

Labor & Employment Law

BEYOND THE RED-BLUE DIVIDE: AN OVERVIEW OF CURRENT TRENDS IN STATE NON-COMPETE LAW

By J. Gregory Grisham

Note from the Editor:

This article discusses trends in non-compete law in various states, pointing out that the trends do not break down along the traditional red-blue divide.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

INTRODUCTION

Covenants not to compete (“non-competes”)¹ have a long history dating back to the medieval era.² In recent years, employers have increasingly used non-competes to try to protect their customer relationships and intellectual property, requiring even low-skill employees to sign them as a condition of employment.³ Non-competes are common in the U.S.; a recent study showed “that roughly 18 percent of the U.S. workforce is bound by a non-compete currently.”⁴ Notwithstanding the prevalence of non-competes, a tension has always existed between non-competes and federal and state public policy favoring free competition.⁵ The vast majority of state supreme courts and appellate courts have come down on the side of upholding non-competes, provided that 1) the employer has a “protectable interest”⁶ to justify the restriction and 2) the restriction is reasonable as to time and geographic

1 This article will examine current state law trends in the enforcement of non-competes. The article will not address the closely related issues of confidentiality agreements and trade secrets, although these issues are often litigated along with non-competes.

2 Non-competes “date back to the medieval era where a master craftsman would make untrained apprentices sign contracts that said they couldn’t set up shop in the town after they finished being apprentices.” *Study Finds Many Companies Require Non-Compete Clauses for Low-Wage Workers*, NPR- ALL THINGS CONSIDERED (Nov. 7, 2016), <http://www.npr.org/2016/11/07/501053238/study-finds-many-companies-require-non-compete-clauses-for-low-wage-workers>. See also Schuyler Velasco, *States move to keep noncompete agreements from shackling workers to jobs*, CHRISTIAN SCIENCE MONITOR (July 27, 2016), <http://www.csmonitor.com/Business/2016/0727/States-move-to-keep-noncompete-agreements-from-shackling-workers-to-jobs>.

3 Mark Muro, *Why Noncompete Pacts Are Bad for Workers—and the Economy*, WALL STREET JOURNAL (May 23, 2016), <http://blogs.wsj.com/experts/2016/05/23/why-states-should-stop-the-spread-of-noncompete-pacts/>.

4 *Id.* Some commentators have argued that the overuse of non-competes can be harmful to employees and employers. See, e.g., Dan Broderick, *Over-Using Non-Competes Harms Logistics Employees and Employers*, GLOBAL TRADE DAILY (March 20, 2017), <http://www.globaltrademag.com/global-logistics/using-non-competes-harms-logistics-employees-employers?gtd=3850&scn=using-non-competes-harms-logistics-employees-employers>.

5 See, e.g., *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); Tenn. Code Ann. § 47-25-101. See also *The Sherman Antitrust Act*, 15 U.S.C. §§ 1–7; *The Clayton Antitrust Act*, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53; *The Federal Trade Commission Act*, 15 U.S.C. §§ 41–58, as amended. The Texas experience with non-competes provides an excellent example of how the law of non-competes has evolved. See Patrick J. Maher, *The Noncompetition Agreement Has a Renaissance*, DAILY REPORT (April 1, 2017), <http://www.dailyreportonline.com/id=1202782768002/The-Noncompetition-Agreement-Has-a-Renaissance?mcode=1202629936552&curindex=1>.

6 Protectable interests have been found to include, among other things, customer relationships, confidential information, and specialized training.

