How Employers Can Recognize and Address Antitrust Risk and FTC Enforcement Actions

November 20, 2024

Association of Corporate Counsel

National Capital Region

2024 CLE Series

Sponsored by Davis Wright Tremaine LLP

ACC Association of Corporate Counsel NATIONAL CAPITAL REGION

Davis Wright Tremaine LLP

Today's Presenters

Gerald A. Stein

Partner, Davis Wright Tremaine

New York and Washington, D.C.

geraldstein@dwt.com

212.402.4095 New York

202.973.4200 Washington, D.C.

Gerald A. Stein is a seasoned antitrust litigator with more than 30 years of legal experience, including more than a decade as a senior trial attorney for the Federal Trade Commission's Bureau of Competition. Gerald is his clients' go-to counsel for all aspects of antitrust litigation and counseling and regularly represents clients in antitrust litigation, including in class actions, multidistrict litigation, and federal appeals. Recognized by The Legal 500 in the areas of antitrust litigation, class action defense, and merger control, Gerald is well-versed in handling multibillion-dollar disputes and government investigations. Gerald is a highly regarded thought leader and is a frequent speaker and contributor to leading litigation and antitrust law publications, and has served for decades in various leadership roles for the ABA and NYSBA antitrust sections.

Today's Presenters

Jeremy Ben Merkelson

Partner, Davis Wright Tremaine

Washington, D.C.

jeremymerkelson@dwt.com

202.973.4260

Jeremy Ben Merkelson is a full-service employment lawyer who serves clients particularly in the financial services, aerospace and defense, information technology, and healthcare sectors. Though he litigates and advises on a wide range of workplace matters, Jeremy has deep expertise with employee mobility and trade secrets cases, successfully first-chairing impactful litigation in the DMV and in Colorado, California, Texas, and Florida. In 2024, Jeremy emerged as a nationally recognized thought leader on protecting intellectual property entrusted to employees and the changing legal landscape for non-competition clauses and other restrictive covenants, quoted in the N.Y. Times, Reuters, Business Insider, IP Watchdog, and Law360.

Jeremy also serves as an invited member of the Sedona Conference Working Group 12 on Trade Secrets and as an active member of the AIPLA Trade Secret Law Committee. Super Lawyers named Jeremy to its list of "Rising Stars" for Labor & Employment in Washington, D.C., in 2021 and 2022. Jeremy is a proud former ACC NCR member (CLO, Association of American Law Schools, 2015-2017). Jeremy earned his J.D. from the University of Virginia School of Law and his B.A. from Yale University (cum laude).

Today’s Presenters

J. David Grossman

Consumer Technology Association

VP, Policy & Regulatory Affairs

Washington, D.C.

With two decades of experience in tech policy, David leads CTA’s advocacy on AI policy, cybersecurity, and competition. Prior to CTA, David was Executive Director of the GPS Innovation Alliance, an organization dedicated to protecting, promoting and enhancing the use of GPS. Previously, David served as Chief of Staff to FCC Commissioner Mignon Clyburn, Legislative Director to Congresswoman Anna Eshoo, and as Technology Counsel to the U.S. House Small Business Committee. David holds a Master's Degree in Public Policy from George Mason University and a B.A. in Political Communication from George Washington University's School of Media and Public Affairs.

Today’s Presenters

Katie Cole

Chief Legal Officer

PECF

Washington, DC

Katie Cole serves as the Chief Legal Officer for the PECF, the foundation overseeing the work of the Washington National Cathedral, National Cathedral School, St. Alban's School, and the Beauvoir Elementary School. These institutions collectively provide education, leadership and support for a diverse set of communities and learners, including 900 employees, 1,500 students, and over 400,000 annual visitors.

Prior to joining the PECF, Katie served for seven years as the General Counsel of KIPP DC Public Charter Schools, a network of 22 schools located in DC that are committed to providing a high-quality education to students from diverse backgrounds. Katie holds a JD from the University of Virginia School of Law and a BA from Yale University.

