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SUMMARY KEYWORDS

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Welcome, and thank you for attending what is the first of will be at least two if not more, one hour programs on non compete and non solicitation agreements. Also, will they alert you that we will be also doing later this year, a one at least a one hour if not longer program on the dtsa that the Defend Trade Secrets Act that was passed out two years ago by the Congress. And that has dramatically changed litigation on trade secret misappropriation cases. And then we'll also be doing later this year, in our some program on physician agreements, particularly physician non compete, agreements. So let me tell you first, if I can a little bit about myself, I'm an employment lawyer here in Washington, DC. I've been practicing pretty much exclusively employment law for now. 50, going on 51 years. My practice has changed a bit in the last few years, the emphasis now is substantially on consulting and of counsel practice, and a mediation practice where I attempt to work with you all to several cases, I can be reached at my email address, which is the way I prefer you communicate with me. And that is our Fitzpatrick and Robert B, don't leave out that B, lowercase b as a boy, Robert B. Fitzpatrick calm. And please feel free to comment on this program. Give us suggestions on what we might include in future programs, any cases, arguments issues that I may not touch upon here today. All right. With that, let's get right into the meat of this subject. And as Tip O'Neill said, all politics is local. And when it comes to non compete non solicitation cases, it is critically important that you be aware of your state statutory law, your state and local courts, case law and the predilections of your judiciary, both federal, state and local. And because choice of law, and choice of form, choice of venue, issues have become major issues and non compete non solicitation cases these days with oftentimes, litigation, and one jurisdiction and companion litigation, another jurisdiction race to courthouse if you will, with the lawyers for each side trying to get the advantage of being in what they think is the most hospitable jurisdiction to them. So having said that, not only are you being familiar with your local landscape, but if, for example, you are an employer, and x state and have an employee who is

serving you now we're going to have non compete non solicit issues with in another state, who may have counsel and may be attempting to argue, despite a choice of law provision, even in your agreement with the individual may be arguing that the law of some other jurisdiction applies you in assessing these need to be familiar with the law of another jurisdiction, or at least associate with someone who is on the ground there and familiar with the lay of the land. So let's start there. We need to Be aware of

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developments, he hit our Let's call him our home states. And while I'm not going to go in to a great deal of the new changes in state laws, let me just give you a few illustrative examples of what is taking place at the state legislative level in terms of changing, revising, amending, or even finally enacting, in the case of that's two cents on non compete on statutes. And that's two cents. And I'll start there. After what seems to me like the better part of a decade of fighting in the state legislature finally enacted a non compete statute, which became effective, I think it was October of last year. It said standards of reasonableness for non competes, etc. I'm not going to go into the details of the vast statute, there will be in the companion written materials that you get with this video, there will be some references that will help you if you need to know about the math statute. Alright, Utah, Oregon, and Nevada. All of them had recently enacted quite employee friendly legislation in the non compete area. And once again, in the written materials, there'll be sites that will lead you to that new legislation. Idaho, repealed legislation that it had on the books with respect to key employees of the employer, and has now made it easier to, for the employer to restrict the movement of such key employees. Once again, there'll be a reference to that the written materials, Illinois, and this is part of a major career that I'm about to discuss Illinois, has passed legislation, non compete legislation that bans non compete agreements for, quote, low wage employees. And as you probably know, this whole movement against non competes for low wage employees started with the Jimmy John's story that got big play in the media, a year or so ago. And that resulted in legislation and efforts by the Attorney General of Illinois, again against Jimmie Johnson. And then, why and I'll come back to this what I'm going to call this low wage. Anti movement against non competes Rhode Island, Colorado, Connecticut and New Mexico, have passed laws that prohibit or limit non compete agreements. in the medical field. These are physician non compete was some that outright prohibit them, some that limit them. Later. We'll talk for example about a Texas statute that deals with physician agreements. And as I said at the start, we're going to have an entire program devoted to physician agreements physician non competes. Lastly, Hawaii passed legislation recently that banned non competes in the tech industry. And once again, there will be cites to that in your written materials. Oregon, and we'll discuss this issue in a little more detail later. An Oregon has passed legislation, a number of statutes that do a number of things