About the Author:

J. Gregory Grisham is an attorney specializing in labor and employment law at Ford Harrison in Nashville, Tennessee.

reach.⁷ Further, most states that have enacted general statutes that authorize non-competes take a similar view permitting reasonable post-employment restrictions to protect the legitimate business interests of the former employer.⁸

I. STATE STATUTES AND STATE ATTORNEY GENERAL ACTION

A. Statutory Changes

Twenty states have enacted “general” statutes that govern the enforcement of non-competes.⁹ In recent years, three states—Arkansas, Alabama, and Georgia—enacted new statutes that permit or favor greater enforcement of non-competes.¹⁰ Under the Arkansas statute, a two-year time restriction on a non-compete is presumptively reasonable unless the particular facts show otherwise.¹¹ The Arkansas statute also provides a long list of protectable business interests.¹² Moreover, contrary to prior Arkansas case law, the statute directs courts to reform an unenforceable non-compete in order to make it reasonable and enforceable.¹³

A new Alabama statute (effective January 1, 2016) replaced a more restrictive law and authorizes non-competes in the employment and sale-of-business contexts as well as in non-solicitation agreements.¹⁴ The statute also sets presumptively reasonable time limits for agreements in each context: 1) two years for an employment non-compete, 2) one year for a non-compete or non-solicitation agreement growing out of the sale of a business, and 3) eighteen months for a non-solicitation agreement.¹⁵ Notably, the statute codifies the judicial practice of “blue penciling” non-competes, authorizing courts to excise terms they find unreasonable to render the non-competes enforceable.¹⁶

The Georgia statute, reenacted in 2011, makes clear that non-competes are enforceable in Georgia where the “restrictions are reasonable in time, geographic area, and scope of prohibited activities.”¹⁷ The statute marked a dramatic departure from the jurisprudence of the Georgia Supreme Court and Court

of Appeals that had been hostile to the enforcement of non-competes.¹⁸ Like the Alabama and Arkansas statutes, the Georgia statute creates a presumptively reasonable time limit for non-competes—two years or less.¹⁹ However, the Georgia statute limits application of non-competes to employees who “customarily and regularly” solicit “customers or prospective customers,” “mak[e] sales or obtain orders or contracts,” perform management duties (with language similar to the executive exemption in the FLSA), or are “key” or “professional” employees.²⁰ The Georgia statute also permits courts to “blue pencil” non-competes provided that the changes do not make the non-compete more burdensome for the employee.²¹

In Idaho, the legislature recently amended Idaho Code §44-2704 to add that a rebuttable presumption of irreparable harm is established where “a court finds that a key employee or key independent contractor is in breach” of a non-compete.²² In order to rebut the presumption, “the key employee or key independent contractor must show that the key employee or key independent contractor has no ability to adversely affect the employer’s legitimate business interests.”²³

In contrast with the actions of Arkansas, Alabama, and Georgia to generally enhance the enforceability of non-competes and Idaho’s new presumption of irreparable harm for breach of a non-compete, Utah recently passed a statute limiting non-competes to one year from the date of the employee’s termination. Non-competes in Utah entered into on or after May 10, 2016 with terms greater than one year are void and may not be saved via judicial “blue penciling.”²⁴ The Utah statute also creates a remedy for employees who are subject to a lawsuit or arbitration in the event the non-compete is determined to be unenforceable, including “(1) costs associated with arbitration; (2) attorney fees and court costs; and (3) actual damages.”²⁵

Illinois just enacted legislation (effective January 1, 2017) that prohibits employers from entering into non-competes with “low wage” employees.²⁶ The term “low-wage employee” is defined as “an employee who earns the greater of 1) the hourly rate equal to the minimum wage required by the applicable federal, state, or local minimum wage law or 2) \$13.00 per

7 See, e.g., *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361 (Tenn. 1966).

8 See, e.g., Fla. Stat. Ann. §542.335.

9 Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Louisiana, Michigan, Missouri, Montana, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, and Wisconsin. Some other states have enacted statutes that govern non-competes in specific occupational groups. See, e.g., Tenn. Code Ann. § 63-1-148 (healthcare professionals).

