize, join labor organizations, bargain collectively, and "engage in other concerted activities for collective bargaining or other mutual aid or protection."
- Concludes that non-competes typically violate Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer to interfere with an employee's Section 7 rights.

NLRB GC Memorandum: Rationale

- Claims that non-competes "are overbroad" and can be construed by employees as "deny[ing] them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work."
- Claims that non-competes chill protected activity, because employees who perceive that they cannot seek new employment may be discouraged from threatening to resign *en masse,* concertedly seeking to join a competitor, and more.

NLRB Activity

- In the fall of 2023, the Regional Director of Region 9 of the National Labor Relations Board filed a consolidated complaint alleging that certain restrictive covenants contained in offer letters and policies in an employee handbook violated the National Labor Relations Act. This complaint is a logical outgrowth of GC Memo 23-08, in which NLRB General Counsel Jennifer Abruzzo set out her view that "the proffer, maintenance, and enforcement" of restrictive covenants violates Section 8(a)(1) of the NLRA.
- According to the complaint, the clinic maintained several policies that run afoul of the NLRA, including:
  1. A confidentiality provision that expressly listed "salaries, bonuses, and compensation package information" in its scope;
  2. An insubordination policy that prohibited disparaging statements about management or other employees;
  3. A company communication policy that prohibited employees from making communications that could harm the "goodwill, brand, or business reputation" of the clinic;
  4. A non-compete provision that imposed a two-year limitation on the employee's ability to provide similar services within a 20-mile radius of the clinic, as well as a two-year limitation on customer and employee solicitation; and
  5. An "Exit Agreement" that included an acknowledgment that damages for any violation of the non-compete, client non-solicit, and employee non-solicit amounted to, respectively tens of thousands of dollars in costs spent training the breaching employee (prorated under certain circumstances), $25,000 per solicited client, and $150,000 per solicited employee.
  - Employer's Motion to Dismiss Denied in December 2023

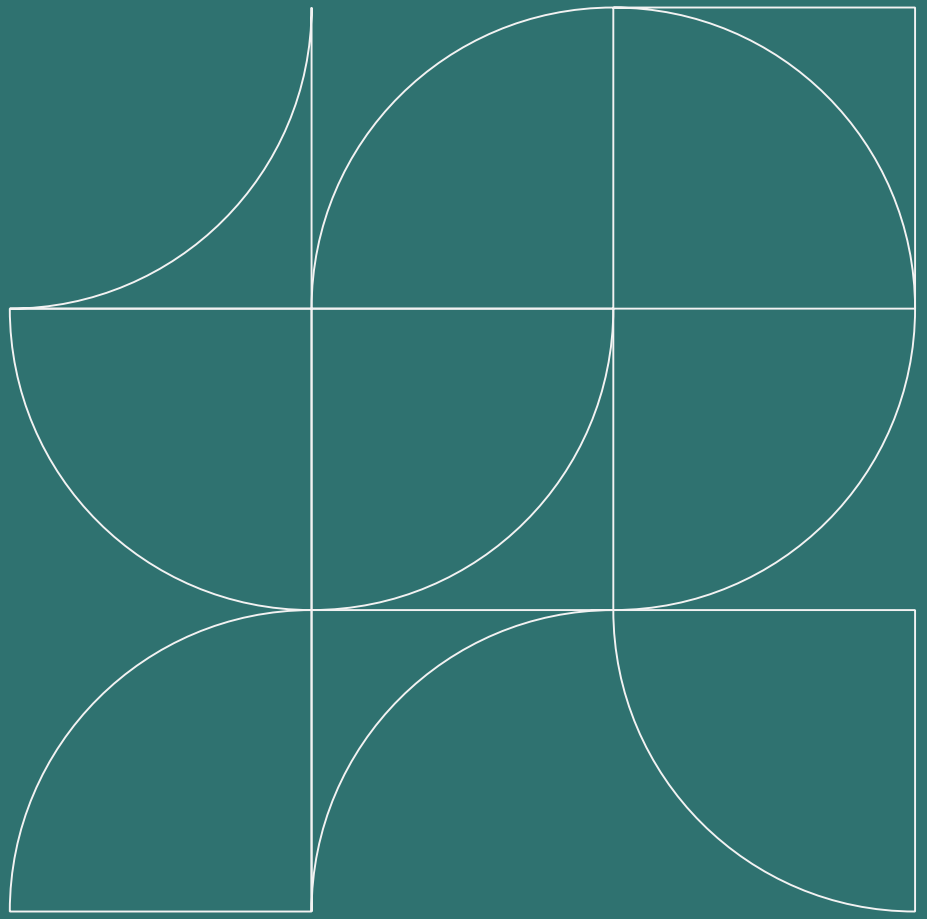
Recent SEC Activity

- The Securities and Exchange Commission ("SEC") levied an $18 million fine against J.P. Morgan for allegedly including overbroad release provisions in settlement agreements. This marks the continuation of its recent activity to enforce SEC Rule 21F-17(a), a regulation that prohibits companies from taking any action to impede or discourage whistleblowers from reporting suspected securities violations to the SEC.
- The language in the agreements required agreed to keep the release payment confidential and "not use or disclose (including but not limited to, media statements, social media, or otherwise) the allegations, facts, contentions, liability, damages, or other information relating in any way to the [client's] Account, including but not limited to, the existence or terms of this Agreement." The confidentiality language included a fairly standard exclusion that carved out responding "to any inquiry about [the] settlement or its underlying facts by FINRA, the SEC, or any other government entity or self-regulatory organization, or as required by law."
- The SEC took the position that this confidentiality language still violated Rule 21f-17(a), because the counterparty could only respond to requests for information from certain government agencies, but the exclusion did not specifically preserve the right to affirmatively report potential violations of securities laws to the SEC.
- In the accompanying press release, SEC Enforcement Director Gurbir Grewal reiterated the rule's breadth and proclaimed, **"Whether it's in your employment contracts, settlement agreements or elsewhere, you simply cannot include provisions that prevent individuals from contacting the SEC with evidence of wrongdoing."** Another SEC official also commented that "[t]hose drafting or using confidentiality agreements need to ensure that they do not include provisions that impede potential whistleblowers."

DOJ “No Poach” Cases

- DOJ recently dismissed a no-poach complaint for alleged use of no hire agreement between companies, after several other cases went to jury without convictions.
- May signal a change in direction by DOJ or a refocus on specific allegations of such claims.

New State Legislation and Key Judicial Decisions: Eastern Region



2023 Non-Compete Changes

- **Connecticut:**
  - New restrictions on non-competes for healthcare workers
  - Non-competes entered, amended, extended, or renewed on or after 10/1/23 are unenforceable if the physician doesn't agree to "a proposed material change to compensation terms"
  - "Primary site of practice" (for 15-mile radius limitation) must be mutually defined by parties
  - Doesn't apply to group practices with fewer than 35 physicians in which majority ownership is physicians
  - Non-compete protections (1 year, 15-mile radius) now extended to APRNs and PAs as well as physicians (but no exception for small group practice)

Legislation on the Horizon

- **New York:**
  - Proposed non-compete **ban**
  - Applies to any worker, employee, or independent contractor
  - Employers who violate the proposed ban would be subject to damages of $10,000 per violation and be required to pay lost compensation, damages, attorneys' fees, and costs
  - Ambiguous as to the applicability to the sale of a business
  - Approved by the New York legislature on June 20, 2023
  - Governor Hochul vetoes bill
  - Expect to see renewed activity in 2024

Key Cases and Precedents

- **Delaware:**
  - A group of cases out of Delaware signal an uphill battle for those using Delaware law for restrictive covenants, even in the context of the sale of a business

