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**Navigating the Maze:
Recent Trends and Strategies in Enforcing
Restrictive Covenants Across State Lines**

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**NAVIGATING THE MAZE:
RECENT TRENDS AND STRATEGIES IN
ENFORCING RESTRICTIVE COVENANTS
ACROSS STATE LINES**



Presentation Roadmap

- Federal Regulations and Activity
- One State's Example: Minnesota
- Another State's Example: California
- Crafting a National Restrictive Covenant Agreement



Federal Regulations: FTC Proposed Rule

- January 5, 2023, FTC proposed rule
 - Would largely ban non-compete agreements nationally between employers and employees
 - If enacted, it would be an “unfair method of competition” for an employer “to enter into or attempt to enter into,” “maintain” or “represent to a worker that the worker is subject to a non-compete clause”
 - Would supersede all contrary state laws



Federal Regulations: FTC Proposed Rule

- Would extend to any contractual provisions that have the “effect” of prohibiting workers from seeking or accepting employment or operating a business after the end of the worker’s current employment



Lina Khan on Non-Competes



Federal Regulations: FTC Proposed Rule

- “[S]uch covenants would be considered non-compete clauses where they are so unusually broad in scope that they function as such.”
 - Broad customer non-solicit agreements that prohibit contacting or accepting business from former customers
 - Broadly drafted non-disclosure agreements where use or disclosure of the company’s confidential information may be implicated by the new employment
 - Contracts with onerous training reimbursement provisions

Federal Regulations: FTC Proposed Rule

- “No-business agreements” (prohibiting a worker from doing business with former clients or customers of the employer)
- “No-recruit agreements” (prohibiting the worker from hiring or recruiting the employer’s workers)
- “Liquidated damages provisions” (requiring the worker to pay the employer a sum of money if the worker engages in certain conduct)

Federal Regulations: FTC Proposed Rule

- Likely legal challenges
 - Major Questions Doctrine: principle of statutory interpretation in United States administrative law which states that courts will presume that Congress does not delegate to executive agencies issues of major political or economic significance