10 See generally Ala. Code §8-1-190; Ga. Code Ann. §13-8-50; and A.C.A. §4-75-101.

11 A.C.A. § 4-75-101(d).

12 A.C.A. § 4-75-101(b).

13 A.C.A. § 4-75-101(f)(1).

14 Ala. Code §8-1-190(b).

15 Ala. Code §8-1-190(b)(3)-(5).

16 Ala. Code §8-1-193.

17 Ga. Code Ann. §13-8-50 *et seq.*

18 Eric Smith & Jerry Newsome, *Georgia’s Reenacted Restrictive Covenants Statute—A New Era in Georgia Noncompete Law Has Finally Arrived*, LITTLER-INSIGHT (May 16, 2011), <https://www.littler.com/georgias-reenacted-restrictive-covenants-statute-%e2%80%93new-era-georgia-noncompete-law-has-finally>.

19 Ga. Code Ann. § 13-8-57.

20 Ga. Code Ann. § 13-8-53(a).

21 Ga. Code Ann. §13-8-54; Ga. Code Ann. §13-8-53(d).

22 Idaho Code Ann. § 44-2704(6).

23 *Id.*

24 U.C.A. 1953 § 34-51-201.

25 U.C.A. 1953 § 34-51-301. There is a pending bill in Nevada that would, among other things, limit the duration of non-competes to three months following the termination of employment. See Assembly Bill No. 149 (introduced February 14, 2017).

26 Public Act 099-0860.

hour.”²⁷ Oregon recently amended its existing statute governing restrictive covenants to limit non-competes to eighteen months from the date of termination.²⁸ A non-compete lasting longer than eighteen months “is voidable and may not be enforced” by an Oregon court.²⁹

Two other states have also recently enacted legislation to clarify existing statutes addressing the enforcement of non-competes in their respective states. Hawaii prohibited the use of a non-compete (and non-solicitation) provision “in any employment contract relating to an employee of a technology business,” making such provisions void.³⁰ New Hampshire recently amended its existing statute to require an employer to provide a prospective employee, prior to the acceptance of an offer of employment, with a copy of the non-compete the individual will be asked to sign. The failure to do so renders the non-compete unenforceable.³¹

Finally, California recently enacted a new statute that will affect employers (including those attempting to enforce non-competes) who try to avoid the application of California’s strict, employee-friendly laws governing non-competes and venue in California.³² The statute limits the ability of employers to require employees to litigate or arbitrate employment disputes 1) outside of California or 2) under the laws of another state, unless the employee was individually represented by a lawyer in negotiating the employment contract.³³

B. Attorney General Actions

Two state attorneys general have recently taken an aggressive approach to restricting the use of non-competes in employment through litigation and settlement. The Attorney General of New York, Eric Schneiderman, recently insisted on a ban on non-competes for most company employees as part of a settlement

with a major media employer.³⁴ In December 2016, Illinois Attorney General Lisa Madigan announced the settlement of a lawsuit against Jimmy John’s—a national sandwich chain—which severely restricted the company’s ability to use non-competes.³⁵

While non-compete law is unique to each state, the trend as reflected in recent legislation is toward general enforcement of non-competes where protectable interests are found and the restrictions are reasonable, albeit with strict time limits and procedural hurdles in some jurisdictions. This pattern seems to hold in both red and blue states, indicating that political categorization is not necessarily helpful in predicting trends in non-compete law. Moreover, at least two state attorneys general have used settlements in specific cases to restrict the use of non-compete agreements. Both represent populous blue states, so that may indicate the start of a trend in the use of this particular method of restricting the use of non-competes.

II. ILLUSTRATIVE STATE CASE LAW

Non-compete cases are rising and cover a multitude of legal issues.³⁶ This section will look at select recent state supreme court and intermediate appellate court decisions that address three issues—1) judicial modification, 2) consideration, and 3) protectable interests—to ascertain current trends in the development of the common law of non-competes.

A. Judicial Modification

A number of recent cases have addressed the issue of whether overbroad non-competes can be saved through judicial modification. Some state courts have adopted the aforementioned blue pencil rule, which allows the trial court to excise overbroad terms that would otherwise render the non-compete unenforceable; others have adopted the more employer-friendly “reformation” approach that permits the court to “reform” the non-compete to make it enforceable. However, state courts in some jurisdictions have declined to adopt either approach and instead interpret non-compete agreements only as written.

