

I KNEW YOU WERE TROUBLE WHEN YOU WALKED IN

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THE ROADMAP



- What legal framework governs Noncompetes?
- Where might you find a Noncompete?
- Is it a Noncompete, or something else?
- Is that Noncompete enforceable?
- What might be changing and when?



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WHICH FAMOUS T.S. WAS BOTH MONICA'S
OPHTHALMOLOGIST & HER BOYFRIEND?



WHICH FAMOUS T.S. WAS BOTH MONICA'S
OPHTHALMOLOGIST & HER BOYFRIEND?

FEDERAL OR STATE?

FEDERAL

- **Congress**
 - U.S. Senate
 - House of Representatives
 - President's Signature
- **438 Federal Agencies & Subagencies**
 - Notice & Comment
 - Emergency Action

STATE (TENNESSEE)

- **General Assembly**
 - Senate
 - House of Representatives
 - Governor's Signature
- **28 State Agencies**
 - Notice & Hearing
 - Emergency Action

STATUTE OR COMMON LAW?

STATUTE

- **Florida**
 - Fla. Stat. Ann. § 542.335
- **California**
 - Cal. Bus. and Prof. Code §§ 16600-16607

COMMON LAW

- **Tennessee**
- **Wyoming**

EVERYONE OR JUST A FEW

EVERYONE

- **California**
- **Texas**

TYPE OF EMPLOYEE

- **Physicians**
- **Lawyers**
- **Highly
Compensated**

It depends . . .

When the Agreement was Signed

- Arkansas (7/22/2015)
- Georgia (05/11/2011)
- Maine (09/18/2019)
- Massachusetts (10/01/2018)
- Michigan (08/29/1985)

“Other”

- How many years?
- How much \$?
- When in the employment relationship?



Where can you find a
Noncompete?



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WHICH FAMOUS T.S. NEVER COULD
GET OUT OF THE 90210?



WHICH FAMOUS T.S. NEVER COULD GET
OUT OF THE 90210?

Does that document contain a Noncompete?

- Employment Agreements

- Executives
- Sales Personnel
- Creative Personnel
 - Designers
 - Engineers
 - Developers
- Everyone?

- Major Business Transactions

- Asset Purchases
- Stock / Membership Interest Purchases
- Mergers



A faded, sepia-toned illustration of a Western town street. The scene is filled with wooden buildings, including a saloon on the left with a sign that says "BAR" and another that says "ROOMS". In the center, a church steeple with a cross is visible against a cloudy sky. On the right, a man in a blue shirt and hat is riding a horse. The street is paved with cobblestones, and there are barrels and chickens in the foreground. The overall atmosphere is that of a classic Wild West town.

IS IT A NONCOMPETE
OR SOMETHING ELSE?



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WHICH T.S. WAS THE BOSS OF NEWARK
N.J. -- BUT ONLY FOR 6 SEASONS?



WHICH T.S. WAS THE BOSS OF NEWARK
N.J. -- BUT ONLY FOR 6 SEASONS?

Non-Compete vs. NDA

Non-Compete

- Contract Provision
 - Reasonable Requirements
- Federal & State Law

Non-Disclosure/Confidentiality

- Contract Provision
 - Defines “Trade Secrets” or “Confidential Information”
- Federal and State Law

6.4 Statements by Employee. Subject to the requirements of any applicable securities or other laws, Employee agrees that, during and after the Term of Employment, Employee will not at any time make any statement or representation, written or oral, which Employee knows or should know is reasonably likely to, impair or adversely affect in any way the reputation, good will, business, customer or supplier relationships or public relations of Company, any Affiliate or any person or entity which Employee knows or should know is one of the following: (i) a manager of Company or any Affiliate, (ii) an employee of Company or any Affiliate, (iii) a person or entity who has or has had a legal or beneficial ownership interest in the shares of Company or any Affiliate (an "Owner"). **Notwithstanding the foregoing**, nothing in this paragraph shall in any way limit or impair Employee's right under Section 7 of the National Labor Relations Act to discuss Employee's wages, hours or the terms and conditions employment, Employee's ability to file a charge or participate in an investigation by the Equal Employment Opportunity Commission, or to make truthful statements pursuant to or under any order or request issued by (A) a court of competent jurisdiction, (B) any governmental authority or (C) a lawfully issued subpoena.