    - *Kodiak Building Partners, LLC v. Adams*
      - Restrictive covenants in acquisition were overbroad; declining to reform

    - *Ainslie v. Cantor Fitzgerald L.P.*
      - Forfeiture-for-competition clause in the partnership agreement was "unreasonable and therefore unenforceable" due to the worldwide scope and overbroad scope of prohibited conduct; again, declining to reform the covenants (DE Supreme Ct. reverses and remands – 1/29/23)

Key Cases and Precedents

- **Delaware (cont'd):**
  - *Intertek Testing Sys. v. Eastman*
    - Stock purchase agreement's worldwide non-compete was overbroad; refusing to blue pencil the covenants as doing so would "save Intertek – a sophisticated party – from its overreach [which] would be inequitable."
  - *Centurion Service Grp. LLC v. Wilensky*
    - Two-year, nationwide non-compete in VP's employment agreement struck down based on overbroad geographic and temporal scope
    - DE choice of law applied after analysis that its application would not circumvent public policy of IL
    - The court again declined to blue pencil the covenants to render them enforceable
  - *Hightower Holding LLC v. Gibson*
    - Invalidated DE choice of law and applying AL law
    - Refused to issue an injunction, finding duration, geographic scope, and scope of proscribed conduct was all overbroad

Key Cases and Precedents

- **Massachusetts:**

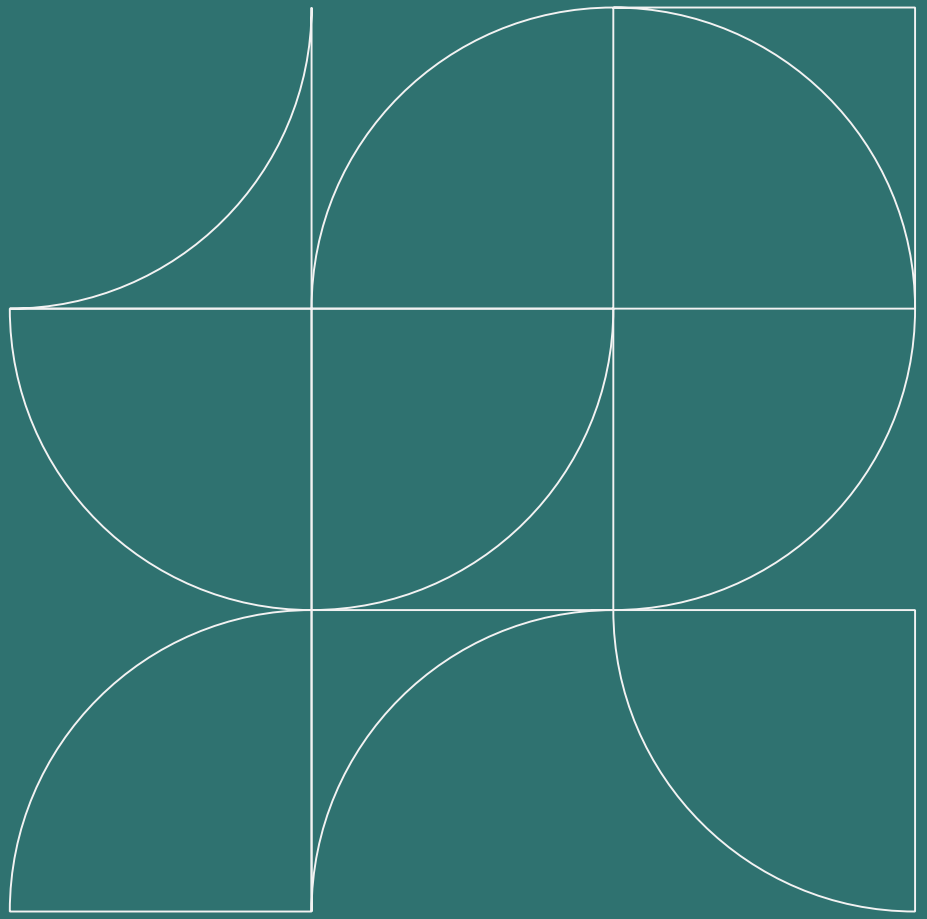
Cynosure, LLC v. Reveal Lasers LLC

  - Finding that DE choice of law does not obviate non-compete requirements under the MNAA for MA residents
  - Stock options constitute mutually agreed-upon consideration
  - Start of employment is sufficient consideration

Sunder Energy, LLC v. Jackson

  - The court declined to blue-pencil and endorses principle that courts should refuse to enforce overbroad covenants rather than blue-penciling them when the covenants are between parties of unequal bargaining power
  - The court found overbreadth in the covenants, which were in an LLC agreement. The court found covenants potentially “indefinite” because they were tied to a minority member’s continued ownership of Incentive Units, the transferability of which was controlled by the managing members
  - The court expressed frustration in number of restrictive covenant cases brought in Delaware Chancery Court involving businesses

New State Legislation and Key Judicial Decisions: Southern Region



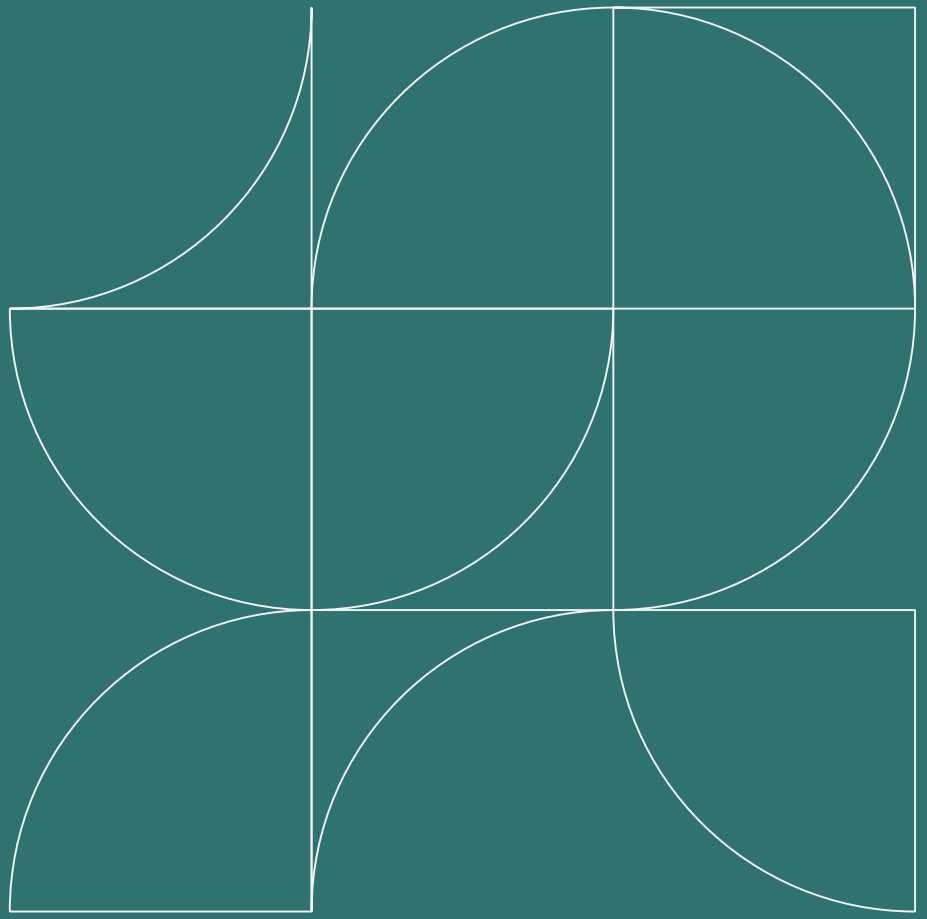
Key Cases and Precedents

- **Georgia**
  - *North American Senior Benefits, LLC v. Wimmer*, 368 Ga. App. 124 (2023): Georgia Court of Appeals held that a geographic limitation is required for an employee non-solicit to be enforceable
  - *Motorsports of Conyers, LLC v. Burbach*, 317 Ga. 206 (2023): Supreme Court of Georgia held that a Georgia court must determine if a restrictive covenant is enforceable under Georgia law before determining whether to enforce a choice