In *Golden Road Motor Inn, Inc. v. Islam*, the Nevada Supreme Court considered whether an unambiguously overbroad non-compete could be judicially modified. The defendant-employee

27 *Id.*

28 O.R.S. § 653.295(2).

29 *Id.*

30 HRS § 480-4(d).

31 N.H. Rev. Stat. Ann. §275:70.

32 Labor Code § 925. See June D. Bell, *New Labor Code Section Helps Ensure California Workers Are Governed By California Law*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Oct. 27, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/disputes-in-california.aspx>. See generally California Business Code §16600 *et seq.*

33 Michael C. Schmidt, *Noncompete Agreements: New Considerations Under Both Employment and Antitrust Law*, LEXOLOGY (Jan. 2, 2017), <http://www.lexology.com/library/detail.aspx?g=83e92aa5-0fdc-4419-9c6d-3f8eba37de98>. Several other states, including Oklahoma, North Dakota, and Montana have general statutes that prohibit the use of non-competes in the employment context. See Okla. Stat. tit. 15, §219A; N.D. Cent. Code §9-08-06; M.C.A. 28-2-703-705. In addition to Nevada, see *supra* note 25, a number of other states, including Maryland and Massachusetts, have pending bills to limit the reach of non-competes. See Jonathan L. Shapiro, *Which States Are Likely to Enact Laws Restricting Non-Compete Agreements in 2017?*, NATIONAL LAW REVIEW (March 23, 2017), <http://www.natlawreview.com/article/which-states-are-likely-to-enact-laws-restricting-non-compete-agreements-2017>.

34 J. Jennings Moss, *Non-compete clauses come under fire by N.Y. attorney general*, NEW YORK BUSINESS JOURNAL (June 15, 2016), <http://www.bizjournals.com/newyork/news/2016/06/15/non-compete-clauses-come-under-fire-by-n-y.html>; Vin Gurrieri, *Law360 Reaches Noncompete Settlement With NY AG*, LAW360 (June 15, 2015), <https://www.law360.com/articles/807290/law360-reaches-noncompete-settlement-with-ny-ag>. See also Chris Tomlinson, *Non compete agreements create modern-day servitude*, HOUSTON CHRONICLE (July 26, 2016), <http://www.houstonchronicle.com/business/columnists/tomlinson/article/Non-compete-agreements-create-modern-day-servitude-8425406.php>.

35 Press Release, Illinois Attorney General, *Madigan Announces Settlement with Jimmy John’s For Imposing Unlawful Non-Compete Agreements* (Dec. 7, 2016), http://www.illinoisattorneygeneral.gov/pressroom/2016_12/20161207.html; Jonathan Israel, *State Attorneys General on the Attack Against Noncompete Overuse*, JDSUPRA BUSINESS ADVISOR (Aug. 16, 2016), <http://www.jdsupra.com/legalnews/state-attorneys-general-on-the-attack-51847/>.

36 Ruth Simon & Angus Loten, *Litigation Over Noncompete Clauses Is Rising*, WALL STREET JOURNAL (Aug. 14, 2013), <https://www.wsj.com/articles/SB10001424127887323446404579011501388418552>.

Islam worked as a casino host at Atlantis and signed a number of agreements related to her employment, including “a non-compete agreement [that] prohibited Islam from employment, affiliation, or service with any gaming operation within 150 miles of Atlantis for one year following the end of her employment.”³⁷ The court affirmed the lower court’s decision that the non-compete was unenforceable because it was overly broad and unreasonable “as it extend[ed] beyond what is necessary to protect Atlantis’ interests.”³⁸ The court also rejected Atlantis’ argument that the non-compete should be judicially modified to render it enforceable. The court stated that, under Nevada law, an unreasonable provision “renders the non-compete agreement wholly unenforceable,” noting that “we have not overturned or abrogated our case law establishing our refusal to reform parties’ contracts where they are unambiguous.”³⁹