10.1 Confidential Information. Employee shall not, during the Term of Employment and at any time thereafter, without the prior, express, written consent of Company's President, directly or indirectly (i) use any Confidential Information (as defined below) in any way or (ii) divulge, disclose or make available or accessible any Confidential Information to any person, firm, partnership, corporation, trust or any other entity or third party (other than when required to do so in good faith to perform Employee's duties and responsibilities under this Agreement, when required to do so by a lawful order of a court of competent jurisdiction or pursuant to the lawful requirement of any law enforcement or other governmental investigation, but in the case of lawful court order or law enforcement requirement, only after written notice to Company and after Company has had an opportunity to contest such order or requirement). In addition, Employee shall not create any derivative work or other product based on or resulting from any Confidential Information (except in the good faith performance of Employee's duties under this Agreement). Employee shall also immediately notify Company's President if Employee becomes aware of any unauthorized use or disclosure. Employee agrees not to make any copies of any kind of any document, computer software or other writing or recording containing any Confidential Information without the prior approval of Company's President (other than when required to do so in good faith to perform Employee's duties and responsibilities under this Agreement or when required to do so by lawful order of a court of competent jurisdiction). Employee shall also proffer to the President or its designee, no later than the effective date Employee's employment with Company terminates for any reason and without retaining any copies, notes or excerpts thereof, all memoranda, computer disks or other media, computer programs, diaries, notes, records, data, customer or client lists or compilations of customer information, marketing plans and strategies and any other documents consisting of or containing any Confidential Information that are in Employee's actual or constructive possession or which are subject to Employee's control at such time. In addition, Employee shall at all times use Employee's best efforts to safeguard any Confidential Information in Employee's possession or control. For purposes of this Agreement, "Confidential Information" shall mean all proprietary information respecting the business and activities of Company or any Affiliate, including, without limitation, customer lists or compilations of information about clients, customers, suppliers, employees, consultants, computer or other files, projects, products, computer disks or other media, computer hardware or computer software programs, marketing plans, financial information, methodologies, know-how, processes, practices, approaches, projections, forecasts, formats, systems, data gathering methods or strategies of Company or any Affiliate. Notwithstanding the immediately preceding sentence, Confidential Information shall not include any information that is or becomes, generally available to the public (unless such availability occurs as a result of Employee's breach of any portion of this Section 10.1 or any other obligation Employee owes to Company or any Affiliate). Nothing in this Section 10.1 shall in any way limit or impair Employee's right under Section 7 of the National Labor Relations Act to discuss Employee's wages, hours or the terms and conditions employment, Employee's ability to file a charge or participate in an investigation by the Equal Employment Opportunity Commission, or to make truthful statements pursuant to or under any order or request issued by (A) a court of competent jurisdiction, (B) any governmental authority or (C) a lawfully issued subpoena.

10.3 Customer Non-Solicitation. During the Term of Employment and for two (2) years following the date of termination of Employee's employment for any reason, Employee agrees not to directly or indirectly **(a)** take any action to solicit or divert any business (or potential business) or clients or customers (or potential clients or potential customers) away from Company or any Affiliate, or **(b)** induce customers, potential customers, clients, potential clients, suppliers, agents or other persons under contract or otherwise associated or doing business with Company or any Affiliate to reduce or alter any such association or business with or from Company or any Affiliate. For purposes of this Section 10.3, a "potential client" or a "potential customer" shall mean a person or entity that Company or any Affiliate **(A)** as of the date Employee's employment terminates, is or will be, in the reasonably foreseeable future, soliciting or considering soliciting (or has targeted for solicitation or will be so targeting in the reasonably foreseeable future) or **(B)** has, at any time or from time to time, within the twelve (12) month period prior to the date Employee's employment terminates, been soliciting for or in respect of any current, actively pending or contemplated product lines, businesses or services offered by Company or any Affiliate, including, without limitation, any licensing arrangements, manufacturing arrangements or distribution arrangements (the "Products") and "potential business" shall mean any current or reasonably foreseeable commercial activity or any current or reasonably foreseeable commercial opportunities associated in any way with the Products.

