

***Courts are not a fan,  
The FTC proposes a ban:  
What is the future of Non-Competes?***



May 3, 2023

CLE for the Association of Corporate Counsel – Charlotte

# Meet the Speakers



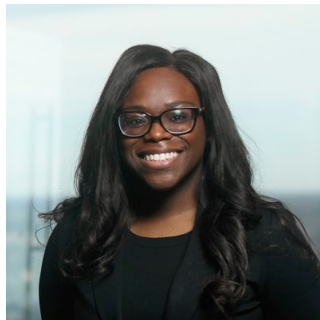
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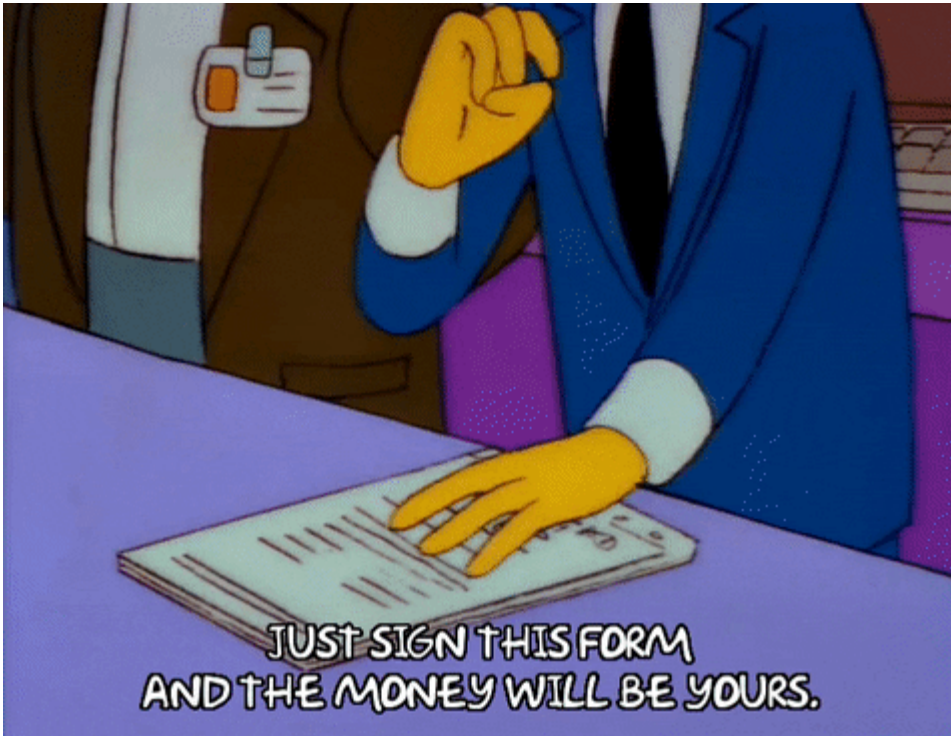
# THE WALL STREET JOURNAL.

## **FTC Proposes Banning Noncompete Clauses for Workers**

Move would allow former employees to take jobs with rival companies or start competing businesses