The North Carolina Supreme Court in *Beverage Systems of the Carolinas v. Associated Beverage Repair* reversed the Court of Appeals’ finding that the trial court had the power to rewrite unreasonable geographic limitations in a non-compete where the parties had agreed that the agreement could be judicially modified.⁴⁰ The court held that the “blue pencil doctrine” could not be employed to salvage the overbroad geographic term:

The Agreement’s territorial limits cannot be blue-penciled unless the Agreement can be interpreted so that it sets out both reasonable and unreasonable restricted territories. [Citations omitted]. We found above that the restrictions to all of North Carolina and South Carolina, the only territorial restrictions in the Agreement, are unreasonable. Striking the unreasonable portions leaves no territory left within which to enforce the covenant not to compete. As a result, blue-penciling cannot save the Agreement.⁴¹

The court also discussed the policy reasons a court should not be permitted to rewrite an unreasonable and unenforceable non-compete agreement:

Allowing litigants to assign to the court their drafting duties as parties to a contract would put the court in the role of scrivener, making judges postulate new terms that the court hopes the parties would have agreed to be reasonable at the time the covenant was executed or would find reasonable after the court rewrote the limitation. We see nothing but mischief in allowing such a procedure. Accordingly, the

parties’ Agreement is unenforceable at law and cannot be saved.⁴²

Other courts have recently embraced the doctrine of judicial reformation of overbroad non-competes. The New Mexico Court of Appeals in *KidsKare, P.C. v. Mann*, while it did not directly address New Mexico law pertaining to judicial modification, ruled that judicial modification of an overbroad non-compete was available where the parties had agreed to a contract provision that authorized judicial amendment of the agreement in the event it was determined to be unreasonable.⁴³ The court reasoned that “[r]eformation of unreasonable clauses was an aspect of the bargain of the parties and consistent with their mutual intent as expressed by the employment agreement.”⁴⁴

B. Consideration

An issue that frequently arises in non-compete litigation is the adequacy of consideration to support the employee’s agreement not to compete with the employer post-employment. State courts in some jurisdictions, while recognizing that continued employment of an at-will employee *can* serve as consideration to support a non-compete, require that the termination of the at-will employee be done in good faith as a condition of enforcing the non-compete.

In *Preston v. Marathon Oil Co.*, the Supreme Court of Wyoming discussed the issue of sufficiency of consideration for a non-compete signed after employment had commenced.⁴⁵ The court reaffirmed its rule that continued at-will employment *alone* is not sufficient consideration to support enforcement of a non-compete signed after commencement of employment, but that any termination must be done in good faith.⁴⁶ Likewise, in *Buchanan Capital Markets LLC v. DeLucca*, the New York Appellate Division affirmed the denial of a motion for preliminary

³⁷ 376 P.3d 151, 153 (Nev. 2016).

³⁸ *Id.* at 155.

³⁹ *Id.* at 156. The Nevada Supreme Court stated that judicial restraint is a sound public policy for not modifying unreasonable unambiguous contract terms since it “avoids the possibility of trampling the parties’ contractual intent.” *Id.* at 157.

⁴⁰ 784 S.E.2d 457 (N.C. 2016).

⁴¹ *Id.* at 461-62.

⁴² *Id.* at 462. See also *Clark’s Sales & Service, Inc. v. Smith*, 4 N.E.3d 772, 783-84 (Ind. Ct. App. 2014) (“[I]f the noncompetition agreement is divisible into parts, and some parts are reasonable while others are unreasonable, a court may enforce the reasonable portions only. When blue-penciling, a court must not add terms that were not originally part of the agreement but may only strike unreasonable restraints or offensive clauses to give effect to the parties’ intentions.”).