10.2 Non-Competition. Employee shall not, during the Term of Employment and for two (2) years following the date of termination of Employee's employment for any reason other than death or Disability, (a) engage, without the prior express written consent of Company, in any business or activity, whether as an employee, consultant, partner, member, principal, agent, representative, stockholder or in any other individual, corporate or representative capacity or render any services or provide any advice to any business, activity, person or entity, if such business, activity, service, person or entity, directly or indirectly, is engaged in manufacturing or selling any products which compete in any manner with or are similar to, the products being developed, produced or sold by Company as of the date Employee's employment with Company terminates or (b) meaningfully assist, help or otherwise support, without the prior express written consent of Company, any person, business, corporation, partnership or other entity or activity, whether as an employee, consultant, partner, principal, agent, representative, stockholder or in any other individual, corporate or representative capacity, to create, commence or otherwise initiate or to develop, enhance or otherwise further, any business or activity if such business or activity, directly or indirectly, is engaged manufacturing or selling any products which compete in any manner with or are similar to, the products being developed, produced or sold by Company as of the date Employee's employment with Company terminates. This **Section 10.2** shall be effective throughout the continental **United States, Canada and Mexico**. Provided however, this **Section 10.2** will be void if Company or its successor in interest ceases all its operations.



Is that Noncompete
Enforceable?