# Types of Employment Covenants



## Covered by proposed rule

- Non-competition

## Not covered by proposed rule\*

- Non-solicitation
- Non-Disclosure
- Garden Leave / Notice
- No-Poaching

# Non-Compete Scenarios: *Sandwich Makers*



**Forbes**

FORBES > ENTREPRENEURS

## Does Jimmy John's Non-Compete Clause For Sandwich Makers Have Legal Legs?

Clare O'Connor

Oct 15, 2014, 12:41pm EDT

# Non-Compete Scenarios: *Hair Stylists*

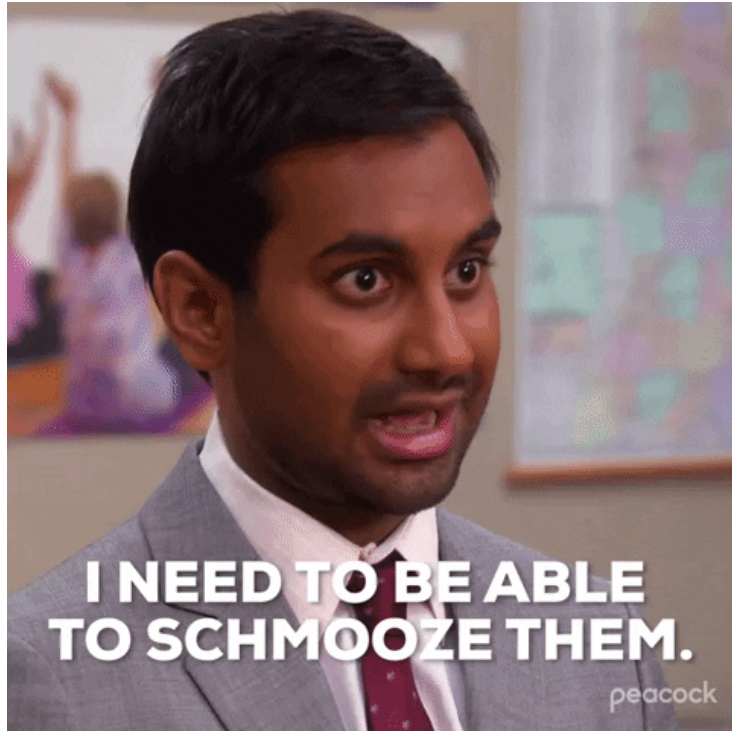


- 2 Years, 7-Mile Radius
- “[T]here is a legitimate concern that a hairstylist, when leaving plaintiff’s employ, will take clients with her.”

*Sec. Nat'l Invs., Inc. v. Rice*, 250 N.C. App. 508, 792 S.E.2d 585 (2016).



# Non-Compete Scenarios: *Salespeople*



- “WTW SE’s Surety Practice is a highly specialized segment of the insurance brokerage industry”
- Defendants’ job was to “build new business relationships with both existing clients and prospective clients”

*Willis Towers Watson Se., Inc. v. Alliant Ins. Servs., Inc.*,  
2022 WL 2555108 (W.D.N.C. July 7, 2022).

# Non-Compete Scenarios: *Technical Employees*



- “[S]oftware architect” for “a software company that develops support products for public safety agencies.”
- Left “to become a senior software engineer” at “another software company active in providing products to law enforcement agencies”

*VisionAIR, Inc. v. James*, 167 N.C. App. 504, 606 S.E.2d 359 (2004).



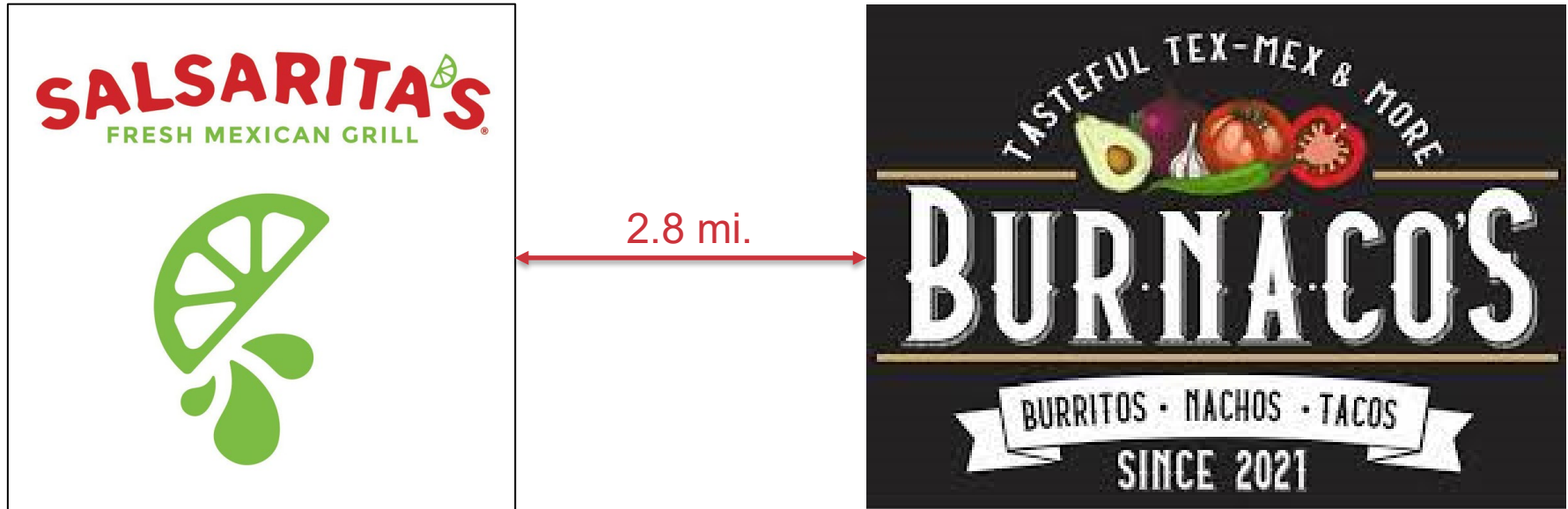
# Non-Compete Scenarios: *High-Level Executives*