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and one is a part of my advice. Part of What is a little bit of a trend and that is require Oregon requires that the employer inform an employee applicant, that there is going to be a written non compete agreement and the employer has to inform the applicant in writing that when they transmit a written employment offer to the individual that they will be expected to sign a non compete agreement when they onboard. That written employment offer letter has to be transmitted according to the Oregon statute to the employee at least two weeks before the first day of the employee's employment. The idea is that the applicant should have notice that there will be a non compete so that presumably, the applicant has the opportunity to not resign from some current job because they do not want to enter into a non compete. From the employers perspective, it seems to me that it makes your ability to defend the voluntariness of the acceptance of the non compete are far greater for you the employer, because the individual good never dropped on them, first day of employment in the pile of documents, that typically onboarding employees and signing, but rather had the opportunity to consider whether they wanted to enter into a non compete or not, before they maybe gave up other employment and had some sort of a detrimental reliance claim. The Oregon laws also

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apply to employees earning more than the median income for a family of 470 $4,000. Now being I think the median income for a family of four and noncom peach in Oregon, cannot be applied to employees below that threshold. This is part of this low wage worker movement, if you will. And Oregon also by statute reduced the duration of a non compete that can be in the state of Oregon from 24 months now to 18 months. Okay. Let me turn quickly to this low wage movement in the not just the fast food industry, but certainly that's one area of concentration. Like Attorney General's particularly in Illinois in New York, but some 10. State ag ag of the District of Columbia have weighed in on this issue. They've joined in a letter that will be cited in your materials about franchise agreements that apply to low wage employees. The New York Attorney General recently entered into a settlement agreement with a company called we work which once again address this practice by we work to impose non competes on low wage employees. There also has been a movement to use interestingly, the sherman antitrust act against no poaching agreements. As you probably know, the US Department of Justice has taken a real interest in no poaching agreements. It was first looking at no poaching in the high tech industry in Silicon Valley in California. These are agreements where employer a agrees with employer B that neither will attempt to steal, recruit away poach their employees. The Department of Justice has argued that this is a Sherman Antitrust violation. And this is an issue that at least till through the tenure of the previous Attorney General appeared to be an issue that department of justice was pursuing with some vague Okay. Let me turn to an entirely different subject. And that is the protocol for broker recruiting. And you may have heard of the protocol if you have represented any of the brokerage houses, particularly on Wall Street, or have represented any investment advisors who work for

those brokerage houses. In 2004. All the major players in the industry, UBS, Morgan Stanley, city grew, etc. Some more I think about 150 brokerage houses entered into an agreement that basically their investment advisors could freely move from house to house and could take, if you will, their books of business from soup, for example of Morgan Stanley, to a Citigroup, global markets, employer. without there being any litigation. It was basically a if you will, a piece true about your brokerage houses.

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Morgan Stanley, last year, withdrew from the protocol agreement. And within days thereafter, UBS withdrew city group global markets with through those are the three big players that I'm aware of that withdrew from the protocol. Whether the protocol is going to collapse, whether there are other major players are going to withdraw or not remains to be seen. But Morgan Stanley is out now. Morgan Stanley has, to my knowledge at least has not fair to well yet. It's litigation efforts that it's initiated since it's with through. I am familiar with a case in the Northern District of Illinois, where they sued figure was about six Investment Advisors. In I think, Indiana, who left Morgan Stanley and set up their own shop. Morgan Stanley's sued in the Northern District had a hearing on a tr o, which was denied by Judge gottschall. And Morgan Stanley was left in the unenviable position of having to defend is certainly what got my attention that these individuals who couldn't get six, whom they sued when they had onboarded with Morgan Stanley years ago, Morgan Stanley had encouraged him to if you will poach clients and business from their former employer, and now Morgan Stanley is suing the six or the six doing the exact same thing to Morgan Stanley upon their departure from company So, turns out remains to be seen the viability of the protocol going forward, you need to be aware that some of the major players are out. And they may be initiating litigation against clients of yours if you represent ri r i, a 's Investment Advisors. And you need to get up to speed on how to negotiate and defend against those efforts. Okay. Non competes historically get fairly close scrutiny. And as I said, a good practice, it seems to me, if feasible is to advise job candidates applicants at an appropriate stage in the application process that she or he will be expected to sign a non compete agreement, a non solicit agreement, a confidentiality agreement, and non disclosure agreement, inventions agreement etc. I think is a good practice to alert people in advance. I also think it is good practice now to get a written certification from the onboarding employee as to whether they have not a form of restrictive agreement from their prior employer. And I would have a form where the applicant certifies that either they don't have one and, or that they do and they have disclosed to you. And let's take both parts of them.