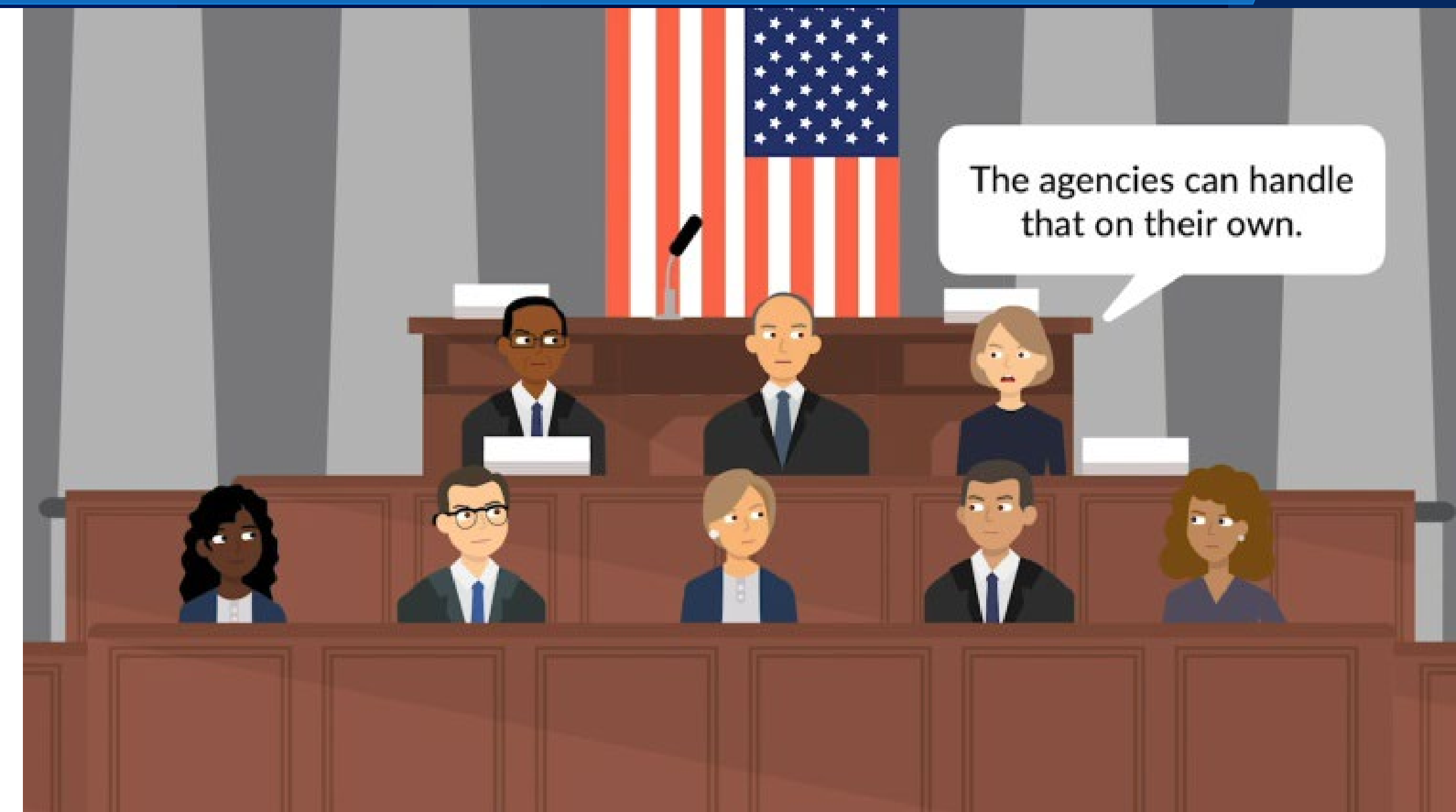


Federal Regulations: FTC Proposed Rule

- Non-compete agreements have existed for centuries and have traditionally been governed by non-federal law
- Many state governments have addressed non-compete reform in recent years
- Congress recently and repeatedly has tried to enact non-compete reform, but has failed to do so. So if Congress wanted to invalidate non-competes, it knew how to do so and could have done so.
- Similarly, if Congress wanted to delegate authority to agency to invalidate non-competes, it could have done so

Federal Regulations: FTC Proposed Rule

- Likely legal challenges
 - Non-Delegation Doctrine
 - Impermissible delegation of congressional authority
 - Congress may not transfer to another branch powers that are strictly and exclusively legislative
 - While Congress can confer discretion on agencies to implement and enforce laws, it must provide an intelligible principle to which the agency is directed to conform