⁴³ 350 P.3d 1228, 1231-32 (N.M. Ct. App. 2015). For another illustrative recent decision approving of judicial modification, see *Emerick v. Cardiac Study Ctr., Inc.*, 357 P.3d 696, 703 (Wash. Ct. App. 2015) (affirming the lower court’s reformation of an overbroad non-compete, which was consistent with Washington precedent, where the former employee contractually agreed to judicial modification in the event a provision of the agreement was unreasonable).

⁴⁴ *Mann*, 350 P.3d at 1232.

⁴⁵ 277 P.3d 81 (Wyo. 2012). The court in *Preston* was answering a certified question from the United States Court of Appeals for the Federal Circuit “regarding the validity of an assignment of intellectual property rights given by Yale Preston to Marathon Oil Company without any additional consideration other than continued at-will employment.” *Id.* at 82. Thus, the discussion of non-competes was in the context of deciding whether continued at-will employment was sufficient consideration to support an employment agreement provision regarding the assignment of intellectual property rights, and the court distinguished the two situations for purposes of sufficiency of consideration. *Id.* at 87-88.

⁴⁶ *Id.*

injunction for an alleged violation of the plaintiff's predecessor's non-compete, holding that "such covenants are not enforceable if the employer (plaintiff) does not demonstrate 'continued willingness to employ the party covenanting not to compete.'"⁴⁷ The predecessor to the plaintiff in *DeLucca* terminated employees (including the defendants) as part of a merger and required them to reapply with the plaintiff (the new employer) if they wished to continue in their previous positions, which was viewed by the court as a termination "without cause."⁴⁸

However, in *Runzheimer Int'l, Ltd. v. Friedlen*, the Wisconsin Supreme Court took a contrary approach, holding, in the context of a non-compete signed after employment began, that "an employer's forbearance in exercising its right to terminate an at-will employee constitutes lawful consideration for a restrictive covenant."⁴⁹ The court discussed the various checks that protect an at-will employee from being terminated shortly after signing a non-compete, including contract defenses of misrepresentation and breach of covenant of good faith and fair dealing.⁵⁰

The Pennsylvania Supreme Court in *Socko v. Mid-Atlantic Systems of CPA, Inc.* rejected the position that continued employment is lawful consideration for the execution of a mid-employment non-compete.⁵¹ The *Socko* court held that, "[i]n the context of requiring an employee to agree to a restrictive covenant mid-employment . . . such a restraint on trade will be enforceable only if new and valuable consideration, beyond mere continued employment, is provided and is sufficient to support the restrictive clause."⁵² The court noted that "new and valuable" consideration could include "a promotion, a change from part-time to full-time employment, or even a change to a compensation package of bonuses, insurance benefits, and severance benefits."⁵³

The Kentucky Supreme Court reached a similar result in *Charles T. Creech, Inc. v. Brown*.⁵⁴ The court ruled that a non-compete agreement signed by an employee mid-employment was unenforceable for lack of consideration when it was not part of

an employment agreement that altered the terms and conditions of his employment. On this point, the court noted:

Creech did not, by way of the Agreement, hire or rehire Brown because the Agreement, unlike the non-compete provision in *Higdon*, was not part of an employment contract. Furthermore, the Agreement cannot be construed as Creech "hiring" or "rehiring" Brown because the Agreement does not contain any of the indicia of an employment contract, *i.e.* it does not state what job Brown would be doing or what salary or wages Brown would be paid. In other words, the Agreement did not alter the terms of the employment relationship between Creech and Brown and was not "the same as new employment." Thus, Creech did not provide consideration to Brown by hiring or rehiring him based on his acceptance of the Agreement.⁵⁵

The Illinois Court of Appeals in several recent decisions took an intermediate approach and held that continued employment for a "substantial period" could be sufficient consideration to support a non-compete executed after the at-will employment commenced.⁵⁶

C. Protectable Employer Interests

State courts continue to carefully examine employer-asserted protectable interests. For example, a Massachusetts Superior Court judge recently denied the plaintiff-employer's motion for a preliminary injunction, finding that the employees' "conventional job knowledge and skill," without more, was insufficient to constitute a protectable interest to support an enforceable non-compete.⁵⁷