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They say they don't, there needs to be a fairly robust discussion between the prospective new employer and the onboarding employee as to whether they do or do not have some form of

restrictive agreement. Recognize that sometimes they just don't remember, if they work for the employer for a long period of time. They may not recall that one day on boarded years and years ago, without employer they actually signed a non compete and non solicit agreement. So they may not be lying to you, but get them to sign that certification in any of them. Assuming they say they have a non compete or assuming I say, No, no, they don't recall. It's aggressive. There's a lot of resistance to it on the part of counsel and their clients, the new employer, but I would give real consideration to reaching out to the former employer, particularly if you've got a non compete agreement, because you're going to have to build the work that the onboarding employee does around that non compete unless it is the opinion of your counsel, that the non compete is simply not enforceable. But you may want to reach out to the prior former employer and try to come to an agreement about what the employee who departed there in his onboarding with your client, what that individual can and cannot do during whatever period of time. In other words, do a deal. What clients can your new employee call upon? What clients are off limits? What's the time period and we'll get At some point to social media, but you need to be a tune to social media has become a big issue and non solicitation cases LinkedIn, Facebook, Instagram, etc. with employers arguing that information put on LinkedIn for example, constitutes a violation of a non solicitation agreement.

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Also, as a part of this onboarding process, regardless of whether the person has or doesn't have some form of restrictive covenant, you want a certification signed by the new employee. A, the individual is not bringing any information, documents, confidential information, trade secrets, attorney client privilege communications from the former employer. All of that is for both the person certifies that they are not bringing it to their new place of employment, and they're not going to use any such information. Customer lists is an area of great controversy in the courts with the courts deeply split. As to whether customer lists are not trade secrets, you need to be familiar with case law from your jurisdiction. There's case law on customer lists in almost every jurisdiction and various fact specific considerations that the courts take into account with respect to customer lists. One thing being what effort, time and effort actually goes into the preparation of a customer list? And what information other than names and addresses is there in a customer list? And depending upon the answers to questions like that, you may be moving more in the direction of actual being a protectable. trade secret or confidential information. But you want a certification that you can use to protect yourself and armor plate yourself. In the event, the former employer gets aggressive about your employment go employee. In the event your new employee has crossed the line unbeknownst to you, and is improperly using information that it purloined, if you will, from the former employer. You'll also want the certification of the onboarding new employee to say that the individual has disclosed to you, your client, the new employer, all agreements that the employee has. And no quibbles about, you know, all agreements that I think apply to this situation. All agreements that I think are enforceable, etc.

No, it is all agreements, regardless of your opinion, new employee about enforceability that you've entered into with a prior employer, and I wouldn't limit myself just to the immediate past employer, there might be an employer a step beyond that, who has potentially an enforceable agreement of some sort with your new employee.

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I would also be instructing fairly aggressively. new employees that they are not To take, keep or use any information confidential or otherwise from their prior employer. Okay, let's turn to another aspect of non competes. And the issue that I think fair to say is really taken off in the employees direction. When I started doing this, there was very little case law on this. There was some case law code out in New York. That was a long time ago, but that was pretty much it, that is, I have an other I, the employer have an otherwise valid non enforceable non compete agreement. And I terminate my employee, but I don't have just good cause for termination. The individuals and at will employee, but I have don't have a good reason for terminating the individual. It is what some courts call a wrongful termination. There's case law out there dealing where there's an F LSA violation that precipitates the departure of the employee. The issue then becomes if I have wrongfully terminated or if the employee was constructively and wrongfully terminated my f mlsa example. I change the compensation plan, such that it's an F LSA violation. And the employee resigns, and then goes to work for a competitor, or I wrongfully terminate, the employee goes to a competitor is the non compete agreement enforceable. And I think it's fair to say there now is a strong trend in the state courts, that the non compete is no longer enforceable. Hence, this becomes for those who are drafting for their client employers, a drafting issue, and you need to include in your non compete agreement, a paragraph a clause that provides that the non compete restrictions apply, regardless of the circumstances of termination, regardless of whether the termination is for cause or no cause wrongful or otherwise. I mentioned at the start, that Texas has a specific statute, dealing with physicians. And let me talk about it but use it as an example of a way in which some of these non compete situations can be resolved without getting into litigation, and that is what I would call the buyout option. The Texas statute provides that physician noncompetes must have a reasonably priced buyout option. And if disputes arise regarding the reasonableness of the price of fairness of the price of the buyout.