- “[O]ne of the six most senior executives in the company.”
- “[P]articipated ... in the most critical and strategic decisions made by the company.”
- After 17 years, took “identical position” with “direct competitor.”

*Okuma Am. Corp. v. Bowers*,  
181 N.C. App. 85, 91, 638 S.E.2d 617, 621 (2007).

# Non-Compete Scenarios: Franchisees



*Salsarita's Franchising, LLC v. Gibson Family Enters., LLC,*  
No. 3:22-CV-00206-FDW-DSC (W.D.N.C.).

# Non-Compete Scenarios: *Sellers of a Business*



- “[S]ole shareholder.”
- “[S]old its assets to New JBL for nearly \$7 million.”
- “[C]onspired to steal confidential documents, poach New JBL's employees, and interfere with its customer relationships.”

*Lunsford v. ViaOne Servs., LLC*,  
2020 WL 5792545, at \*1 (N.C. Super. Sept. 28, 2020).

# Current Enforcement Environment



# Current Enforcement Environment

- *Prometheus Grp. Enterprises, LLC v. Gibson*, 2023 WL 2589284, at \*5 (N.C. Super. Mar. 21, 2023) (“North Carolina courts have repeatedly warned the drafters of restrictive covenants about the dangers of using the phrase ‘directly or indirectly’ when defining the scope of a non-compete.”).



# Current Enforcement Environment

- *Prometheus Grp. Enterprises, LLC v. Gibson*, 2023 WL 2589284, at \*5 (N.C. Super. Mar. 21, 2023).
- *Outdoor Lighting Persps. Franchising, Inc. v. Harders*, 228 N.C. App. 613, 628, 747 S.E.2d 256, 267 (2013) (covenant prohibited “any business operating in competition with an outdoor lighting business or any business similar to the Business”).

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- *Prometheus Grp. Enterprises, LLC v. Gibson*, 2023 WL 2589284, at \*5 (N.C. Super. Mar. 21, 2023).
- *Outdoor Lighting Persps. Franchising, Inc. v. Harders*, 228 N.C. App. 613, 628, 747 S.E.2d 256, 267 (2013).
- *Window Gang Ventures, Corp. v. Salinas*, 2018 WL 1046613, at \*10 (N.C. Super. Feb. 21, 2018) (“Plaintiff has ... offered scant evidence that Salinas and Gang Group serviced Plaintiff’s customers in Wilmington”).

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- *Outdoor Lighting Persps. Franchising, Inc. v. Harders*, 228 N.C. App. 613, 628, 747 S.E.2d 256, 267 (2013).
- *Window Gang Ventures, Corp. v. Salinas*, 2018 WL 1046613, at \*10 (N.C. Super. Feb. 21, 2018).
- *Maaco Franchisor SPV, LLC v. Kennevan, LLC*, 2020 WL 5577889, at \*5 (W.D.N.C. Sept. 17, 2020) (“[T]he Court finds that Maaco has not made a clear showing of irreparable harm caused by Defendants' actions.”).