Legislation on the Horizon

- **Arkansas:** HB 1628 (died in House committee) -- Would have enacted a near-total ban on employee non-competes
- **Oklahoma:** SB 697 (pending in Senate) – Would enact the Uniform Restrictive Employment Agreement Act.
- **Texas:** HB 1043 (died in House without floor vote) -- Would have banned non-competes for low-wage workers (workers who earn not more than the greater of (1) the federal minimum wage or (2) $15 an hour)

New State Legislation and Key Judicial Decisions: Midwestern Region



2023 Non-Compete Changes

- **Minnesota** – All employee non-compete agreements banned going forward effective July 1, 2023.
  - Sale of business is exempted.
  - Non-solicit and non-disclosure covenants expressly allowed
  - Foreign choice-of-law and venue provisions are prohibited
- **Missouri** – New presumptions of enforceability for restrictive covenants between businesses and owners of businesses effective 8/28/2023
  - Employee non-solicits are presumed enforceable if 2 years or less
  - Customer non-solicits are presumed enforceable if 5 years of less
  - Courts expressly authorized to reform overbroad restraints
- **South Dakota** – Non-competes banned for healthcare practitioners for contracts entered after July 1, 2023.

Legislation on the Horizon

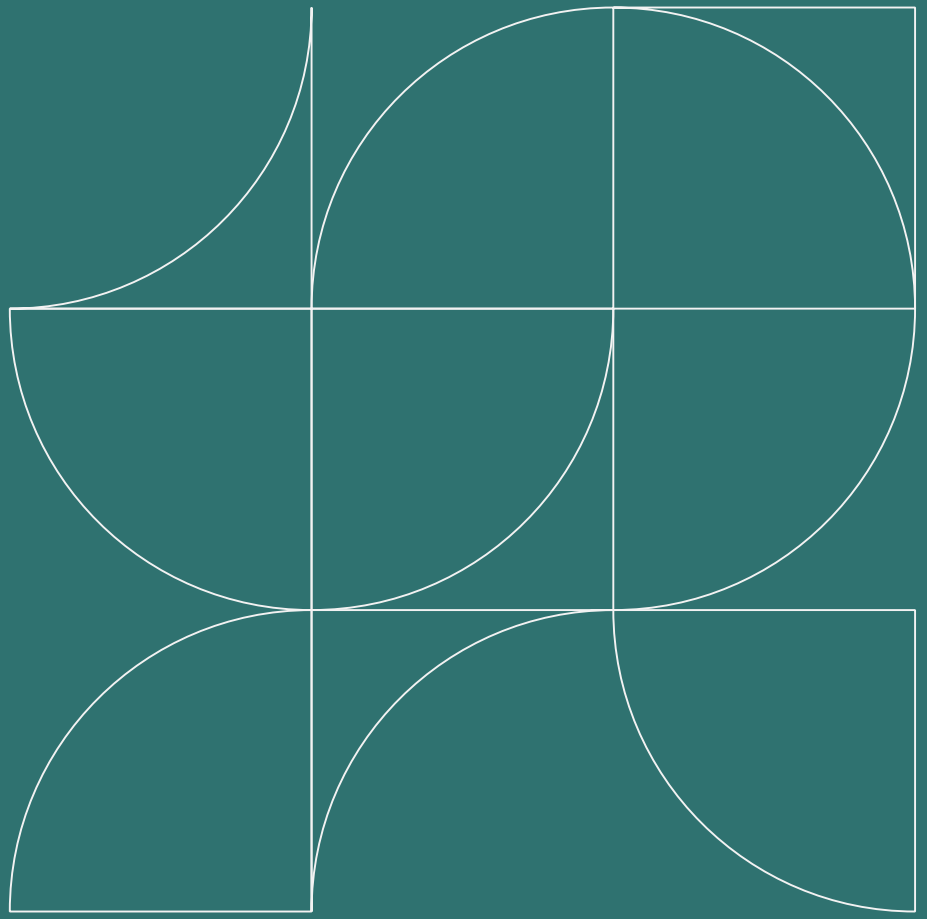
- **Michigan** – House Bill 6031, pending since April 24, 2022
  - Prohibits non-competes for low-wage employees (earning 138% or less of the federal poverty line)
  - Notice requirements
  - $5,000 penalty for each violation
- **Wisconsin** – AB 481, introduced October 12, 2023
  - Prohibit post-employment non-compete agreements
  - Open question of whether the legislation would also apply to non-solicit covenants
  - Likely no effect on sale-of-business covenants

Key Cases and Precedents

Illinois

- *Midwest Lending Corp. v. Horton*, 2023 IL App (3d) 220132
  - the Appellate Court affirmed the trial court's dismissal of the plaintiff's complaint pursuant to which the plaintiff sought to enforce certain post-employment restrictive covenants.
  - Defendant, who was employed for only seven months, challenged the enforceability of the restrictive covenant agreement because he was not employed for at least two years and received no other consideration.
  - In response, plaintiff relied upon a $25,000 sign-on bonus that defendant received as part of his offer letter and claimed that this bonus was "adequate consideration." The court disagreed because the offer letter never identified the restrictive covenant agreement nor any of its terms. As such, the plaintiff failed to demonstrate that the bonus was consideration expressly provided in exchange for the defendant agreeing to the terms of the restrictive covenant agreement.

New State Legislation and Key Judicial Decisions: Western Region



2023 Non-Compete Changes

- Two new laws passed in **California** that make non-compete provisions with employees unlawful and require employers to notify current and former employees (going back to January 1, 2022) that they are void. Prohibit employers from attempting to enforce a contract that is void regardless of whether the contract was signed, and the employment was maintained outside of California.
- **Montana** passes law banning non-competes for certain medical professions (psychologists and counselors)
- Increase in salary thresholds for non-competes in **Oregon** and **Washington**. The thresholds for noncompete agreements will rise to **$120,559.99** for employees and approximately **$301,399.98** for independent contractors in WA. OR is **$113,241** (total “annual gross salary and commissions”).