TENNESSEE

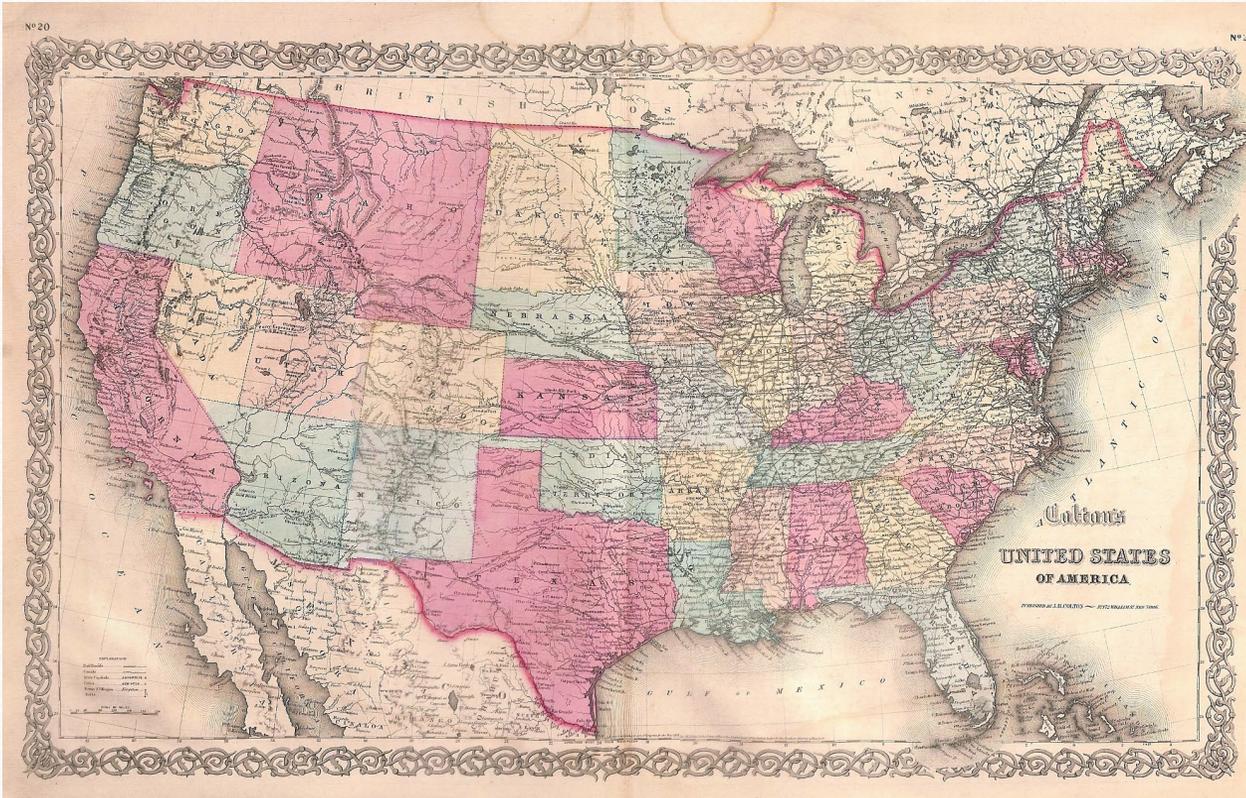


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- Supported by Consideration
- Reasonable Time
- Reasonable Geographic Territory
- Legitimate Business Interest
- Not Against Public Policy