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- *Prometheus Grp. Enterprises, LLC v. Gibson*, 2023 WL 2589284, at \*5 (N.C. Super. Mar. 21, 2023).
- *Outdoor Lighting Persps. Franchising, Inc. v. Harders*, 228 N.C. App. 613, 628, 747 S.E.2d 256, 267 (2013).
- *Window Gang Ventures, Corp. v. Salinas*, 2018 WL 1046613, at \*10 (N.C. Super. Feb. 21, 2018).
- *Maaco Franchisor SPV, LLC v. Kennevan, LLC*, 2020 WL 5577889, at \*5 (W.D.N.C. Sept. 17, 2020) .
- **State statutes**: AL, AZ, AR, CA, CO, CT, DE, DC, FL, GA, HI, ID, IL, LA, ME, MD, MA, MI, MO, MT, NH, NM, NY, ND, OK, OR, SC, SD, TN, TX, UT, WA, WI

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- *Outdoor Lighting Persps. Franch*  
228 N.C. App. 613, 628, 747
- *Window Gang Vent*  
2018 WL 10466 (Sep. 21, 2018).
- *Maaco Franch*, *Jennevan, LLC*,  
2020 WL 4500 (N.C. Sept. 17, 2020) .
- [S](#) AL, AK, AR, CA, CO, CT, DE, DC, FL, GA, HI,  
ID, IL, IN, IA, KS, KY, LA, MA, MI, MO, MT, NH, NM, NY, ND, OK, OR,  
SC, SD, TN, TX, UT, WA, WI

**DISFAVORED**



# FTC's Notice of Proposed Rulemaking

- January 5, 2023 – FTC voted 3-to-1 to publish a Notice of Proposed Rulemaking that would prohibit non-competes as an “unfair method of competition” under Section 5 of the FTC Act



# FTC's Notice of Proposed Rulemaking

## *What is Prohibited?*



- What would it prohibit an employer from doing?
  - Entering into or attempting to enter into a non-compete clause with a worker
  - Maintaining a non-compete clause with a worker
    - Must rescind any pre-existing non-competes no later than compliance date
    - Must notify worker that non-compete is no longer in effect, including **former** workers, in an individualized communication
  - Representing to a worker that the worker is subject to a non-compete where there is no good-faith basis for believing an enforceable non-compete exists

# FTC's Notice of Proposed Rulemaking

## *Key Definitions*

- What is a “non-compete”?
  - Contractual term between an employer and a worker that prevents 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



# FTC's Notice of Proposed Rulemaking

## *Key Definitions*

- What is a “non-compete”?
  - Functional test determines whether a contractual term is a non-compete, and includes *de facto* non-competes, such as:
    - An NDA that is written so broadly that it effectively precludes the worker from working in the same field
    - A contractual term requiring the worker to pay the employer for training costs if the worker's employment is terminated within a specified time period



# FTC's Notice of Proposed Rulemaking

## *Key Definitions*

- Who is a “worker”?
  - Any natural person who works, paid or unpaid, for an employer. Includes, for example, volunteers, independent contractors, interns, etc.





# Mechanics of Proposed Ban

- Are there any exceptions?
  - Does not apply to a non-compete clause that is entered into by a person who is selling a business
  - Would likely not apply to certain employers that are exempted from coverage under the FTC Act. For example:
    - Most non-profits
    - Certain banks
    - Common carriers



# Mechanics of Proposed Ban

- What about state laws that govern non-competes?
  - The new rule would supersede any state statute, regulation, order, or interpretation that is inconsistent with the rule
- When will the rule take effect?
  - Comment period closed April 19, 2023
  - After comment period, rule would become effective 60 days after publication in Federal Register
  - Compliance will be required within 180 days from publication

# Enforcement

- How will the rule be enforced?
  - FTC has authority to issue a complaint in situations where it believes its rules have been violated



# Enforcement

- How will the rule be enforced?
  - If a respondent contests the charges, complaint is adjudicated before an administrative law judge (ALJ) in a trial-type proceeding.
    - Upon conclusion of the proceeding, the ALJ issues an “initial decision” setting forth findings of fact and conclusions of law and a recommendation for either a “cease and desist” order or dismissal of the complaint.
    - FTC and the respondent may appeal the initial decision to the full Commission. After the Commission issues a final decision, the matter may be appealed in court.
  - After a cease-and-desist order is finalized, the Commission may seek an array of remedies in court including civil penalties, restitution, damages, injunctive relief, orders of rescission or reformation of contracts.
    - The FTC may also make referrals to the U.S. Department of Justice for criminal prosecution.