Legislation on the Horizon

- **Utah**, attempt in 2023 to curtail the use of non-competes with healthcare providers
- **Nevada**, attempt to ban physician non-competes passed both houses but the Governor vetoed
- **New Mexico**, attempt to ban non-solicitation provisions with physicians and prohibit out-of-state choice of law and forum clauses did not go forward
- **Hawaii**, attempt to ban non-competes with workers in a restaurant, retail store, newspaper, magazine, news agency, press association, wire service, or radio or television transmission station or network
- ***California, always something…AB747***

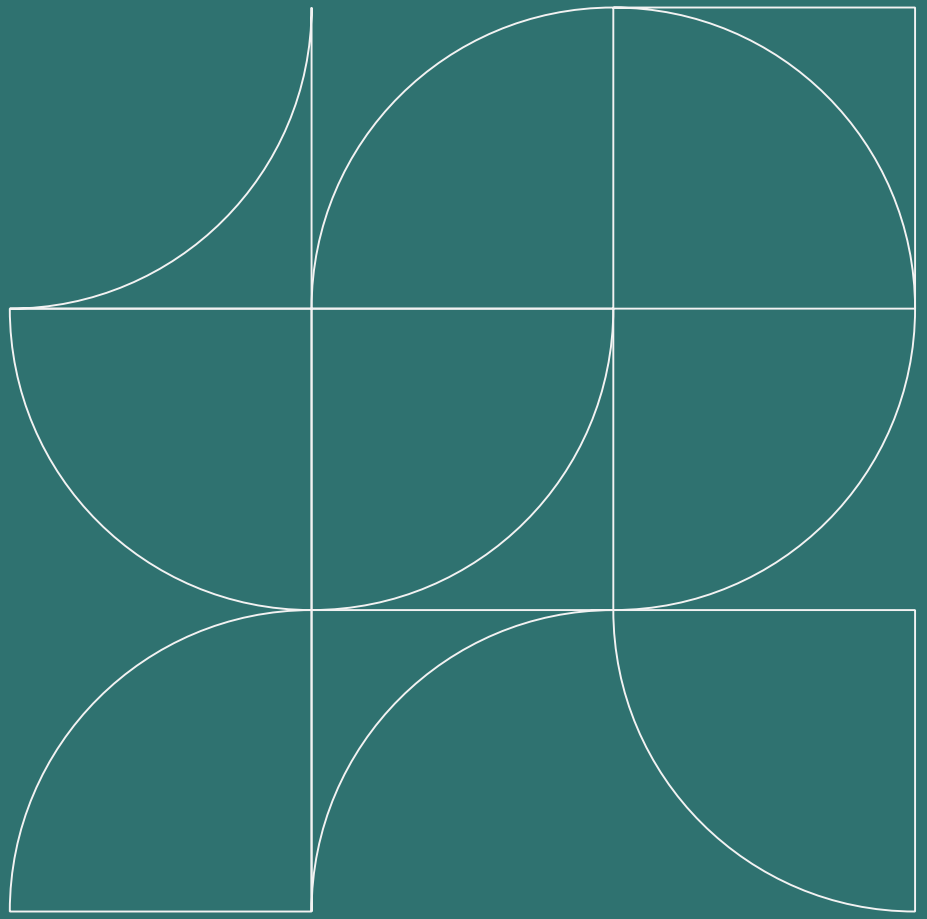
Key Cases and Precedents

- ***Nevada**, Tough Turtle Turf, LLC v. Scott*, 139 Nev. Adv. Op. 47 (Nov. 2, 2023).
- NRS 613.195(6) provides that a district court" shall revise . . . to the extent necessary" a noncompete that unreasonably limits the time, geographical area, or scope of activity; a greater restraint than is necessary to protect the employer; or imposes undue hardship on the employee.
- NRS 613.195(1) which declares a noncompete "void and unenforceable" if it imposes a restraint greater than necessary to protect the employer; any undue hardship on the employee; or restrictions that are not appropriate in relation to the valuable consideration supporting the agreement.
- In *Tough Turtle*, the Nevada Supreme Court read these provisions together to hold that while a district court **is not always required to modify an** overbroad noncompete agreement, it must do so "when possible."

Key Takeaways

1. **Review and Enhance Restrictive Covenant Agreements**
   - Conduct a comprehensive review of existing agreements
   - Implement updates to align with current legal standards
2. **Customize Restrictions for Maximum Protection**
   - Tailor restrictions to address specific needs:
     - Non-solicit clauses for sales representatives
     - Non-compete clauses for C-Suite and executives
     - Non-disclosure clauses for mid-level employees and below who are non-customer-facing
3. **Consideration of State-Specific Nuances**
   - Recognize the importance of adapting strategies to accommodate state-specific legal requirements
   - Ensure compliance with regional regulations for comprehensive protection

California's New Non-Compete Laws



SB 699

Adds Section 16600.5 to the Business and Professions Code

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares the following:

- (a) Noncompete clauses in employment contracts are extremely common in the United States. Research shows that one in five workers are currently subject to a noncompete clause out of approximately 30 million workers nationwide. The research further shows that California employers continue to have their employees sign noncompete clauses that are clearly void and unenforceable under California law. Employers who pursue frivolous noncompete litigation has a chilling effect on employee mobility.
- (b) California's public policy provides that every contract that restrains anyone from engaging in a lawful profession, trade, or business of any kind is, to that extent, void, except under limited statutory exceptions. California has benefited significantly from this law, fueling competition, entrepreneurship, innovation, job and wage growth, equality, and economic development.
- (c) Over the past two decades, research on the harm of noncompete clauses and other contract clauses involving restraint of trade to pursue one's profession has been accelerating. Empirical research shows that noncompete clauses stifle economic development, limit firms' ability to hire and depress innovation and growth. Noncompete clauses are associated with suppressed wages and exacerbated racial and gender pay gaps, as well as reduced entrepreneurship, job growth, firm entry, and innovation.
- (d) Recent years have shown that employers utilizing broad noncompete agreements attempt to subvert this longstanding policy by requiring employees to enter void contracts that impact employment opportunities once an employee has been terminated from the existing employer. Moreover, as the market for talent has become national and remote work has grown, California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees.
- (e) The California courts have been clear that California's public policy against restraint of trade law trumps other state laws when an employee seeks employment in California, even if the employee had signed the contractual restraint while living outside of California and working for a non-California employer.
- (f) California has a strong interest in protecting the freedom of movement of persons whom California-based employers wish to employ to provide services in California, regardless of the person's state of residence. This freedom of employment is paramount to competitive business interests.

SB 699

Adds Section 16600.5 to the Business and Professions Code

SEC. 2. Section 16600.5 is added to the Business and Professions Code, to read:

- 16600.5. (a) Any contract that is void under this chapter is unenforceable regardless of where and when the contract was signed.
- (b) An employer or former employer shall not attempt to enforce a contract that is void under this chapter regardless of whether the contract was signed, and the employment was maintained outside of California.
- (c) An employer shall not enter into a contract with an employee or prospective employee that includes a provision that is void under this chapter.
- (d) An employer that enters into a contract that is void under this chapter or attempts to enforce a contract that is void under this chapter commits a civil violation.
- (e) (1) An employee, former employee, or prospective employee may bring a private action to enforce this chapter for injunctive relief or the recovery of actual damages, or both.
- (2) In addition to the remedies described in paragraph (1), a prevailing employee, former employee, or prospective employee in an action based on a violation of this chapter shall be entitled to recover reasonable attorney's fees and costs.

SB 699

Legislative History

Legislative History of SB 699

- The bill was author sponsored and supported by Maravail Life Sciences, the California Employment Lawyers Association, and several law school professors. Also supported by California Hispanic Chambers of Commerce.
- Maravail Life Sciences stated, the “use of noncompete clauses in employment contracts, can have a chilling effect on employee mobility and stifle economic development. Research has shown that noncompete clauses limit firms’ ability to hire and depress innovation, growth, and are **associated with suppressed wages and exacerbated racial and gender pay gaps.”**
- The bill allegedly promotes **economic equity** because it “allows employees or potential employees to recover attorney’s fees and other related costs, which is sometimes the difference between pursuing litigation and not, for folks who do not have the means. SB 699 not only increases the incentives not to restrict employees’ freedom of movement in the employment sense, but also ensures benefits to employees who prevail, helping to recover for the time they were left unemployed due to the noncompete as well.”