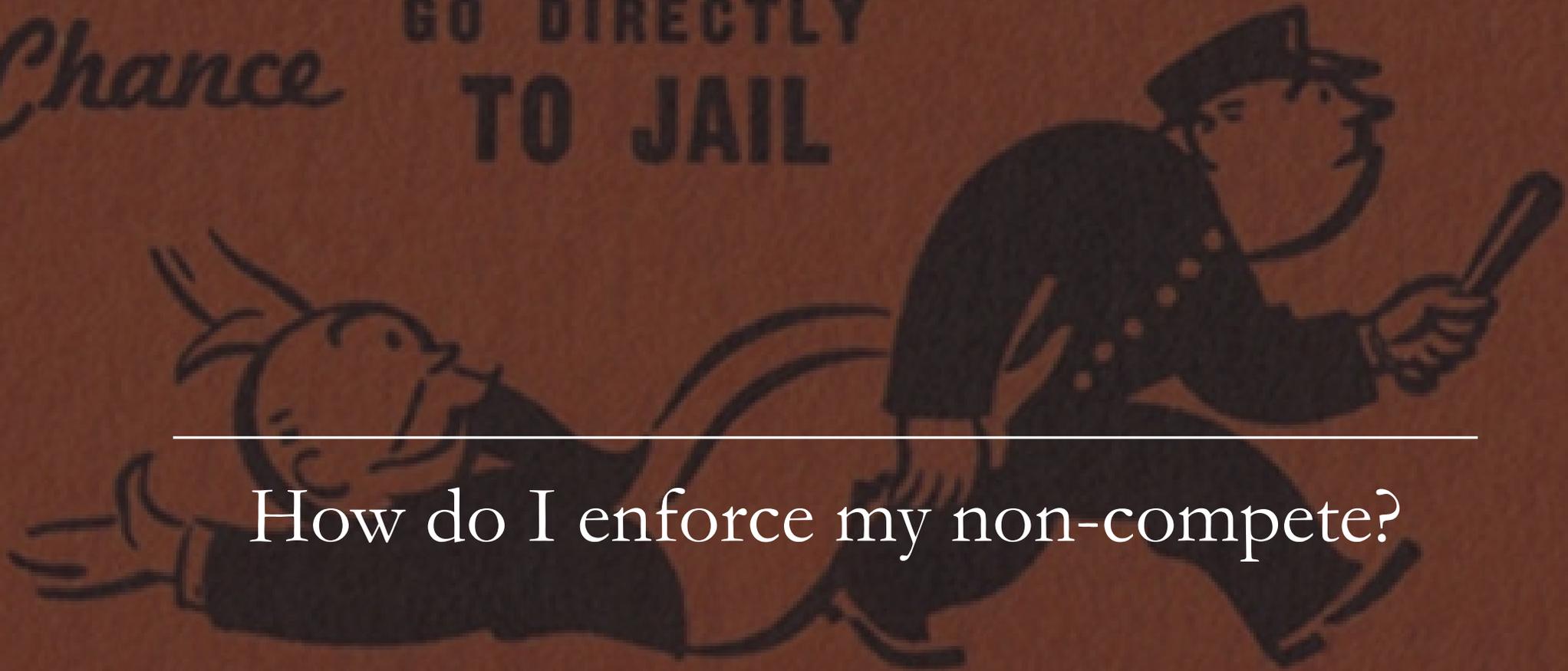
Other States

- What happens if non-compete is subject to other law?
 - Employee living/working in another state?
 - Non-compete provision says controlled by another state?
 - Your new employee has a non-compete with their old employer.
 - Tennessee recognizes Choice of Law in most circumstances.
 - Exception is when Tennessee law is more favorable to employee.



Chance

GO DIRECTLY
TO JAIL



How do I enforce my non-compete?

DO NOT PASS GO, DO NOT COLLECT \$200



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WHICH T.S. WAS A SELF-DESCRIBED GENIUS,
BILLIONAIRE, PLAYBOY, PHILANTHROPIST?



WHICH T.S. WAS A SELF-DESCRIBED GENIUS,
BILLIONAIRE, PLAYBOY, PHILANTHROPIST?

-
- File Suit!
 - Injunction
 - Temporary
 - Permanent
 - Judgment



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Former Employee Using Trade Secrets to Compete?

- Injunctive Relief
- Breach of Contract Claims
 - Violations of Non-Compete and NDA
 - Trade Secret Misappropriation
- Tort Claims

What's a Trade Secret?

- Federal Law
 - “Defend Trade Secrets Act”
- Financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs or codes... IF
 - Owner takes reasonable measures to keep the information secret, AND
 - Information derives “independent economic value...from not being general known...or readily ascertainable through proper means”
- Tennessee Law
 - “Tennessee Uniform Trade Secrets Act”
- Technical, non-technical, or financial data, a formula, pattern, compilation, program, device, method, technique, process or plan
- “Derives economic value, from not being generally known or readily ascertainable by proper means”
- “Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy”



The Times They are
a'Changin'



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WHICH T.S. GREW UP ON A CHRISTMAS
TREE FARM?



WHICH T.S. GREW UP ON A CHRISTMAS
TREE FARM?

THE WHITE HOUSE



JULY 09, 2021

Executive Order on Promoting Competition in the American Economy



[BRIEFING ROOM](#)

[PRESIDENTIAL ACTIONS](#)

To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

Current Status?



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FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly \$300 billion per year

January 5, 2023





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The Proposed Rule (for now)

- Who?
 - Employees & Independent Contractors
- What?
 - Rescind Pre-Existing Non-Competes
 - Require Notice to Employees
- How?
 - Section 5 of the FTC Act



Current Status

- Notice and Comment Period Ended April 19, 2023
- Next Step: Publish the Rule in the Federal Registry
- 60 Days
- BUTApril 2024?
- AND



FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers

Agency action eliminates noncompetes covering thousands of workers, promoting greater economic opportunity and competition

January 4, 2023

Tags: [Competition](#) | [Bureau of Competition](#) | [Unfair Methods of Competition](#)

The Federal Trade Commission has taken legal action against three companies and two individuals, forcing them to drop noncompete restrictions that they imposed on thousands of workers. Drawing from the FTC's substantial expertise in this space, these actions mark the first time that the agency has sued to halt unlawful noncompete restrictions.

