

### Complex Restrictive Covenant Topics for the Advanced Practitioner

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#### The Challenges

- Huge variety in state approaches
  - California, North Dakota, Oklahoma (no non-competes)
  - Income / exemption limitations
  - Virginia, Wisconsin, and South Carolina (time limit on non-disclosure)
  - Louisiana (parishes)
- Never-ending state law changes
  - 10 states have statutorily changed restrictive covenant laws in last 3 years
- Procedural differences among states
  - Illinois (review period), Oregon (provide copy), Washington (garden leave), Massachusetts (garden leave, noncompete only)
- Potential penalties for enforcing employer
  - Class action for unfair business practices
  - Employer pays employee's fees
  - Two-way fee shifting

#### The Choice of Law and Venue

- One template with one choice-of-law/venue provision – pick the best state!
- One template with one choice-of-law/venue provision – pick the home state
- One template with a highest common denominator level of restrictions – pick the home state (maybe)
- One template with a highest common denominator level of restrictions – pick the state where the employee last worked
- Limited templates covering different groupings of states – pick the home state (maybe)
- One template with step-down restrictions and limitations based on where employee works

## The Language Non-Competes

Avoid	Use
No work in any capacity	No work in a role that is the same or substantially similar to prior duties
No work for [pick a number] years	No work for a period of time selected to complement industry/company/employee reality
No work anywhere	No work in the geography where recently worked, national only if duties actually national
No work for any entity	No work for a competitor that does the same or substantially similar business of employer

## Customer Non-Solicits

Avoid	Use
No soliciting any customers of any sales representative	No soliciting customers with which employee built goodwill
No soliciting any customers, known or unknown	No soliciting customers about which employee learned confidential information
No soliciting customers that ever worked with employer	No soliciting customers that did business in recent period
No accepting of business from customers	No soliciting of business from customers

## Employee Non-Solicits

Avoid	Use
No soliciting any employee of former employer	No soliciting employees with whom employee had direct relationships or supervision
No soliciting any level of employee	No soliciting employees who hold a uniquely essential position for management or service
No hiring employees	No <i>soliciting</i> employees
No engaging independent contractors / vendors	No soliciting <i>employees</i>