SB 699

Legislative History

Legislative History of SB 699

"Despite California's strong laws and public policy against noncompetition agreements, **companies that do business in California continue to attempt to enforce noncompete agreements against California residents.** As the market for talent has become national and remote work has grown, **California employers increasingly face the challenge of employers outside of California attempting to prevent the hiring of former employees. Employers who pursue frivolous noncompete litigation can have a chilling effect on employee mobility.** SB 699 seeks to strengthen penalties for employers who attempt to utilize non-competes, making them liable for actual damages and penalties. The bill would also authorize a prospective employee to bring an action for injunctive relief and for the recovery of those damages and penalties and would provide that a prevailing employee is entitled to recover reasonable costs and attorney's fees."

AB 1076

Amends Section 16600 and adds Section 16600.1 to the Business and Professions Code

SECTION 1. Section 16600 of the Business and Professions Code is amended to read:

- 16600. (a) Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.

- (b) (1) This section shall be read broadly, in accordance with *Edwards v. Arthur Andersen LL*P (2008) 44 Cal.4th 937, to void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter.

- (2) This subdivision does not constitute a change in, but is declaratory of, existing law.

- (c) This section shall not be limited to contracts where the person being restrained from engaging in a lawful profession, trade, or business is a party to the contract.

AB 1076

Amends Section 16600 and adds Section 16600.1 to the Business and Professions Code

SEC. 2. Section 16600.1 is added to the Business and Professions Code, to read:

- 16600.1. (a) It shall be unlawful to include a noncompete clause in an employment contract or to require an employee to enter a noncompete agreement, that does not satisfy an exception in this chapter.

- (b) (1) For current employees, and for former employees who were employed after January 1, 2022, whose contracts include a noncompete clause, or who were required to enter a noncompete agreement, that does not satisfy an exception to this chapter, the employer shall, by February 14, 2024, notify the employee that the noncompete clause or noncompete agreement is void.

- (2) Notice made under this subdivision shall be in the form of a written individualized communication to the employee or former employee and shall be delivered to the last known address and the email address of the employee or former employee.

- (c) A violation of this section constitutes an act of unfair competition within the meaning of Chapter 5 (commencing with Section 17200).

AB 1076

Legislative History

Legislative History of AB 1076

The bill was author-sponsored and is supported by Attorney General Rob Bonta, The California Employment Lawyers Association, the California Nurses Association/National Nurses United, the California Teamsters, and Economic Security Project Action.

According to the author, “AB 1076 protects employees by prohibiting the inclusion of noncompete agreements in an employee’s contract. Although noncompete agreements are not enforceable in California, employers continue to include them in contracts which misleads employees and threatens their job prospects. **These non-compete agreements were originally meant to protect businesses’ trade secrets, but they have disproportionately harmed women and people of color. The exploitative practice of including noncompete agreements deprives workers of fair compensation, stifles innovation, and deters entrepreneurism.** This bill ensures that no employee is faced with signing away their rights as a condition of employment.”

The California Nurses Association/National Nurses United (CNA) was in support and stated:

> "While businesses with high pay or high levels of education are generally more likely to use noncompete agreements, non-competes are also common in workplaces with low pay and where workers have fewer education credentials. According to the Economic Policy Institute, approximately 30% of establishments offering an average hourly wage below $13 require non-compete agreements for all their workers."

AB 1076

Legislative History

Legislative History of AB 1076

- Attorney General Rob Bonta noted that "approximately 45% of businesses still include noncompete clauses in employment contracts in the state." The Attorney General explains that these "agreements generally require workers to refrain from accepting new employment opportunities in a similar line of work or establishing a competing business, usually for a specified time and within a geographic area." The Attorney General further explains that while **"Edwards confirmed that such clauses are unenforceable, putting an unenforceable term in a contract is not necessarily unlawful."**
- According to Bonta, the bill strengthens California's restraint of trade prohibitions by making it unlawful to include a noncompete clause in an employment contract or to require an employee to enter a noncompete agreement, that does not satisfy a statutory exception.
- **Staff Comments:** It is unknown how many additional actions would be brought as a result of the implementation of this bill. **The DOJ anticipates that there will be a significant increase in complaints about violations of law should AB 1076 pass.** The DOJ estimates it would need 2.0 deputy attorney general positions and the complement of 2.0 legal secretaries, at an annual, ongoing rate of approximately $800,000.
- The California Employment Lawyers Association, in support of AB 1076, explained that "although noncompete clauses have been unlawful in California since 1872, our attorneys routinely see these clauses included in employment agreements with California employees. **These clauses restrict workers from freely switching jobs, which lowers overall wages, and undermines fair competition. These clauses can have a significant chilling effect on workers who may not understand that such agreements are void under California law.**

SB 699
AB 1076

Amend Sections 16600 of and add Sections 16600.1 and 16600.5 to the Business and Professions Code

- Makes any contract that is void as a restraint on trade (including non-competes) unenforceable regardless of where and when the employee signed the contract
  - No matter how narrowly tailored, with limited exceptions, even when the person restrained is not a party to the contract
- Prohibits employers from entering contracts with current or prospective employees that contain non-compete provisions
- Employers entering into these agreements or attempting to enforce them are liable for injunctive relief, damages, and attorneys' fees/costs under SB 699
- AB 1076 requires **affirmative notice** to current and former employees by February 14, 2024, that any noncompete clause/agreement previously signed is now void
- States a violation constitutes an act of unfair competition under BPC 17200 *et seq.*

Impact on Labor Code 925 and Constitutional Issues

- How will the new laws interact with California Labor Code Section 925, which prohibits employers from requiring employees who primarily reside and work in California to agree **as a condition of employment** to adjudicate claims outside of the state or deprive the employee of the substantive protection of California law, **unless the employee was in fact represented by legal counsel.**
- It is also unclear what effect a judgment secured outside of California enforcing a noncompete would have within the state and whether full faith and credit would be honored by a CA court. SB 699 raises constitutional issues as well, including whether the law poses an undue burden on interstate commerce (e.g. dormant commerce clause) or impairs the obligation of contracts entered outside the state.