Agenda

- Part I: Key Employment Issues In the Context of FTC Antitrust Oversight
  - No-Poach and Wage/Information Sharing: Existing Rules on Restricting Hiring Between and Among Competitors
  - Employee Mobility/Non-Competition and Non-Solicitation Agreements
  - Artificial Intelligence (employment context) and FTC Regulation
- Part II: What to Expect With Trump Part II
  - Changes at FTC, federal rules and enforcement
  - What to expect at state level
  - Thoughts about the future

No-Poach/Non-Solicitation Agreements

- A non-solicitation agreement (or no-poach agreement) restricts a company from recruiting and hiring a competitor's employees.
- Common in industries where there is a strong demand among competitors for employees with advanced training or highly specialized skills
- Companies are often concerned that competitors may recruit and hire away employees to use their knowledge for a competitive advantage.
- Employees are important company assets, and companies have a legitimate, compelling interest in retaining employees.
- When an employee leaves, the company loses its investment in that employee's training and professional development.
- The employee takes the expertise and knowledge gained from that employment, as well as confidential and proprietary information and business relationships.
- If an employee is recruited and hired by a competitor, the company’s trade secrets could be at risk.

What are common uses for no-poach agreements?

- These horizontal agreements with other companies that hire employees with similar skill sets can arise in various contexts.
- For example, companies entering a joint venture or other collaboration may use a non-solicitation agreement to preclude one company from using the collaboration as an opportunity to recruit or poach the other's employees.
- Ancillary agreements (i.e., agreements that accompany and are secondary to a *bona fide* primary agreement) are generally permitted because they have procompetitive benefits.
- "Naked" no-poach agreements are almost always illegal.
- Can lead to civil and criminal liability.
- Sherman Act Section 1 prohibits agreements that unreasonably restrain trade.
- Generally found to be per se illegal.

Examples of Situations Where Lawful Ancillary Non-Solicitation Agreements Are Used

Reasonably necessary for a merger or acquisition, investment, or divestiture, including relating to due diligence.

Ancillary to a legitimate collaborative project with a competing company.

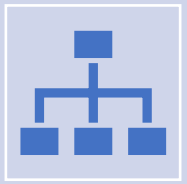
Used unilaterally to restrict a company's recruiting practices, including in contracts with consultants, auditors, outsourcing vendors, recruiting agencies or providers of temporary employees, or contract workers.

Incorporated in the settlement of a legal dispute.

Reasonably necessary for contracts with resellers or original equipment manufacturers.

Reasonably necessary for the function of a legitimate collaboration agreement, such as joint development, technology integration, joint ventures, joint projects, and the shared use of facilities.

Ancillary no-poach agreements must be reasonably tailored to meet the specific needs



Reasonably necessary and collateral (or subordinate) to a legitimate business collaboration.

Supported by a procompetitive justification.

Narrowly tailored to match the scope of the collaboration, such as limited by:

geography;

employment function;

product group; and

time period.

Takeaways When Using Non-Solicitation Agreements

There are limited and justified uses for non-solicitation agreements in mergers, consulting, and other contexts. Companies entering into non-solicitation agreements should:

- Identify the specific legitimate venture to which the agreement is ancillary and define the scope of the agreement. It should relate just to that venture and should not be overly broad or prohibit competition outside the scope of the venture.
  - Consider specifying this in a “Whereas” clause
- Document why the agreement is reasonably necessary to achieve and implement the procompetitive venture. For example, protecting confidential and proprietary business information from theft and unfair competition by former employees is a legitimate concern.
- Identify with reasonable specificity the employees who are subject to the agreement. Only employees who are directly involved in the venture should be covered. An agreement covering all employees without limitation is likely to be challenged as overly broad.
- Designate a specific termination date or event.
- Memorialize the agreement in writing and have it signed by all parties.

Non-Competes w/ Employees

- Public Policy Concerns
  - Effect on free competition/economic efficiency (i.e., puts entrepreneurs on the sidelines, may inhibit creation of new business ventures)
  - Effect on employees' ability to earn a living in chosen field with particular concern for lower wage earners (i.e., Jimmy Johns) and physicians
  - Restriction on otherwise broad freedom of contract
  - Business reasons to have them are broad though: protecting trade secrets, customer goodwill, ancillary to sale-of-business to retain talent and/or keep founders from competing immediately after selling interests
- Recent Trends
  - Growing hostility towards non-compete agreements
  - Both at state and federal level
  - Multiple states have recently enacted laws
    - Severely restricting (or banning) non-compete agreements
    - Imposing enhanced penalties for violations
  - Focus not just on non-competes, also non-solicits and other post-employment restrictions (i.e., benefits forfeiture, "TRAP" clauses, other limitations)