# Legality and Alternatives

- Is this even legal?
  - According to Republican Commissioner Christine Wilson, no.
  - The rule can be challenged during the 180-day notice period
  - Expect challenges on multiple legal grounds, including:
    - FTC lacks authority to engage in “unfair methods of competition” rulemaking
    - Rulemaking falls within “major questions doctrine” and the FTC lacks clear Congressional authorization to undertake this initiative
    - Rulemaking is an impermissible delegation of legislative authority under the “non-delegation doctrine”



# Legality and Alternatives

- FTC also considering alternatives to proposed full ban:
  - Adopting a rebuttable presumption of unlawfulness, whereby use of a non-compete clause would be permitted if employer could meet a certain evidentiary burden
  - Including exemptions or different standards for different categories of workers, which could be based on a worker's job functions, occupations, earnings, another factor, or some combination of factors; instead of applying to all workers uniformly
  - Adopting disclosure requirements in lieu of full ban, requiring employers to disclose non-competes to employees prior to making an employment offer as well as to the FTC



# Industry Impact

## *What does the FTC say?*



An estimated\*  
**18%**  
of U.S. workers  
are covered by  
noncompetes.

**That's 30 million people.**

### **The FTC estimates that banning noncompetes may:**

- ▶ Increase workers' earnings by nearly \$300 billion
- ▶ Save consumers up to \$148 billion on health costs each year
- ▶ Double the number of companies in the same industry founded by a former worker

Researchers estimate that banning noncompetes nationwide may close racial and gender wage gaps by 3.6-9.1%.\*\*



# Industry Comments

## **Big Business and Labor Unions Flood FTC With 25,000 Comments on Non-Compete Rule**

- Some supporters urge more limits on employer-worker deals
- Opponents say agency goes too far in restricting businesses

By Leah Nylén

April 19, 2023 at 5:00 AM EDT *Updated on April 19, 2023 at 3:44 PM EDT*

# Practically speaking,

If the rule is published and no nationwide injunction is issued, employers will need to comply . . .

. . . but even if it is stayed, the FTC action can be taken as *evidence* that noncompetes are presumptively unfair.

# Compliance



# Dear Employees:

A new rule enforced by the Federal Trade Commission makes it unlawful for us to maintain a non-compete clause in your employment contract. As of [DATE 180 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE], the non-compete clause in your contract is no longer in effect. This means that once you stop working for [EMPLOYER NAME]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] at any time following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms of your employment contract. For more information about the rule, visit <https://www.ftc.gov/legal-library/browse/federal-register-notice/non-compete-clause-rulemaking>.

# What happens after that?





# Other potential regulatory/law enforcement actions

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Monday, July 25, 2022

## **Justice Department Files Lawsuit and Proposed Consent Decrees to End Long-Running Conspiracy to Suppress Worker Pay at Poultry Processing Plants and Address Deceptive Abuses Against Poultry Growers**

*Decree Provisions Would Stop the Exchange of Compensation Information, Ban President of Data Consulting Firm from Industry, Subject Settling Poultry Processors to 10-Year Antitrust Compliance Monitor; Decree Would also Prohibit Deceptive Conduct Towards Chicken Growers that Lowers Their Compensation*

- State attorneys general
- Department of Labor – OSHA?
- Centers for Medicare & Medicaid Services?
- Federal and state legislative efforts to tighten up non-competes
- Private antitrust actions (but litigants will be required to show that the subject non-compete harms competition in a relevant market)