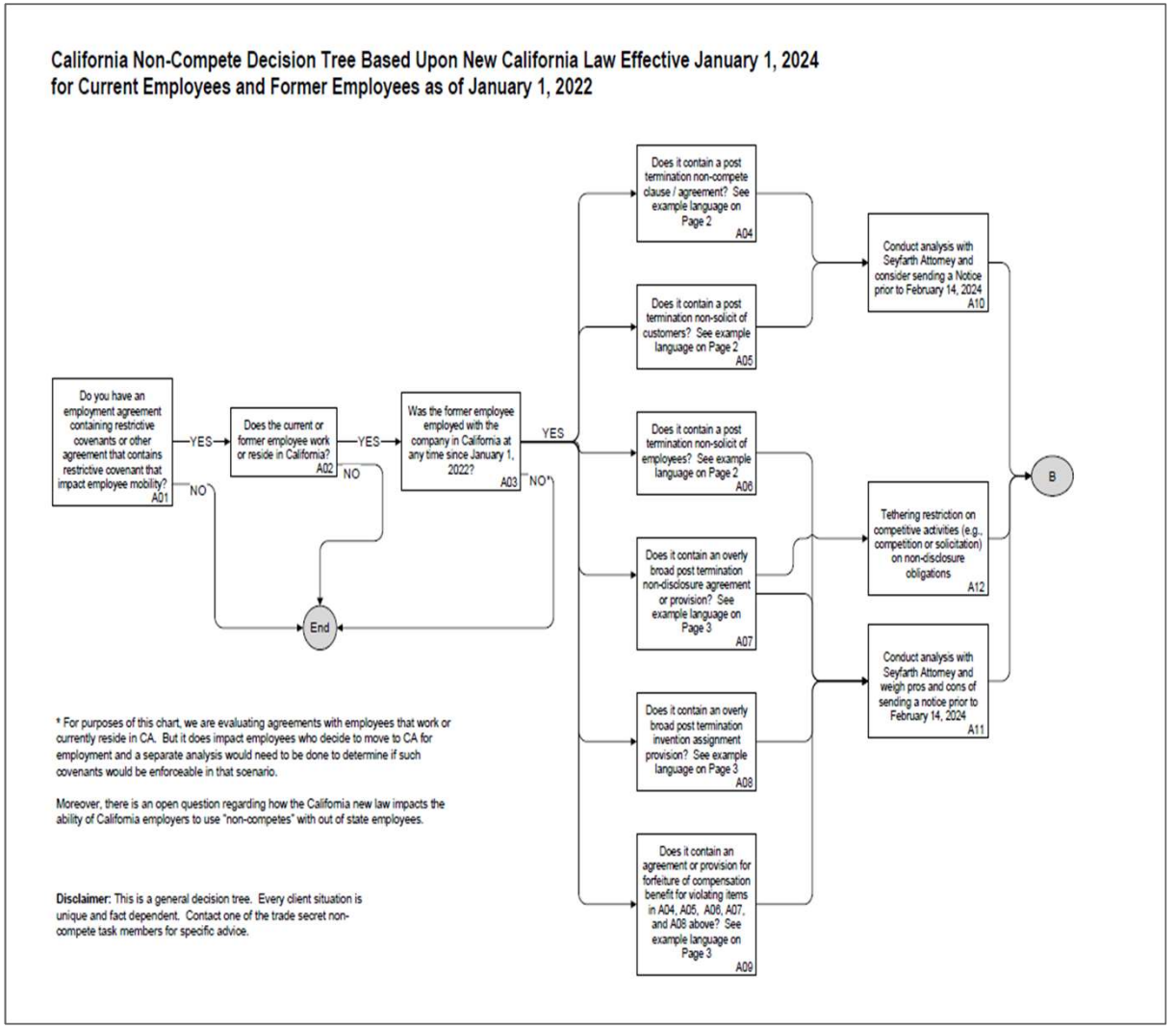
What this means for Employers:

1. Identifying Covered Employees
2. Analyzing Restrictive Covenants
3. Providing Individualized Notification
4. Updates and Amendments to Agreements
5. Applicability to Out-of-State Employees
6. Removal of Post-Termination Employee Non-Solicit Provisions or Other Provisions?
7. Potential Lawsuits and PAGA Considerations
8. Exceptions under CA law to the ban?
9. FAQ from Clients

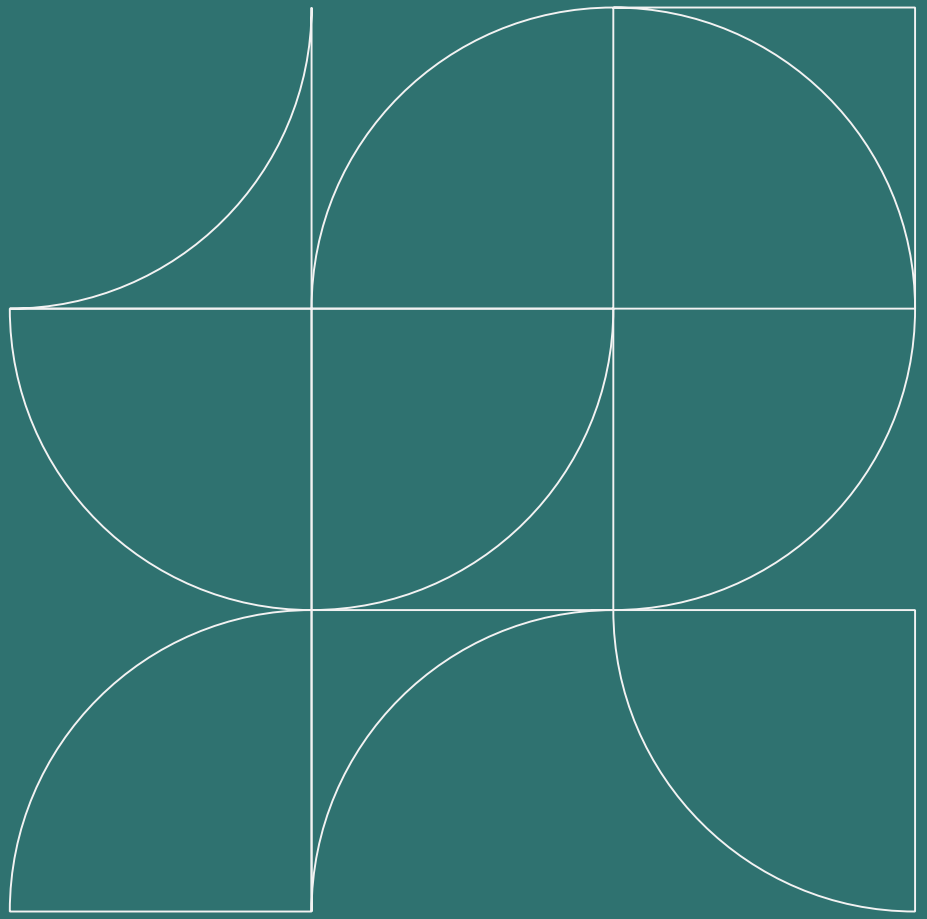
NOTICE DEADLINE

February 14, 2024

Assessment of Notice Obligations Under New Statute



Trade Secret Update



Damages

- Second Circuit:
  - *Syntel Sterling Best Shores Mauritius Ltd. v. TriZetto Grp.*
    - Unjust enrichment damages cannot be awarded under the DTSA for avoided development costs absent evidence that the trade secret's value was diminished by misappropriation.
    - The Second Circuit noted that a trade secret holder can recover both actual losses and unjust enrichment, so long as the damages are not duplicative. The court also concluded that unjust enrichment damages were meant to make the trade secret holder whole when damages for actual losses were not sufficient. The court found that unjust enrichment damages are appropriate in situations where the trade secret has lost some value, or the defendant has enjoyed some commercial benefit that is not otherwise compensable as lost profits. The court found that that TriZetto had already recovered any profits Syntel received as part of the jury's award of lost profits and had received a permanent injunction ending Syntel's use of the trade secrets and any future benefit. The trade secrets also had appreciated in value in the interim.
    - The court held that TriZetto was not harmed in a manner that warranted unjust enrichment damages. The court disagreed with other circuits that awarded unjust enrichment damages for misappropriation that did not result in a diminished value to the trade secret or some uncompensated commercial benefit to the defendant.

Damages

- **Fourth Circuit:** *Synopsys, Inc. v. Risk Based Security, Inc.*
- The trade secret's value must come from its *secrecy*
  - Summary judgment granted based on its failure to show its trade secrets derived value from being kept secret. The plaintiff tried to show value by pointing to two things: 1) the acquisition price that an acquirer had recently paid for the company; and 2) most of the company's revenue came from licensing its database of vulnerabilities.
  - The Fourth Circuit affirmed the finding that neither item was sufficient to show value was tied to the secrecy of the information. The plaintiff should have presented expert testimony about the competitive value of each discrete trade secret, or at least of groups of them that share the same evidence of commercial value. The Fourth Circuit held: "Not everything with commercial value constitutes a trade secret."
  - *See also Health Care Facilities Partners, LLC v. Diamond*, 2023 U.S. Dist. LEXIS 97611 at *30-31 (N.D. Ohio June 5, 2023), the court granted summary judgment noting that conclusory allegations of competitive value are insufficient to establish a trade secret. The plaintiff must demonstrate "discrete, particularized facts" based on personal knowledge to support the conclusion of independent economic value derived from secrecy.