The FTC's Final Rule in a Nutshell

- Currently no federal statute or other federal regulation
  - Revert to state by state analysis
- FTC Rule sought to ban as "unfair competition" pursuant to Sections 5 and 6(g) of the FTC Act:
  - Entering into (or attempts to enter into) a non-compete with a worker
  - Enforcing (or attempting to enforce) a non-compete with a worker
  - Representing that a worker is subject to a non-compete
- Allowed existing non-competes with "senior executives" entered into prior to the "effective date" of the ban to remain in place
- Invalidates all noncompete Ks entered into on or after the "effective date" regardless of whether the individual is considered a regular "worker" or a "senior executive"
- Replaces all state/local laws on non-competes that conflict
- Requires "notice" to all workers on or prior to the effective date that their existing non-competes are not enforceable and will not be enforced by company

FTC Proposed Rule

- Also banned “de facto” agreements, not just non-competes
  - Non-disclosure, non-solicitation, and other covenants
  - That have “the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.”
  - I.e., can’t have training or bonus pay clawbacks (“TRAPs”)

Limits of FTC Jurisdiction

15 U.S.C. § 45(a)(2) exempts from FTC Section 5 authority:

- Banks, savings and loan institutions, federal credit unions
- Motor, rail, and water carriers
- Telephone and telegraph carriers
- Commercial airlines
- Activities subject to the Packers and Stockyards Act, 1921

FTC Rule Banning Non-Competes: Now Dead

- Multiple challenges. Most notable are *Ryan LLC v. FTC*, No. 3:24-cv-986 (N.D. Tex.), *ATS Tree Services v. FTC*, No. 2:24-cv-01743 (E.D. Pa.); and *Properties of the Villages, Inc. v. FTC*, No. 5:24-cv-00316 (M.D. Fla.).
- In *Ryan*, federal judge in Dallas held FTC had (1) overstepped its authority under the FTC Act adopting the ban, and that the FTC does not have ability to regulate unfair methods of competition by substantive rulemaking; and (2) the rule was arbitrary and capricious even if the FTC had such authority. Set aside rule.
- *Villages* (Fla.) granted preliminary injunction but only as to the challengers. Held that FTC non-compete ban failed under major questions doctrine.
- *ATS* decision (Pa.) rejected the challenge and ruled for the FTC.
- FTC has appealed the *Ryan* decision to the 5th Circuit (still pending) and the *Villages* decision to the 11TH Circuit (also still pending).

FTC Ban under Trump II

- With change of administration, unlikely for several reasons that FTC will continue to pursue a blanket ban on non-competes
- Republican commissioners will take over control of FTC, likely to rescind the rule, probably would not continue to fight appeals
- (Possible we'll see bipartisan support for non-compete ban at some income threshold to protect lower wage workers, but not likely through unfair competition rulemaking at FTC)
- State law continues to control. Non-competes and other restrictive covenants still enforceable outside of a handful of jurisdictions.

FTC Still Has Individualized Enforcement Authority

- Beginning in 2023, FTC has started to announce individual enforcement actions against companies engaged in “unfair methods of competition” involving non-competes.
- Four actions in 2023 alone, each of which resulted in settlement agreements voiding existing non-competes and agreement not to enter new ones.
  - *In re Prudential Security, Inc*.: FTC went after Michigan company that continued to require employees to sign non-competes after court said they were unreasonable under Michigan law
  - Three separate FTC investigations against glass container manufacturers
- Even though Rule has been struck down, specter of FTC investigation and enforcement proceedings under Section 5 still exists.