In *Davis v. Johnstone Group, Inc.*, the Tennessee Court of Appeals affirmed the trial court's decision to deny enforcement of a non-compete due to lack of any protectable interest since the defendant, a real estate appraiser, had not received specialized training, knew no confidential information, and had no special relationship with the plaintiff's clients.⁵⁸ The Court of Appeals found that the defendant had simply acquired "general skills and knowledge of the trade" during his employment which inured to the defendant's exclusive benefit.⁵⁹

Similarly, the Arkansas Court of Appeals in *Burleigh v. Center Point Contractors, Inc.* reversed the trial court's grant of

47 144 A.D.3d 508 (N.Y. App. Div. 2016) (quoting *Post v. Merrill Lynch, Pierce, Fenner & Smith*, 48 N.Y.2d 84, 89 (1979)). See also *Marsh USA, Inc. v. Alliant Ins. Servs., Inc.*, 49 Misc. 3d 1210(A) (N.Y. Sup. Ct. 2015). Some courts have refused to enforce non-competes based on a material change in the terms and conditions of employment after the agreement is signed. See, e.g., *Patriot Energy Grp., Inc. v. Kiley*, 2014 WL 880880, at *8 (Mass. Super. Ct. 2014).

48 Paula Lopez, *New York Appellate Court Refuses to Enforce Non-Compete Against Terminated Employees*, ALLYN & FORTUNA, LLP (March 10, 2017), <http://www.allynfortuna.com/new-york-appellate-court-refuses-to-enforce-non-compete-against-terminated-employees/>.

49 862 N.W.2d 879, 892 (Wis. 2015).

50 *Id.* at 891-92.

51 126 A.3d 1266 (Pa. 2015).

52 *Id.* at 1275-76. See also *AmeriGas Propane, L.P. v. Coffey*, 2015 WL 6093207, at *6 (N.C. Super. Ct. 2015) (Under North Carolina law the "mere eligibility for discretionary raises does not constitute consideration to support a restrictive covenant.").

53 *Socko*, 126 A.3d at 1275.

54 433 S.W.3d 345, 354 (Ky. 2014).

55 *Id.* at 353.

56 See *Prairie Rheumatology Assocs. v. Francis*, 24 N.E.3d 58 (3d Dist. 2014); *Fifield v. Premier Dealer Servs.*, 993 N.E.2d 938 (Ill. App. Ct. 2013).

57 *Elizabeth Grady Face First, Inc. v. Garabedian*, 2016 WL 1588816, at *4 (Mass. Super. Ct. March 25, 2016). The Court in *Garabedian*, in concluding that the former employees did not possess trade secrets or confidential/proprietary information belonging to the plaintiff, noted that most of the former employees' training occurred at a school run by the plaintiff that was also attended by non-employees. *Id.* at *3.

58 2016 WL 908902, at *6 (Tenn. Ct. App. 2016).

59 *Id.* quoting *Selox, Inc. v. Ford*, 675 S.W.2d 474, 476 (Tenn. Ct. App. 1984). See, e.g., *Hasty v. Rent-A-Driver, Inc.*, 671 S.W.2d 471, 473 (Tenn. 1984) ("There is authority for the proposition that general knowledge and skill appertain exclusively to the employee, even if acquired with expensive training, and thus does not constitute a

a preliminary injunction, finding that no protectable interest existed.⁶⁰ Specifically, the court found that the plaintiff had not provided the defendant with specialized training or confidential information.⁶¹ Moreover, the court noted the testimony of one of the plaintiff-employer's witnesses that the plaintiff's "customer list" "was generated by a subscription service, Datafax, and that anyone who had the ability to qualify for a particular job would be able to find the jobs that were available for bidding using that service."⁶²

As with state legislation, state appellate court decisions with respect to non-compete law do not indicate any red-blue divide. The common law in some states is more employer-friendly, while it is more employee-friendly in others, but there is no neat political breakdown.

