

# Employees, Trade Secrets, Antitrust

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## About Today's Talk

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- This presentation is designed to promote discussion on legal and ethical issues regarding employees, trade secrets and antitrust.
- It is not legal advice.
- It does not represent the opinions of Fish & Richardson P.C. or any of its lawyers or clients.

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# Topics

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- Covenants not to Compete
- Non-disclosure agreements
- Misappropriation of trade secrets
- Computer Fraud and Abuse Act
- Copyright infringement
- Conversion
- Tortious interference with contract
- Antitrust issues

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## Departing Employee Problems: Non-compete

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- Where permissible, non-competes are the cleanest mechanism to prevent a former employee from competing against a former employer.
  - State laws on enforceability of covenants not to compete vary dramatically from state to state.
  - Aside from limits on them under some state laws, venue and personal jurisdiction can be an issue.
  - If a contract is overbearing it may be void or in some states revised, “blue-penciled” by the court.
  - Some courts may still require separate proof of irreparable injury for an injunction.

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# Non-Compete: Choice of Law

- **Can you get a non-compete under the law of the relevant state?**
  - Some states have laws that expressly render them void in the employment context (e.g., California, Oregon, Colorado, others).
  - Trend to bar non-competes for non-exempt employees or for people laid off or terminated without cause.
  - Massachusetts 2018 statute has advance notice requirements, and a garden leave payment provision.
  - Some states laws expressly condone and even permit modification of them to preserve their validity (“Blue Pencil” states, e.g., New Jersey, Pennsylvania, Texas).
  - Some states require separate proof that non-compete is necessary for a legitimate business reason: protect trade secrets, protect confidential information and protect goodwill.

## “Blue Pencil” States Allow Revision to Preserve Validity of Non-Competes

- Texas is a “blue pencil” state.
- Texas Business and Commerce Code § 15.51(c), if the duration or geography are unreasonable, “***the court shall reform the covenant*** to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity *to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee* and enforce the covenant as reformed . . . .”
- Other blue pencil states include Arizona, Delaware, Kentucky, North Carolina, etc.

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