Common Non-Compete Requirements

- Patchwork of differing state laws creates compliance and administrative headaches
- But some common requirements apply in most states:
  - Must be reasonable in area, duration, and scope
  - Disfavored for low-wage employees
  - Employees must receive reasonable advance notice
  - Employees must have opportunity to consult with counsel
  - New consideration usually required for existing employees (i.e., merit increase, bonus, $, or some tangible additional benefit)
  - Choice-of-law and venue provisions may not be enforceable
- Understanding these basic requirements goes a long way towards compliance

Trends At The State Level

- Some states that have adopted laws curtailing the enforcement of non-compete agreements in the last five years:
  - Minnesota (ban)
  - Illinois
  - Maine
  - Maryland
  - Massachusetts
  - New Hampshire
  - Rhode Island
  - Oklahoma
  - Virginia (low-wage earners)
  - Oregon
  - Nevada
  - Colorado
  - Washington, D.C. (complete ban for employees earning less than $150K - effective October 2022)

Trends At The State Level (Cont.)

- States where non-compete legislation is currently under consideration:
  - New York (even more restrictive than the FTC ban, no sale of business exception!)
  - Connecticut
  - West Virginia
- States where non-compete agreements are not enforceable (with very limited exceptions):
  - California
  - North Dakota
  - Oklahoma
  - Minnesota

District of Columbia - Ban on Non-Compete Agreements Amendment Act of 2020
D.C. Code §§ 32-581.01 et seq.

- Effective April 1, 2022
- Not retroactive
- One of the broadest prohibitions in the country on the use of non-compete agreements
- Bans private employers that operate within D.C. from requiring an individual who performs work in D.C. to sign a non-compete agreement
- But only for lower wage workers (i.e., <$150,000 generally, <$250,000 for medical professionals)
- D.C. Office of Attorney General is cracking down!

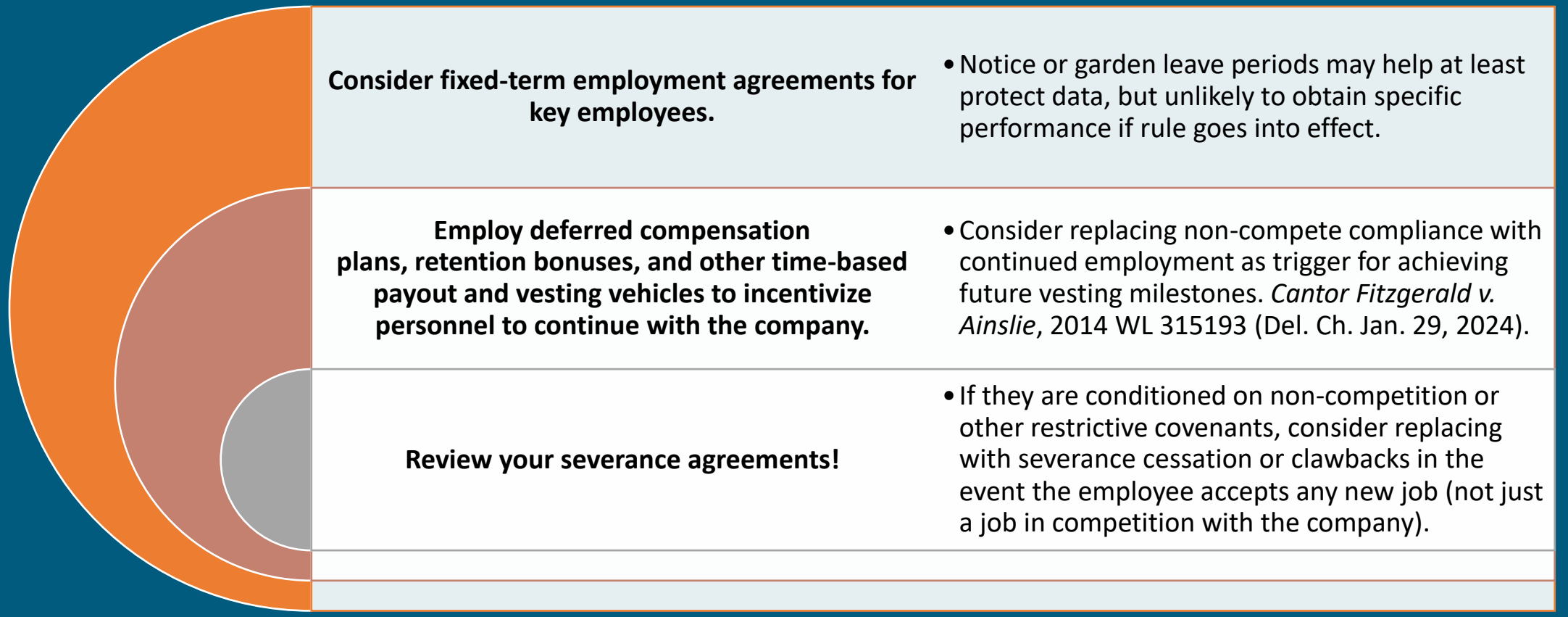
Choice Of Law And Venue Restrictions: Key Takeaways for Remote Workforce