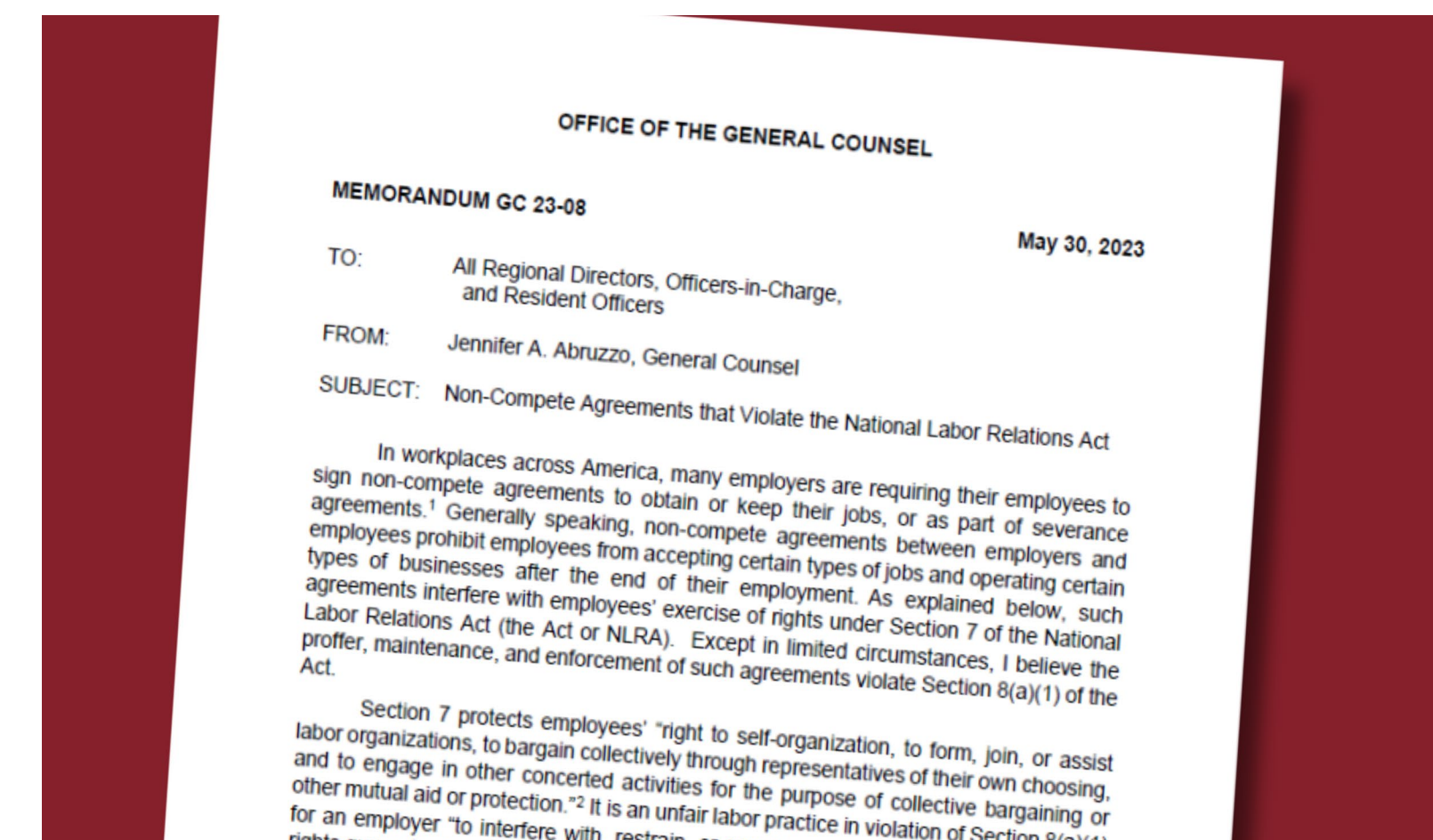


Federal Activity: NLRB GC Memo & Recent Action

- May 30, 2023, NLRB GC Memorandum 23-08
 - NLRB GC Jennifer A. Abruzzo set forth her view that non-competes employment contracts and severance agreements violate the NLRA except in limited circumstances
 - Non-competes “reasonably tend to chill” employees’ exercise of rights protected by the NLRA
 - Does not expressly state non-solicits violate the NLRA
- September 1, 2023, NLRB Cincinnati Regional Office Consolidated Complaint
 - Alleges a medical clinic and spa violated the NLRA by, among other things, requiring its employees to execute agreements containing non-competes as well as customer and employee non-solicit agreements

Federal Activity: NLRB GC Memo & Recent Action

- NLRB GC Abruzzo's Position
 - Non-compete agreements violate Section 8(a)(1) because they interfere with employees' ability to exercise their Section 7 rights.
 - NLRA Section 7
 - Protects employees' rights:
 - 1) To self-organization, to form, join, or assist labor organizations;
 - 2) To bargain collectively through representatives of their own choosing; and
 - 3) To engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
 - NLRA Section 8(a)(1):
 - It shall be an unfair labor practice for an employer to:
 - Interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7