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There are fights in Texas where appraisal appraisers are used. Those disputes end up in arbitration. There are various approaches that have been used in texas a cost approach a market approach In the income approach to attempt to quantify what is a reasonable buyout price, this is certainly something to give some consideration to, if you are the new employer and really want this individual, but know that there is going to be some dispute with the former employer unless you can arrive at a deal. Okay, let's talk about red pencils and blue pencils, and particularly blue

pencils. And what do I mean by that? There are states that permit what is called Blue penciling, blue penciling, is there is a non compete that has one or more clauses that are simply unenforceable. The geographic scope is excessive, let's say. The geographic excuse me the temporal scope is excessive. And let's say the temporal scope is five years. And there seems to be a consensus that that's excessive, but three years would not be excessive. Some states permit the courts to burn pencil that is, effectively rewrite the non compete agreement and change in my example, five years to three years and enforce the blue pencil agreement. There are other states that simply draw a if you will, red line and say Nope, no blue penciling whatsoever. Under no circumstances, will penciling be permitted. Virginia is one of those jurisdictions where and I'll get to an exception. But Virginia is one of those states that I think most people would say, Virginia just does not permit with a pencil. That is a lot of litigation in the last few years over a blue pencil. And blue penciling can take at least two forms. And one would be where you can just strike a provision, you can just remove a clause and just say it's not in the agreement anymore. The agreement now as blue pencil by me, the judge is now an enforceable agreement, because I have excised the provisions that otherwise made it unenforceable. And some states say if I can just either judge can just take out that clause, or change five to three years, then that I'm particularly comfortable with the removal. I'm a little bit less comfortable with changing five to three, for example, because now I am rewriting and that's the other species if you will, blue penciling cases, a few states where the judiciary permits, what I'll call reformation of the non compete and the judges and just

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removing an unenforceable clause. The judges I actually read doing revising, rewriting the agreement. And the overwhelming majority of the courts are loath to do that. Lots of quotable quotes from the courts say we're not here to do the job that the lawyers should have done in the first place. We're not going to rewrite your agreements. That's not the office The judiciary. Now, two potential exceptions and this comes to drafting on your part. One is to put a clause in the agreement that authorizes blue pencil. And some states, there are decisions, for example out of Virginia saying I didn't get to cut it. Just because new lawyers have agreed to attempt to confer the power on us to do your job in effective rewrite this agreement by including a blue penciling clause in the agreement, we're not going to enforce that we're not going to blue pencil the agreement. Another way that people have attempted to get around some of these problems is the choice of law. And sometimes the companion choice venue provisions in the agreement. And while this is a well, there actually is Virginia litigation, where the non compete had a choice of law clause of a jurisdiction that was not untag antagonistic has Virginia is to blue pencil clause clauses. And so the non compete said, if a dispute arises, it will be resolved in, let's say, Maryland, which is not as antagonistic to blue pencil as Virginia. If that choice of law provision is otherwise enforceable, as a matter of contract law and a matter of reasonableness, then Virginia courts may in the blue pencil, because they are applying Maryland law sitting in Virginia, or there may

actually be a choice of venue that also sends the matter to Maryland. So you got a Maryland judge, applying Maryland law to an agreement that otherwise arises under Virginia, where you can put pencil, this issue has also arisen in California, not in it probably has arisen in the blue pencil, pencil context, but what I'm familiar with is California, as we all know, is by statute said essentially prohibits with one exception, non compete agreements in the state. So I have employees in California, or working for a California headquarter employer, and the employee is in another jurisdiction, let's say 10 C. Can I put in that agreement, a choice of law clause that says California law will not apply? Tennessee law will apply. And therefore I have assuming it complies with Tennessee law, I would otherwise enforceable non compete agreement, even though I am a California based employer. And this has been an issue of some controversy, and particularly federal courts in California. These choice of law provisions, for the most part, have been forced permitting a California employer to

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do otherwise what California state law does not permit that is to enforce a non compete. Okay. Let's turn to another topic on non competes. That is what I would call selective enforcement. And the question is, is it a viable defense to a non to an effort by employer a to enforce a non compete agreement? Is it a viable defense to argue? Well, you know, when executive Number one left. And he or she was essentially doing the same work that my client does. You all did not pursue an effort to enforce the identical non compete agreement that that executive one hand, now you're getting hot under the collar about my client executive number two, who worked in essentially the same job with the identical non compete agreement. You can't pick and choose whom you're going to seek to enforce the agreements. Well, that argument, at least under Ohio law, has not been successful. There is a decision out of the Western District of Tennessee, which will be in your written materials, applying Ohio law, holding that selective enforcement argument has no traction. There's also litigation that will be in your materials coming out of New York and Wisconsin on this issue. In my view, I think because of the increased scrutiny and to some extent, in some jurisdictions increased hostility towards non competes. If I were representing executive to, and there were no case law yet definitive case slide by jurisdiction, I would not hesitate to make that argument. It would go It seems to me to Is there a legitimate protectable interest here? And there has to be a protectable interest that undergirds any non compete agreement. And if you did not afford enforce it against executive one, well, why all of a sudden Is there a protectable interest that requires you to enforce the self same agreement against executive to so I don't think the battle is over by any means on selective enforcement. Let me turn to reimbursement of training costs and signing bonuses, and many agreements. onboarding new employees have clauses that say, if you voluntarily leave the employer within a year, 18 months, what have you, you will be responsible for all or there may be a percentage formula of what it costs us