Damages

- **Seventh Circuit:** *Motorola Solutions Inc. v. Hytera Communications Corp.*
- The district court disgorged the defendants' full, worldwide profits from the sale of the accused products under the DTSA.
- The defendants appealed arguing that the trial court erred by awarding damages for non-U.S. sales under the DTSA and disgorging 100% of the defendants' profits from the accused products.
- The case is currently pending before the U.S. Court of Appeals for the Seventh Circuit.
- Oral argument heard argument on Dec. 5, 2023. A decision is expected in 2024.

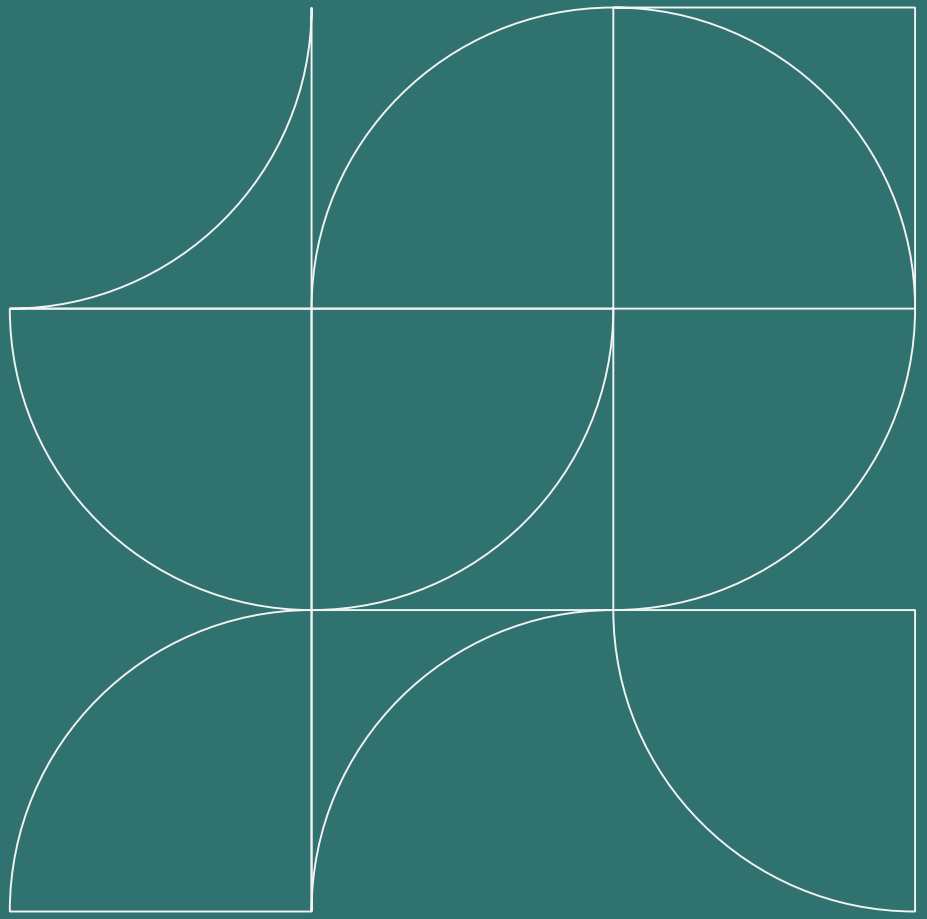
Failure of Secrecy Measures/Confidential Relationship

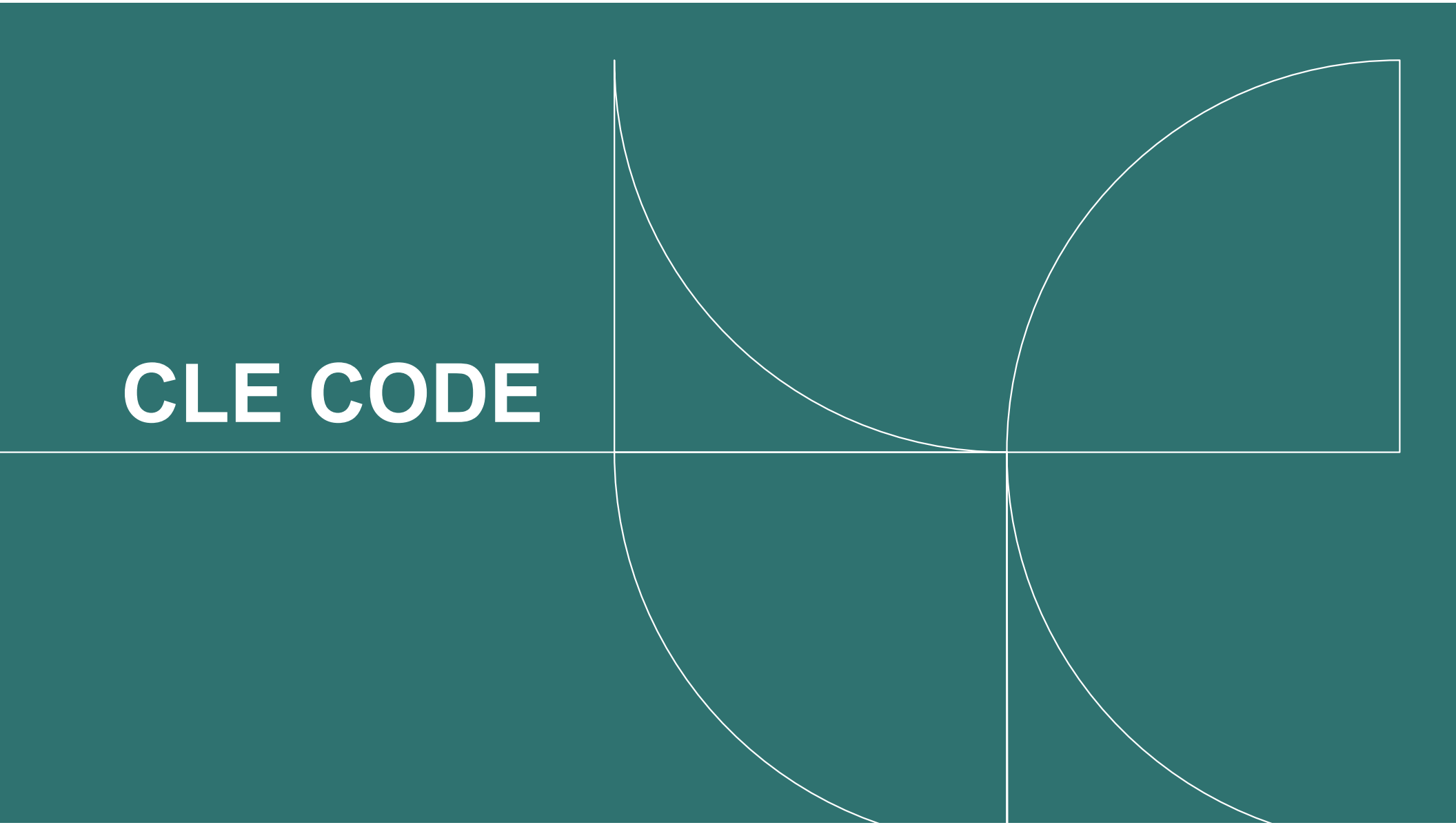
- **Sixth Circuit:** *Novus Group LLC v. Prudential Financial Inc.*
- The plaintiff shared with Nationwide an idea for a potential new financial product. Nationwide refused to sign a nondisclosure agreement and told the plaintiff not to share any confidential information the plaintiff filed suit for trade secret misappropriation after two Nationwide employees joined Prudential and pitched an alleged similar product.
- On appeal, the Sixth Circuit affirmed summary judgment for the defendant. Nationwide had not entered into a confidential relationship with the plaintiff; in fact, the opposite was true because Nationwide had explicitly rejected signing an NDA and asked that the plaintiff not share confidential information. Without the confidential relationship, the plaintiff's trade secret claim failed.