Federal Activity: NLRB GC Memo & Recent Action

- NLRB GC Memo – Limited Exceptions
 - Employees could not reasonably construe the agreements to prohibit their acceptance of employment subject to the NLRA’s protections
 - Provisions that clearly restrict only individuals’ managerial or ownership interests in a competing business
 - True independent-contractor relationships
 - “Narrowly tailored non-compete” is “justified by special circumstances”
 - Does not provide examples, however, the Memo states:
 - “[I]t is unlikely an employer’s justification would be considered reasonable in common situations where overbroad non-compete provisions are imposed on low-wage or middle-wage workers who lack access to trade secrets or other protectible interests”
 - “[B]usiness interests in retaining employees or protecting special investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus”

Federal Activity: NLRB GC Memo & Recent Action

- Cincinnati Regional Office Consolidated Complaint Against Juvly Aesthetics
 - On September 1, 2023, the Regional Director filed a consolidated complaint applying GC Abruzzo's legal theory against an operator of medical clinics and spas that provides non-surgical aesthetic services in Ohio and Wisconsin
 - Seeks to rescind the unlawful provisions in the spa's Offers of Employment, Employee Handbook, Non-Compete and Confidentiality Agreement, and Exit Agreement, and seeks compensatory damages for the former employees
 - The agreements prohibit a departing employee from engaging in the following activities for a 24-month period following termination:
 - 1) Soliciting or hiring any current or former employees of the spa
 - 2) Intentionally interfering with or soliciting any of the spa's customers
 - 3) Practicing aesthetic medicine and providing a specifically listed service within a 20-mile radius of any of the spa's locations and
 - 4) Owning, investing in, or providing services to any medical practice that competes against or provides similar services to the spa within a 20-mile radius of any of the spa's locations (10-mile radius for New York City)



Federal Activity: NLRB GC Memo & Recent Action

- Regional Office's Brief in Opposition to Partial Motion to Dismiss
 - “With regard to Respondent’s citation to prior Board and Administrative Law Judge cases, it is well within the purview of the General Counsel to exercise her prosecutorial discretion to argue that the interpretation and application of the Act should change with the changing realities of the modern workplace”
 - “With regard to Respondent’s arguments that the General Counsel’s position is contrary to state law, Counsel for the General Counsel intends to argue that these matters are properly within the purview of the Board and that, to the extent state law is to the contrary, it should be preempted by the Act”

One State's Example: Minnesota

Minnesota's new non-compete law generally does the following:

- Bans non-competes for employees and independent contractors
- Applies these bans to any contract—including agreements governing employment, contractor status, intellectual property rights, equity, separation, severance, and anything else
- Bans non-Minnesota choice-of-law and choice-of-venue provisions for non-competes in employment agreements
- Gives employees the right to void those provisions and to seek attorneys' fees associated with litigation to enforce that right

One State's Example: Minnesota

The new law does not ban:

- Non-disclosure and confidentiality agreements
- Customer non-solicitation agreements
- Employee non-solicitation agreements
- Non-competes in the context of a sale of a business or the dissolution of a business
- Non-compete agreements entered into before July 1, 2023

Another State's Example: California

- California – Assembly Bill 1076
 - Revises California's restrictive covenant ban, Business and Professional Code § 16600, to be

“read broadly, in accordance with *Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, to void the application of any noncompete agreement ... no matter how narrowly tailored”
 - Takes effect on January 1, 2024

Another State's Example: California

- California – Assembly Bill 1076
 - Requires employers to notify “employees, and for former employees who were employed after January 1, 2022, whose contracts include a noncompete clause . . . that the non-compete clause is void”
 - Notice must be sent to both the employee’s last known street and email address. Failure to send the notice constitutes “unfair competition” and could result in steep penalties.