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to train you, or the signing bonus, or the relocation costs steadily picked up. And pretty uniformly. These reimbursement of training cause relocation bonus signing, bonus agreements are being enforced. And there will be a host of citations California, Texas, Wisconsin, etc. in your materials on this. I know from talking to Paul employee lawyers, that there is a significant body of hostility towards these agreements and I think there is a attitude out there of thinking they are not enforceable. They are and if one is representing an executive, negotiating Have a new employment agreement with a new employer. Be aware that that reimbursement clause may be enforceable. And you may want to focus on that in your negotiations with the employer to dilute it to the extent that she can. I talked a little bit already about forum selection clauses and choice of law clauses. There is a really good case that will be in your materials out of Nebraska. Where case gets transferred to Indiana, and as a result, that work indoors to the benefit of the employer. Because, excuse me, the law in Indiana is markedly more helpful than the law of Nebraska. Well, let's leave it there. We're going to pick up with a non compete non solicitation agreements part two, and we'll be doing another our program discussing current developments. I thank you for attending this first one hour. I welcome your input, criticism, ideas, cases, issues that we haven't covered. And I encourage you to watch non compete non solicit part two, I can be reached as I said by email at our Fitzpatrick at Robert B. fitzpatrick.com. Thanks ever for attending. Hope you attend part two. Hello, and welcome. This is the second part of what is looking like it's going to go to three parts at least each an hour long by discussing with you non compete and non solicitation developments. And we will have a separate program separate apart from what I think will be the three part non compete non solicit program. We'll have a separate standalone program on the Defend Trade Secrets Act dtsa. The legislation passed by the Congress about two years ago now. And then we'll have also a separate standalone physician agreements particularly physician non compete agreement. So this is part two of non solicit, non solicitation non compete agreements. I am Bob Fitzpatrick. I'm here in my office in Washington DC where I've been practicing employment law now for going on 51 years. I can be reached and I strongly prefer email. I can be reached by email at our Fitzpatrick at Robert

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B. Make sure that middle initial B is an oil is in there are Fitzpatrick at Robert B fitzpatrick.com. Please feel free to send me any appraisals, criticism, ideas for future programs, issues that I have not touched upon or not adequately touched upon in your judgment cases that I ought to be familiar with. Whatever. I strongly encourage you to reach out to me and communicate that will help me to make these programs nothing but better for you in the future. Alrighty, let's turn to consideration for a non compete and the issue that has generated many many court decisions around the country. That is whether continued at will employment or new At will employment is adequate consideration for a non compete. And certainly at the start of the employment relationship, there doesn't seem to be any issue that at will employment is sufficient consideration

for a non compete. The issue arises when a non compete is attempted to be put in place. Some times subsequent to the original hiring of the employee and the employer arguing that two weeks, two months, a year, whatever. After the person started employment, they signed a non compete agreement and the consideration for that was the continuation of their otherwise at will employment. And the courts have divided rather deeply on whether that is sufficient consideration or not. Wisconsin, if you will, being kind of the outlier on this issue now, holding that that is sufficient consideration otherwise, and all these sites will be in the written materials that accompany this. But other states like Wyoming, Pennsylvania, have held that that is not sufficient consideration for a non compete imposed, if you will, upon the employee, after the employee has already been with the employer for some period of time. One very interesting development, and I think not helpful to employers seeking to enforce non competes is, for example, a court of appeals opinion out of Missouri, where the issue of the adequacy of the consideration the court said, is normally a legal question for the court to determine. But if that determination turns on disputed issues of fact, then, lo and behold, we are in jury trial on the adequacy of the consideration. And that's certainly not a place where most employers want to be, in any event much less to be on any issue like the adequacy of consideration of one industry, if you will, that seems to generate an unusual number of non compete agreements, and seems to intrigue, the judiciary, our hair salons, and interestingly, there are a spate of decisions going both ways in hair salon cases, typically addressing the issue of