- Be aware that you cannot always rely on choice-of-law/venue provisions to avoid troublesome state laws (i.e., Colorado, Washington)
- If there are restrictions, assume the law of the state in which the employee presently resides applies (remote workers, beware)
- When in doubt, consult legal counsel

How Should Employers React?

- Refresh knowledge of state law and be ready to adapt to new changes.
- Recognize the challenge of protecting sensitive business data w/o noncompetes.
  - Can’t seek injunctive relief except after you realize there is a problem, which is costly.
  - Need to beef up trade secret protection programs and insider theft detection.
  - Clean exit and clean entry for all employees and contractors.
- Consider fresh revisions to your restrictive covenants agreements.
  - Offer letters, employment, severance, independent contractor, independent director/board member, operating, partnership, signing bonus, equity inventive and other agreements may all have restrictive covenants.
  - Consider modifying existing agreements to ensure maximum enforceability under state law (next slide discusses how)
  - Consider non-solicits, TRAPs, NDAs, no-hire clauses, signing bonus clawback provisions, forfeiture for competition provisions

Tips for Creative Drafting Ahead of the Curve



Consider fixed-term employment agreements for key employees.	• Notice or garden leave periods may help at least protect data, but unlikely to obtain specific performance if rule goes into effect.
Employ deferred compensation plans, retention bonuses, and other time-based payout and vesting vehicles to incentivize personnel to continue with the company.	• Consider replacing non-compete compliance with continued employment as trigger for achieving future vesting milestones. *Cantor Fitzgerald v. Ainslie*, 2014 WL 315193 (Del. Ch. Jan. 29, 2024).
Review your severance agreements!	• If they are conditioned on non-competition or other restrictive covenants, consider replacing with severance cessation or clawbacks in the event the employee accepts any new job (not just a job in competition with the company).

Restrictive Covenants: How to Narrowly Tailor to Increase Odds of Enforceability

- Tailor your potentially “de facto” non-competes to make clear that customer non-solicits, employee non-solicits, no-hires, NDAs, and other restrictive covenants do not prevent employee from accepting future employment with any competitor or employer in the same field.
- Craft IP and confidentiality agreements so that they do not bar use of information or generalized knowledge learned during employment.
- Be precise and narrow as to the secret sauce that is really a trade secret.
- Consider categorizing and assigning security levels to high-value company data and noting which levels employees have access to as part of their jobs.

Clean Exit and Clear Entry!

- **Onboarding**
  - Entrance questionnaire.
  - Policies, agreements, and training.
- **During employment**
  - Categorize company data based on sensitivity levels.
  - Limit access on need-to-know basis.
  - Conduct audits – use insider threat tools to detect anomalous activity.
  - Technical measures to block outflow (e.g., USBs, cloud storage, personal email).
- **Exit**
  - Conduct a real exit interview.
  - Collect devices and data from remote workers.
  - Reminder of obligations on way out.