Another State's Example: California

- California – Assembly Bill 1076
 - Decisions interpreting *Edwards* complicate which employees or former employees should receive a notice
 - Generally applies to customer non-solicits
 - California state appellate courts applying *Edwards* have held California's non-compete ban also applies to employee non-solicits. California federal courts have disagreed
 - Several California state appellate courts have applied *Edwards* to hold California's non-compete ban also applies to overly broad confidentiality provisions. At least one California federal court has adopted that conclusion.

Another State's Example: California

- California – Senate Bill 699
 - Provides that the law voiding contracts under California law applies to contracts regardless where and when an employee signed
 - Prohibits an employer from enforcing a contract that would be void under California law—even if the contract was signed, and the employee worked outside, California
 - Prohibits an employer from entering into a contract that would be void under California law
 - Grants current, former, and even prospective employees a private right of action for damages, injunctive relief, and fees
 - Unclear whether the law applies retroactively to existing agreements

Another State's Example: California

- California – Senate Bill 699 - complex implications:
 - A non-CA employer could violate the new law by requiring a CA employee to sign a non-compete
 - A non-CA employer could violate the new law by trying to enforce a non-compete against a non-CA employee who seeks to work, anywhere, for a new CA employer
 - A non-CA employer could violate the new law by trying to enforce a non-compete against an employee who moves to CA
 - A non-CA employee working for a non-CA employer, who moves to CA (to work remotely or otherwise) could sue the non-CA employer for violating the new law

National Restrictive Covenant Agreements

- General considerations:
 - Scope of position / activity
 - “Competitor” definition
 - “Customer” definition
 - “Potential Customer definition
 - Solicitation versus acceptance
 - “Confidential Information” expiration
 - Choice of law / venue



National Restrictive Covenant Agreements



General Approach:

State-Specific Addenda

Pop-Up Question

In a scenario where a non-compete agreement is deemed overly broad or unreasonable, what factors might a court consider in deciding whether to enforce or modify the agreement? Please select the most relevant option:

- A) The geographic scope of the restriction
- B) The duration of the non-compete period
- C) The nature of the employee's role and the potential harm to the employer
- D) All of the above

National Restrictive Covenant Agreements

- California
 - No non-compete
 - Probably no customer non-solicit
 - Probably no employee non-solicit
 - Subject to California law
 - Subject to California venue



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National Restrictive Covenant Agreements

- Colorado
 - Acknowledgement of restrictions
 - Wage threshold
 - Subject to Colorado law
 - Subject to Colorado venue
 - Separate notice of employee rights