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the stylists taking clients and the issue of goodwill, customer goodwill. And the training of the stylist and some courts focus on what skill level the stylist had when they came in the door to the hair salon, and how much they learned there and that they didn't bring a book of business they didn't bring clients with them. those cases tend to go in favor of enforcement of the non compete by hair salon a then there is a line of cases where the person comes in already fully Trade brings that experience to the table with the hair salon and generates business customers and creates goodwill and relationships with customers who go with that person to hair salon B. And those cases, the non competes tend not to be enforced. And there'll be sites in your written materials even on hair salons tortious interference claims, and these arise in all sorts of contexts. There is an interesting decision out of the Third Circuit recently on does the lawyer have to have actual knowledge of this his employer being the new employer, the one who is onboarding a new employee? Does that employer have to have actual knowledge of the non compete agreement as an element of a tortious interference claim, and the Third Circuit held that indeed, the employer has to have actual knowledge of the non compete. There were issues in this case, which I found interesting and go back to what I talked about a bit in part one of this program, and that is, the plaintiffs argued that the employer had asked the right questions of the onboarding employee. And indeed, the new employer had the new employer had done what I have recommended that is asked, Is there a non compete, if there is provide us with a copy of it, etc. And so the court found

that, if you will, the right questions had been asked query, whether the decision would be different if the employer had not asked had not engaged in that to diligence on an onboarding employee, and took somebody in, if you will, deaf, dumb and blind, who then they discover after the fact has a non compete, and they then get sued. tortious interference claim? Is the actual knowledge requirement that the Third Circuit required going to be applied in such a fight circumstance, I'm not certain that it will. Okay, let's turn to extension clauses. This once again, is a drafting issue for those of you who are drafting agreements for your client employer.

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The non compete agreement, let's say, prohibits the individual for 12 months, from competing in a certain geographic area with a certain universe of competitors, all of which is carefully defined in the agreement. And nine months into those 12 months. Lo and behold, your client employer, a the employer, who has a non compete agreement, discovers that that employee who left nine months ago, indeed, has been working now for eight, nine months for a competitor and in violation of the non compete. Excuse me, of you, and your client hastened to court, seek a tr o. And let's say you get a tiara. The issue then is what's the length of the prohibition on say the TRL converts into a preliminary injunction? What's going to be the length of that injunction? You discover it nine months in, you get your planetary injunction nine bucks in a week or two later. There's a 12 month non compete period Do you only get two and a half month injunction? Or do you get the full 12 months? If your agreement does not have a what I would call an extension clause in it, you're only going to get normally two and a half months unless the court engages in, uses the doctrine of equitable extension of a non compete and there is some case law in that regard. But you want to put in your agreement, an extension clause that says in those circumstances, the injunction, the restriction runs from the date of discovery, the date of the entry of an injunction, however, you will draft that agreement. Click agreements. And there are two types of electronic agreements. There are click agreements, and there are browser agreements. Click agreements is where the employee actually clicks on a button that says I accept I agree, what have a browser agreement is, if the individual entered the website that the argument is made, constitutes acceptance. browser agreement acceptance issues, I think it's fair to say but pretty uniformly rejected. Okay. So if you have a client who thinks it has a browser non compete agreement, I think you need to look at your local work and advise your client, they may or may want to move in another direction to get a more robust, enforceable non compete agreement. But let's go to clicker agreements. And you don't have a, you know, a wet signature here you have an electronic signature. And this, interestingly, has generated a fair amount of litigation in the last year or so around the country. And some of it and I've been personally involved in some of it, some of it comes down to can your client can the employer actually establish authenticate that there was an electronic acceptance. And we've got one case, and it's it's not an outlier, there's been more than just this one case. One case up in the district of Maryland, where the federal judge held that there were disputed issues of fact,

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was an arbitration case, not a non compete with the analysis applies equally to a non compete situation, which I'd said there are disputed issues of fact. And as to whether there was a click agreement, acceptance in that case of the arbitration agreement, employer has not been able to satisfy me the judge, in a summary judgment type setting, which is a motion to compel arbitration is in the nature of summary judgment, not been able to convince me that it can authenticate and establish that there was electronic acceptance, therefore, there's going to be a jury trial on that issue. And, of course, as I said earlier, that's a place that I think an employer does not want to be. So if you have click agreements, you need to be working with your clients to make sure that it retains electronically the information that it will need to authenticate that indeed the employee did except you also probably want to have electronic proof that the employee Fully enter the document and had sufficient time to read and review the document before accepting it. There was some effort to get a quick click agreement. Otherwise, you're going to get pushback in some jurisdictions that may add some traction, that the individuals simply was given this mass of documents electronically to go through and did not intelligently except also there's a statute in Maryland, I don't know whether there's similar legislation in other states. Most of the states have electronic signature statutes. Now, kind of many statutes have its federal counterpart. The Maryland statute is interesting in that it's set the way I read it, at least, to agree to do business he like chronically, you can't agree to do business electronically, electronically. In other words, you can't have a click agreement that I will do business electronically and review, for example, your non compete and click, I accept, unless I have a written wet signature, that I agree to do business that way. That's the way I read the Maryland statute. I may read it completely wrong. As I say, I'm not aware whether there is language in other state laws similar to the Maryland law. First, material breach doctrine is a way that employees use to attempt to get around a non compete agreement. Most states have case law that says if one party to a contract is the first to materially breached the contract, the contract that is not enforceable and a non compete situation. One of the issues that counsel for an employee is looking at is is there a material breach already by the employer, such that I can say the non compete is simply not enforceable? Because you've already been if you will, a bad boy. For example, the employer reduces compensation and reduces compensation such that that is a breach of its agreement with the employee. That