According to the complaints issued by the FTC, each of the companies and individuals illegally imposed noncompete restrictions on workers in positions ranging from low-wage security guards to manufacturing workers to engineers that barred them from seeking or accepting work with another employer or operating a competing business after they left the companies.

NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act

Office of Public Affairs

202-273-1991

publicinfo@nrb.gov

www.nrb.gov

May 30, 2023

Today, NLRB General Counsel Jennifer Abruzzo [sent a memo](#) to all Regional Directors, Officers-in-Charge, and Resident Officers, setting forth her view that the proffer, maintenance, and enforcement non-compete provisions in employment contracts and severance agreements violate the National Labor Relations Act except in limited circumstances.

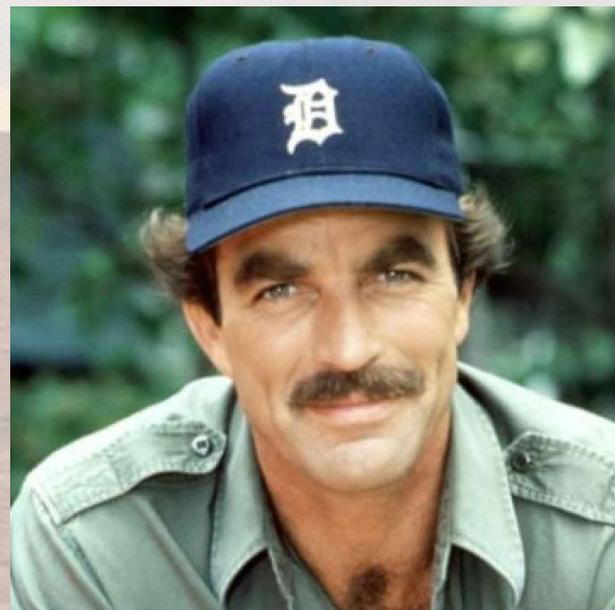
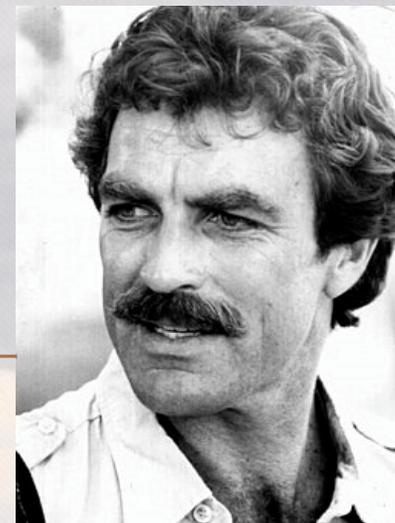


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“Non-compete provisions reasonably tend to chill employees in the exercise of Section 7 rights when the provisions could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work,” said General Counsel Abruzzo. “This denial of access to employment opportunities interferes with workers engaging in Section 7 activity in a number of ways—for example, workers know that they will have greater difficulty replacing their lost income if they are discharged for exercising their statutory rights to organize and act together to improve working conditions; their bargaining power is undermined in the context of lockouts, strikes and other labor disputes; and their social ties and solidarity leading to improvements in working conditions at workplaces are lost as they scatter to the four winds.”

General Counsel Abruzzo explains that in some cases, noncompete agreements could be lawful if the provisions clearly restrict only individuals’ managerial or ownership interests in a competing business, or true independent-contractor relationships. Moreover, there may be circumstances in which a narrowly tailored non-compete agreement’s infringement on employee rights may be justified by special circumstances.

Current Status?



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In conclusion, Regions should submit to Advice cases involving non-compete provisions that are arguably unlawful under the analysis summarized herein, as well as arguably meritorious special circumstances defenses. In appropriate circumstances, Regions should seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision. In this regard, Regions should seek evidence of the impact of overbroad non-compete agreements on employees and, where applicable, present at trial evidence of any adverse consequences, including specific employment opportunities employees lost because of the agreements.²⁵

Interagency Cooperation