Large Jury Verdicts

- A Delaware jury found that data security company willfully infringed rival security company's data security patent and misused two of its trade secrets, awarding a grand total of $45 million between the two claims.
- A $62 million award for human regenerative technology company after a jury found a former employee breached his fiduciary duties and loyalty when he started a competing business using the plaintiffs' trade secrets.
- A $210 million award for computer science company after a jury found rival liable for willfully misappropriating CSC's trade secret source code.
- A $46 million award by a jury to scientist whose implant trade secrets were stolen by a competitor.

Computer Fraud Update




CLE CODE

Computer Fraud Updates

- The U.S. Supreme Court in *Van Buren v. United States*, 14 S.Ct 1648 (2021) resolved the split in federal circuit courts' rulings on the definition of "unauthorized access" and "access in excess of authorization" under the Computer Fraud and Abuse Act. The Court found that the burden of authorized access or access in excess of authorization rests on the employer to restrict access and establish security protocols to regulate access and that an employee exercising permissible access does not lose access if the purpose of that access is not as intended by the employer. Unauthorized access or access in excess of authorization claims are strengthened by the Supreme Court decision where access had been definitively terminated or restricted by the employer.

Forum Non Conveniens

1. In a recent CFAA case between Apple and a software company, a Northern California District court rejected the software company's arguments for dismissing the case "in all respects," including Apple's claim that the company violated the Computer Fraud and Abuse Act (CFAA) and other laws by selling the alleged spyware to governments around the world.
2. Apple's lawsuit claiming Israeli surveillance software company remotely hacked users' iPhones and allowed its clients to monitor and record individuals can stay in California, a federal judge ruled, holding that the company had not shown that Apple should have filed suit in Israel.
3. The court denied the motion to dismiss filed by the software company finding that while the parties agree that an Israeli court is a potential alternative forum, the balance of applicable private and public interest factors weigh in favor of keeping the case in California.
4. The company "has not demonstrated that the circumstances of this lawsuit overcome the 'great deference' due to a plaintiff who has sued in its home forum, as Apple has done here," the Court said.
5. The Court found that Apple would be equally burdened if the case were litigated in Israel. He also said that the software company overlooked current discovery practices of producing documents electronically and taking remote video depositions, which could reduce burdens on both sides.
6. The Court said that it has handled litigation involving witnesses and evidence far outside the U.S. without any unfair burdens placed on a party and that the company "has not shown that this case will be different."
7. "With respect to a final judgment, it may be, as NSO suggests ... that enforcement of a United States judgment is not 'automatic' in Israel, but that is a far cry from saying it would be so problematic as to warrant dismissal of this case," the judge added, saying NSO has not met its "heavy burden" of showing that the circumstances of the case warrant dismissal on forum non-conveniens grounds.
8. "The anti-hacking purpose of the CFAA fits Apple's allegations to a T, and NSO has not shown otherwise," the judge said in his opinion.

Employee Sabotage of Computer System

- A former bank employee from San Francisco was sentenced to 24 months in prison for intentionally damaging his former employer's cloud system and stealing valuable computer code.
- The bank employee pleaded guilty in April 2023 to two charges that he violated the Computer Fraud and Abuse Act by obtaining information from a protected computer and by intentionally damaging a protected computer and one charge of making false statements to a government agency, the U.S. Attorney's Office for the Northern District of California said in a statement.
- According to prosecutors, the employee worked as a cloud engineer for the bank, which is headquartered in San Francisco, until March 2020 when he was fired for violating company policy.
- Based on a superseding indictment returned by a federal grand jury in December 2022, he used his company-issued laptop -- which he did not return after being fired -- to access the bank's computer network to cause substantial damage.
- Prosecutors said the employee deleted the bank's code repositories, ran a malicious script to delete logs, left taunts within the bank's code for ex-colleagues, and impersonated other bank employees by opening sessions in their names.
- The superseding indictment also noted that he emailed himself a proprietary bank code that he had worked on as an employee valued at over $5,000. According to prosecutors, the total cost of the damage to the bank's systems is at least $220,621.
- Besides his prison sentence, the employee is ordered to pay restitution totaling $529,266.37 and to serve three years of supervised release to begin after his prison term is completed.

CA Court Rejects CFAA Claim Against Car Manufacturer

- In *Fish*, 2022 WL 1552137 (C.D. Cal. May 12, 2022), a putative class action filed in the US District Court for the Central District of California, the plaintiff vehicle owners claimed that the manufacturer had manipulated their vehicle batteries through unauthorized software updates that resulted in diminished battery capacity in violation of the CFAA, as well as breach of warranty in violation of the federal Magnuson-Moss Warranty Act and California's Song-Beverly Act.
- In an order granting the manufacturer's motion to dismiss, the court rejected the CFAA claim on several grounds. First, the court held the vehicle owners failed to plead the requisite $5,000 in damages within the "narrow conception of loss" under the CFAA, which confines losses to the reasonable costs to restore a system to its condition prior to the offense. But the vehicle owners had alleged only that the manufacturer's OTA update had purportedly diminished the value of the battery system, not that they actually incurred any costs in attempting to repair the alleged damage.
- Second, the court addressed the meaning of "unauthorized access" in the context of the CFAA and explained that the concept of exceeding authorized access "does not apply to individuals with improper motives who simply utilize access that is 'otherwise available to them.'" Because the manufacturer had unfettered access to the vehicle owners' media control units and batteries, "the fact that [the manufacturer] allegedly damaged these systems without [the owners'] consent is irrelevant."
- The court left room for claims under the CFAA where a manufacturer is alleged to have "blatantly misdescribed the nature of the . . . updates," but noted that the plaintiff vehicle owners in that case had failed to do so.

Data Theft and Whistleblowers

- California Penal Code Section 502 Whistleblower Case. *Garrabrants v. Erhart*, 2023 WL 9016436 (Cal. Ct. App. 2023)
- Defendant was an auditor for a financial institution who allegedly "blew the whistle" on the employer concerning the actions of the bank's CEO. While the defendant's case was pending in federal court, **the CEO sued the defendant in state court for copying, retaining, and transmitting to multiple regulatory authority documents the defendant believed evidenced possible wrongdoing; those documents included allegedly personal and confidential information that belonged to the CEO.**
- At trial, a jury awarded the CEO approximately $1500 on his claims against the defendant for invasion of privacy, receiving stolen property, and unauthorized access to computer data in violation of Penal Code § 502. The trial court awarded the CEO more than $65,000 in costs and more than $1.3 million in attorney's fees as the prevailing party.
- The Court of Appeal reversed the judgment, holding that the trial court erroneously instructed the jury that third parties have an unqualified reasonable expectation of privacy in financial documents disclosed to banks; and that the defendant needed to believe the documents may have been lost or destroyed had he not removed them; and other instructional errors regarding the Penal Code claims.

Questions

Seyfarth

UPCOMING WEBINAR

Navigating the Intersection of Non-Compete Agreements and Employee Mobility

Tuesday, February 20, 2024

2:00 p.m. to 3:00 p.m. Eastern

Seyfarth Shaw LLP

thank you

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