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would be the predicate for counsel arguing that that's first material breach and the non compete is not enforceable in drafting a non compete agreement, while I think it's a tough road to hoe, I would certainly attempt to craft language around the first material breach doctrine. Okay. Do noncompetes apply and are they in forcible against in house attorneys and there are ethics opinions out of DC, Virginia, that say non competes against in house attorneys are unenforceable. There is litigation out of Colorado that is more favorable to the employer in terms of enforcing a non compete against in the house. There is major jurisprudence out of New Jersey on this issue, all

of which stands for the proposition that employer can't enforce a non compete against an in house attorney. Now, it certainly

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can

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do have other measures to ensure that in House Counsel does not Spirited Away, privileged information. Alright, let's turn to the material change doctrine. And while I have not done hard research, recently, the last time I looked at this issue, it seems still to be largely confined to Massachusetts. And the way the material change crew works is I employer, a, hire an executive, and the person's position is, let's say, four steps removed from the CEO at the time or hire the individual. And, of course, the individual signs off on a non compete agreement. Subsequent to hiring the individual four steps away from the CEO, the individual is promoted once say, two times over and is now one step removed from the CEO. So there has been a material change in the person's job duties, compensation plan, etc. And the issue arises as to whether that material change vitiates, the non compete that was put in place when you were four steps away. Massachusetts has embraced this doctrine. And as a general proposition holds that if there is a material change like that, then there needs to be a new non compete, entered into when that change takes place. Otherwise he original non compete is not enforceable, as I say, to my understanding doctrine has been confined to as two sets, certainly, unless you have definitive law in your jurisdiction against you on that issue, or if I'm wrong, and it's not just confined to Massachusetts, it certainly is an issue that I would railings. Let's turn to a topic that I will call forfeiture for competition. And these are you could also call them clawback cases. And these are non compete agreements that have clauses in them that say that in the event that you go to a competitor in violation of the non compete, you then forfeit compensation, you might forfeit severance pay. If this is in a stock agreement, you might forfeit the earnings on stock option, you might forfeit unvested shares that you can still might vest and you could still cash out. You might forfeit restricted stock, you might forfeit equity awards. And there might even be a clawback where you actually have to reimburse the employer for monies you've already been paid. And in New York, I think it's fair to say This is called the employee choice doctrine. And while not, I think it's fair to say not called in other jurisdictions, the employee choice doctrine seems to me it's exactly the same thing. You are forfeiting compensation,

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you're not being prohibited from competing, you can go ahead and work for employer B, but if you do, you're going to lose, you're going to pay a price, you're going to lose certain

compensation. And those agreements have been enforced in many jurisdictions, other than New York, in some jurisdictions, they are looked on upon as non compete agreements in disguise. And those courts have, rather than simply say, you know, it's a matter of contract law, the contract says, you forfeit, you forfeit, those courts instead of said, No, this is a disguise non compete. And therefore, we're going to use the reasonableness test that we otherwise would use in a non compete situation. And as I've said, repeatedly, there will be citations in your written materials on those issues. The assignment of a non compete agreement. And those jurisdictions that say, a non compete agreement is a personal services contract. tend to go in the direction unless there's something in your agreement, and we'll get to that in a second. those jurisdictions tend to say that, at assignment of what they denominate as a personal services agreement, a non compete is not enforceable. On the other hand, if you put in your non compete agreement that is assignable that in the event of a stock sale or sale of assets, it can be conveyed. And this is the employees consent to that assignment. There are interestingly a substantial number of jurisdictions that hold that a non compete agreement is not a personal services agreement. And therefore, the body of law that says a personal services agreement is not assignable. And that's kind of black letter law. But these jurisdictions say non compete agreement is not a personal services agreement, and therefore is not assignable. And those jurisdictions say, No, it's not a personal services agreement. It is assignable. In some of those jurisdictions use the reasonableness test that I mentioned a moment ago. A sale of a business at a non compete arising out of the sale. The courts are far far more willing to enforce a stringent non compete agreement against the founder. The equity holders in a sale of business and sites are in your materials, automatic renewal clauses as to whether there's adequate consideration for automatic renewal clauses came up in the North Carolina case, holding there was not adequate concern. iteration that's in your materials, and routinely in these agreements. Council puts in irreparable harm clause that has the employee saying that they agree that in the event of a breach that's irreparable harm and counsel have run into court for tr rose and waive the non compete and for the judgment, say here, the employees already agree we're being irreparably harmed. There's now authority 10th circuit case and others,