III. A NEW FEDERAL INTEREST IN NON-COMPETES

In May 2016, President Obama signed into law the Defend Trade Secrets Act of 2016 ("DTSA"), which established a federal cause of action for trade secret misappropriation that closely tracks the Uniform Trade Secrets Act.⁶³ Later in the year, the White House and Treasury Department each issued reports critical of non-competes.⁶⁴ "[T]he White House issued a 'Call to Action' and a report entitled *Non-Compete Reform: A Policy Maker's Guide to State Policies*, expressing concern about overuse of non-compete agreements," particularly with respect to low-wage, low-skill workers.⁶⁵ The report also summarized recent "reform efforts" which included:

- Limiting the scope of such clauses—either based on time (current restrictions are usually one to two years) or geography;
- Carving out specific professions (lawyers are almost always carved out, but doctors could be too);
- Prohibiting the use of non-competes except for individuals with salaries at or above a specified

threshold (currently used by Oregon and effective in Illinois starting January 1, 2017, for new non-competes);

- Assessing enforcement options (commonly either the ability to reform as needed, ability to strike the offending portion, or requirement to strike entire agreement if overbroad);
- Enhancing transparency for employees, such as by requiring prior notice that a job offer or promotion includes a non-compete requirement (intended to help individuals maximize their own bargaining power in negotiating over terms of employment, and avoiding the choice of signing or losing their job);
- Other reform options include the potential use of "garden leave"—where employers pay employees during a period in which they are not working—to ensure that continued employment is adequate consideration for a non-compete.⁶⁶

The DTSA was passed and the Treasury and White House reports were issued under President Obama, and it is still too early to assess if the Trump Administration will show a similar interest in non-compete agreements. The new Congress has not yet introduced legislation that would create a federal law governing non-competes.

IV. CONCLUSION

The last several years have witnessed a flurry of activity in the states in the non-compete area. While each state has fashioned its own unique body of law in this area, there appears to be a clear trend toward enforcing non-competes where appropriate. There is also a countervailing trend toward limiting the duration of non-competes as well as their application to low-wage, low-skill workers. While there is a general recognition of protectable employer interests, these interests are scrutinized by the courts to ensure that non-competes are enforced only where the resulting competition would be unfair. The assessment of non-compete validity continues to be a fact-intensive inquiry. State appellate courts remain divided on whether a non-compete can be judicially modified to promote enforceability, although the trend of the law seems to be toward permitting modification (to varying degrees). None of the discernible trends in either legislation or common law seem to break down along what is often thought of the red-blue divide among states. Finally, the jury is out on whether the Trump Administration will follow in the footsteps of its predecessor to use the bully pulpit to encourage reform in the non-compete area.

protectable interest of the employer.") (citations omitted). See also *Hinson v. O'Rourke*, 2015 WL 5033908 (Tenn. Ct. App. 2015) (affirming, among other things, dismissal of a non-compete claim where employee received mostly on-the-job training, the employee had no special relationship with customers, and alleged "trade secrets" had been publicly disclosed and were available from other sources).

60 474 S.W.3d 887 (2015).

61 *Id.* at 891.

62 *Id.* at 889-90.

63 J.M. Durnovich, *The Defense of Trade Secrets Act of 2016 - A new federal cause of action for trade secret misappropriation*, JDSUPRA BUSINESS ADVISOR (June 24, 2016), <http://www.jdsupra.com/legalnews/the-defense-of-trade-secrets-act-of-26627/>.

64 *White House Releases Noncompete Call to Action*, FAIR COMPETITION LAW (Oct. 25, 2016), <https://faircompetitionlaw.com/2016/10/25/white-house-releases-noncompete-call-to-action/>.

65 Dabney D. Ware, *Use of Non-Compete Agreements – Too Much of a Good Thing?*, NATIONAL LAW REVIEW (Nov. 7, 2016), <http://www.natlawreview.com/article/use-non-compete-agreements-too-much-good-thing>.

66 *Id.*