Federal Legislative Action

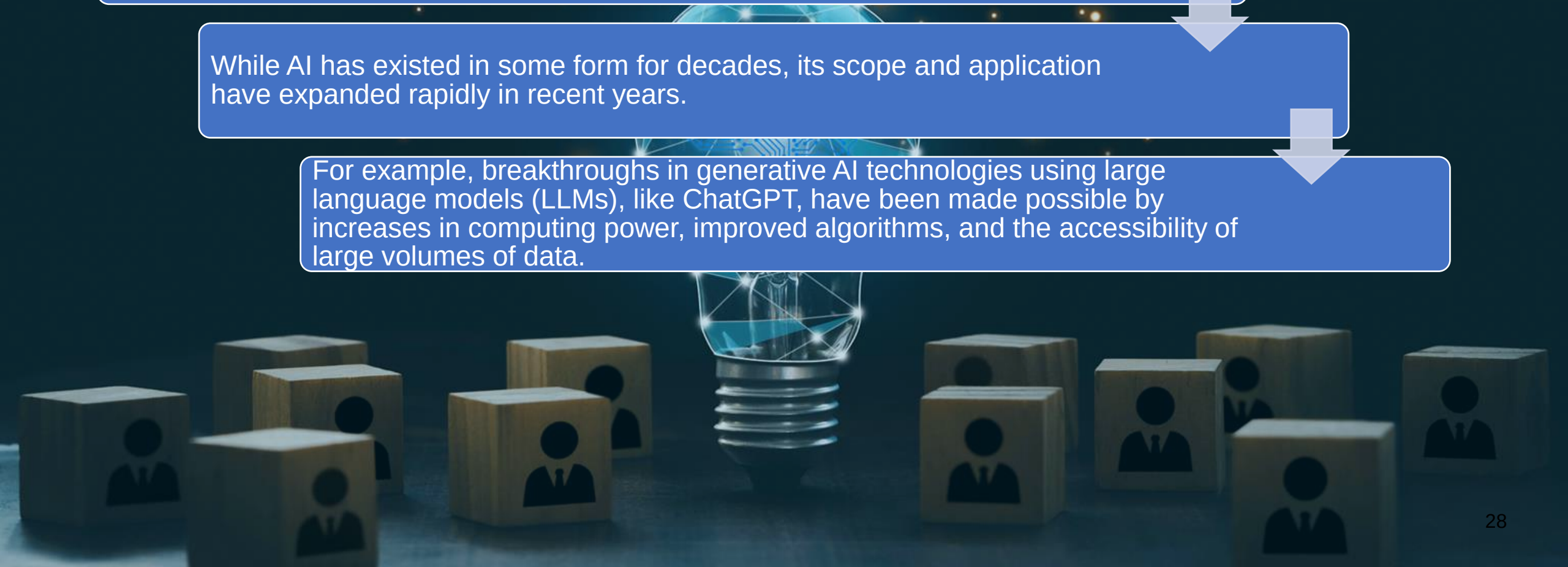
- Two proposed acts banning (or severely restricting) non-compete agreements currently pending before Congress:
  - Workforce Mobility Act of 2023 (Senate Bill 220)
  - Freedom to Compete Act of 2021 (Senate Bill 2375)
- Both bills have bipartisan sponsors
- Such bills are uniquely amenable to bipartisan support
  - Democrats like protecting labor interests + low-income workers
  - Republicans like competition + freedom to choose one’s profession
- That said, both bills are currently stalled in committee
- No indication when, if ever, they will move forward

Artificial Intelligence

Artificial intelligence has become an important and widely used tool across a host of technologies and industries.

While AI has existed in some form for decades, its scope and application have expanded rapidly in recent years.

For example, breakthroughs in generative AI technologies using large language models (LLMs), like ChatGPT, have been made possible by increases in computing power, improved algorithms, and the accessibility of large volumes of data.



Antitrust Considerations When Using AI

- Businesses are increasingly using AI to respond to market conditions faster, innovate their product offerings, set prices, and more.
- For example, AI pricing algorithms can:
  - Assimilate and almost instantly process significant amounts of information relating to competitors' prices, demand, the price and availability of substitutes, and even customer personal data.
  - Respond almost immediately to changes in the market or competitor pricing.
  - Set prices to achieve a business objective consistently across all sales.
- While the benefits of AI from a commercial perspective are clear, its use raises potential antitrust risks, specifically relating to unlawful, anticompetitive agreements such as:
  - facilitating price-fixing agreements among competitors
  - reaching anticompetitive agreements with other AI systems

Practice Tips: Minimize AI Antitrust Risks

To minimize antitrust risks, counsel should:

- Maintain an up-to-date record of the AI's design and objectives
- Consider the impact of the AI on competition
- Consider who else is using the same AI in the market
- Consider what commercially sensitive information you are sharing and receiving when using a third-party AI product
- Document what other, non-AI factors are considered when setting prices, etc.
- Use caution for products that “guarantee best pricing” or that “all your competitors” are using it

Trump Part II

Open discussion about potential policy objectives and FTC enforcement priorities.

Questions?