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holding that irreparable harm cannot be presumed. And parties can contract away, if you will, that issue. Okay. In the few minutes, we have left, let's turn real quickly to non solicitation agreements. These have become if you will, kind of a cat's meow. In the last few years. People moving away from non compete agreements, because of the many problems having to do with enforceability of them and increased hostility by the courts to them, they've moved to non solicit, which do not prohibit the employee from going to work elsewhere, but prohibit the employee from either soliciting customers or soliciting co workers or both. That is stealing employees away from the employer or doing business with customers who heretofore had been customers of employer a. And let's turn to an issue that I think employee counsel have presumptively thought and maybe ill advised their clients on and that is, who made the first contact and employee counsel, have

thought and advised I think it's fair to say over the years, hey, client, if you didn't call the customer, but they called you and initiated the discussion that eventually led to a sale. You didn't violate the non compete because they made the first contact. You didn't reach out to them. Excuse me and the first circuit Federal Court held in a case arising out of Massachusetts, corporate technologies vs. Hartmann, it'll be in your written materials. First Circuit, affirming the district judgment as to suit said no, we don't buy into this first contact will argument. It doesn't make any difference to us as to who called whom, it is the content of the communications, the discussions that is the heart of the matter. And if the customer called the former employee, and initiated discussions that are in the nature of sales in the employee makes the sales pitch or makes a successful sale in the corporate technology case, that might indeed be a violation of the non solicitation agreement. Now, some have written very strong clauses in their non competes prohibiting any contact between the employee and customers. So that the issue of first contact simply doesn't copy doesn't make any difference. You are not supposed to have contact with the customers? I've seen advice by employee counsel where they say, Yeah, but you ought to, you know, periodically keep that relationship alive, sending them Christmas cards, what have you. I have to say I think that's dangerous advice. And I think some courts may very well say that while that is a sales pitch, it is potentially solicitation. enticement, then the issue that has come up with significant frequency, and I'll close with this is social media

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and LinkedIn, Facebook, etc. And the courts are split a bit on this issue. If you, your client puts on his or her LinkedIn profile, their new job is that somehow solicitation of customers from the former employer, I think fair to say the courts have said no, that's not across for. On the other hand, if the LinkedIn profile has, or your Facebook has new employer, and a pitch, a positive description of products, a positive description of the work environment that may be attracting former co workers from your former employer to depart and come to work for you are, some courts may find that that's across the line and violate state solicitation. Once again. It seems to me that this is a drafting issue for counsel and putting language in the non compete that draws lines as to what is permissible, what is not permissible in terms of social media posts by the departing employee. You also in negotiations with the departing employee might want to review their LinkedIn profile or even have in your agreement that their LinkedIn profile has to be reviewed by you for the sufficiency to Karcher. And there typically would be an electronic clause in the agreement about once you apart, you're not on social media, either under your name another name or anonymously, to disparage the company, reveal confidential information, trade secrets, etc. You can also in that clause put in provisions having to do with social media and solicitation. One issue that arises in the non solicitation cases is what's the remedy? where let's say your client has openly, aggressively in the subtle recruited employees from their former employer to jump ship and come work where the employee is. It's a violation. You presumably can get an order prohibiting it going forward in the future. But what's the likelihood you're going to get an order

That requires those employees to no longer work for employer B. I don't I don't see the courts doing that. Are you going to get an order from a court that they have to come back to work for employer a, that simply is not going to happen. So I have some serious reservations about the adequacy of the remedies, that there are for a violation of the non solicit of form former co workers such that I think you want to have their a liquidated damages clause is a reasonable liquidated damages clause that hopefully induces your departing employee from engaging in conduct. So let's leave it there. Once again, thank you for attending.

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And as I say, I welcome comments, criticism, suggestions for the future. issues. We haven't discussed new cases that I haven't brought up at cetera. appreciate any input at all from you all it will make for better programs going forward. I can be reached by email at our Fitzpatrick at Robert B. Make sure that middle initial lowercase b is in boys there are Fitzpatrick at Robert B. Fitzpatrick. Once again, thanks for attending. I appreciate your time and attention.