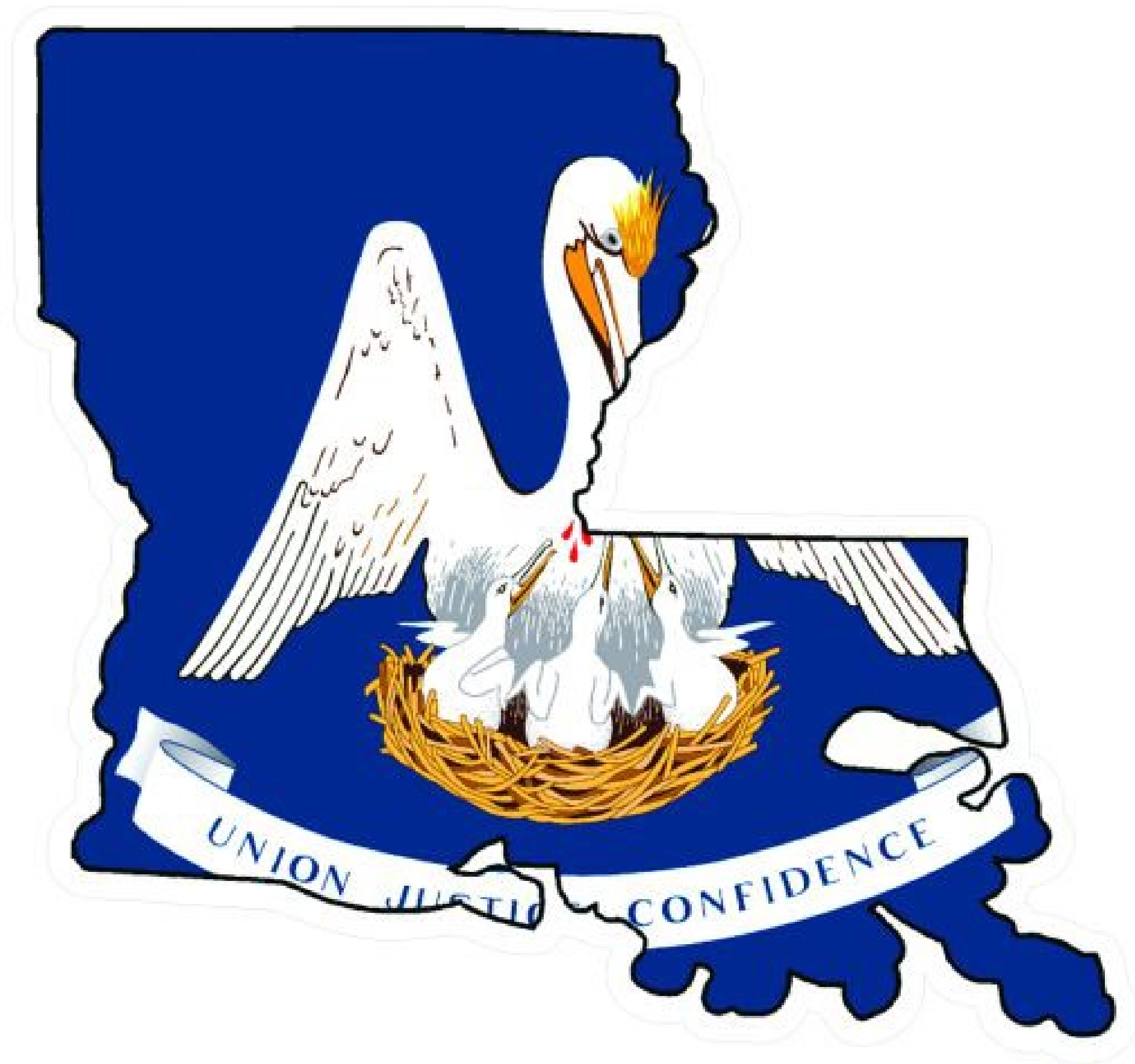


National Restrictive Covenant Agreements



- Illinois
 - Wage threshold
 - Review period

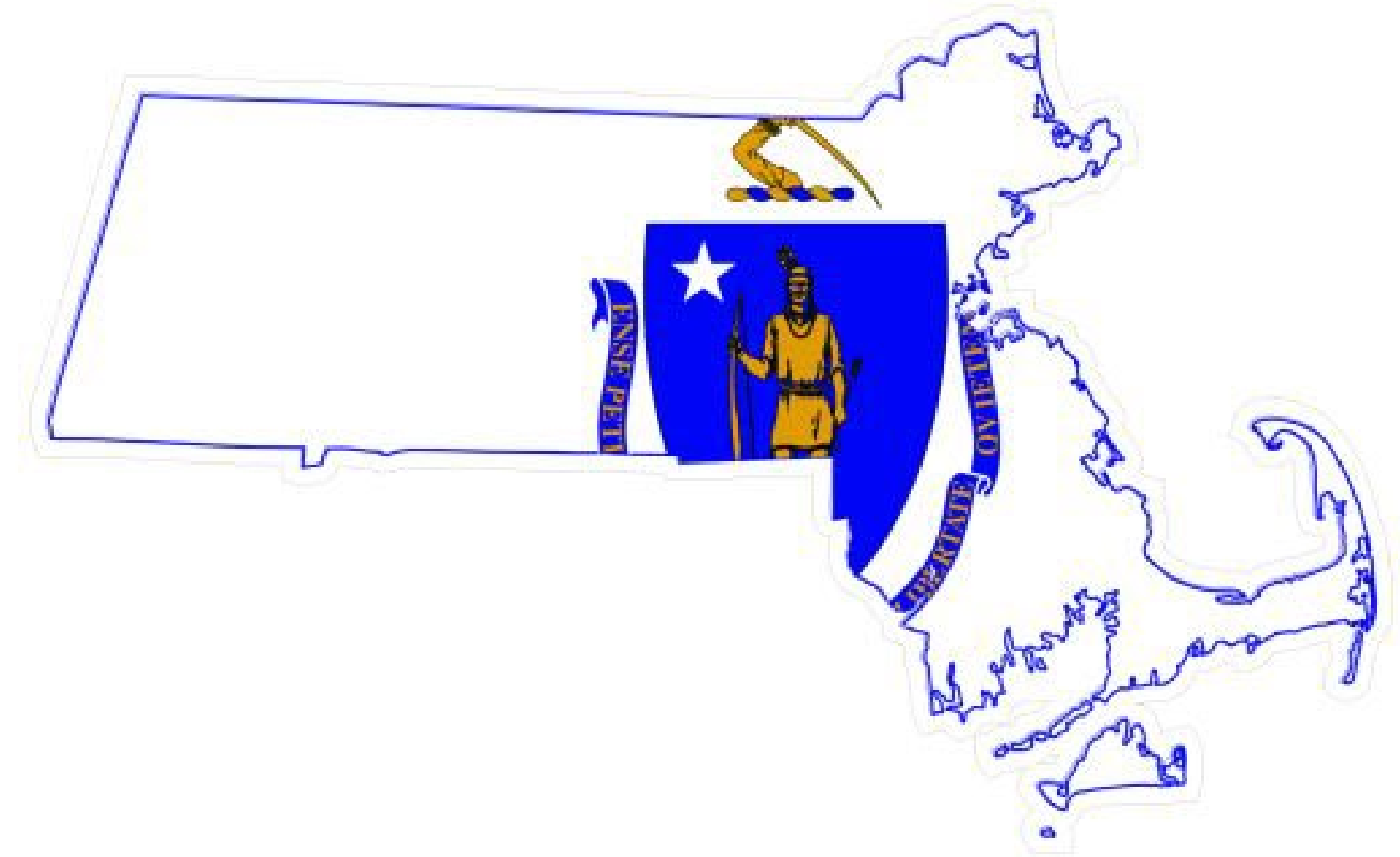
National Restrictive Covenant Agreements



- Louisiana
 - Parish specific
 - Customer patronage
 - Subject to Louisiana law
 - Subject to Louisiana venue

National Restrictive Covenant Agreements

- Massachusetts
 - Voluntary termination
 - Involuntary termination with cause
 - Garden leave
 - Review period
 - Right to counsel
 - Subject to Massachusetts law (limited)
 - Subject to Massachusetts venue (limited)



National Restrictive Covenant Agreements



- Minnesota
 - No non-compete
 - Careful non-solicits
 - Subject to Minnesota law
 - Subject to Minnesota venue

National Restrictive Covenant Agreements

- North Dakota
 - No non-compete
 - Careful non-solicits
 - Subject to Minnesota law
 - Subject to Minnesota venue



National Restrictive Covenant Agreements

- Oregon
 - Advance notice
 - Unlawful discrimination carve-out
 - Exemption threshold
 - Subject to Oregon law (limited)
 - Subject to Oregon venue (limited)



National Restrictive Covenant Agreements

- Virginia
 - Wage threshold



National Restrictive Covenant Agreements



- Washington
 - Wage threshold
 - Garden leave for involuntary termination
 - Unlawful discrimination carve-out
 - Subject to Washington law (limited)
 - Subject to Washington venue (limited)

National Restrictive Covenant Agreements

- Maine, Maryland, Nevada, New Hampshire, Rhode Island, Washington DC
 - Consider wage thresholds

THANK YOU! If you have any questions, please contact one of the presenters



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