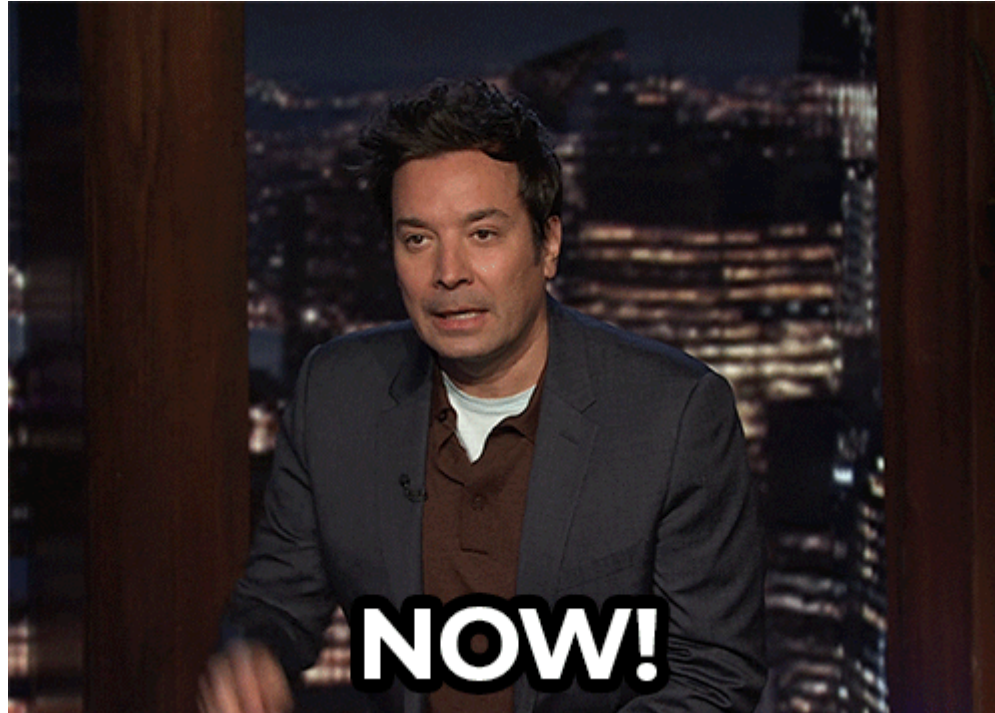
# What is the Future of Litigation?



## Greater focus on:

- Non-solicitation
- Non-disclosure
- Garden Leave / Notice
- No Poaching
- Trade Secrets Laws
- Digital Trespass
- Computer Fraud & Abuse

# Revisit Your Other Agreements



# Non-Solicitation Covenants

*Must also be narrowly tailored*



# Non-Disclosure Covenants

## *Not everything is confidential*

The term “**Proprietary Information**” means all confidential and/or proprietary knowledge, data or information of the Company. By way of illustration but not limitation, “Proprietary Information” includes all or any of the following: (a) trade secrets, inventions, ideas, processes, formulas, source and object codes, data, programs, other works of authorship, knowhow, improvements, discoveries, developments, designs, techniques, Assigned Inventions (as defined below), Company Inventions (as defined below) and any other proprietary technology and all trade secrets, patents, copyrights, trademarks and other intellectual property rights throughout the world in those Assigned Inventions and Company Inventions, (b) information regarding plans for research, development, new products, marketing and selling, business plans, budgets and unpublished financial statements, licenses, prices and costs, margins, discounts, credit terms, pricing and billing policies, quoting procedures, methods of obtaining business, forecasts, future plans and potential strategies, financial projections and business strategies, operational plans, financing and capital raising plans, activities and agreements, internal services and operational manuals, methods of conducting Company business, suppliers and supplier information and purchasing; (c) information regarding customers and potential customers of the Company, including customer lists, names, representatives, customers’ needs or desires with respect to the products or services offered, proposals, bids, contracts and their contents and parties, the type and quantity of products and services provided or sought to be provided to customers and potential customers of the Company and other non-public information relating to customers and potential customers; (d) information regarding any of the Company’s business partners and their services, including names, representatives, proposals, bids, contracts and their contents and parties, the type and quantity of products and services received by the Company, and other non-public information relating to business partners; (e) information regarding personnel, employee lists, compensation, and employee skills; and (f) any other non-public information that a competitor of the Company could use to the competitive disadvantage of the Company. Notwithstanding the foregoing, it is understood that, at all times, I am free to use information that is generally known in the trade or industry through no breach of this Agreement or other act or omission by me.



# Garden Leave Requirements

*How effective is it?*





# Regularly Revisit Your Covenants



# Review your information security standards for insider risk



Need to know

Physical security in the space  
(peripherals, phones)

Digital security, gates and footprints



# Litigation Impact

*What if the rule never goes into effect?*

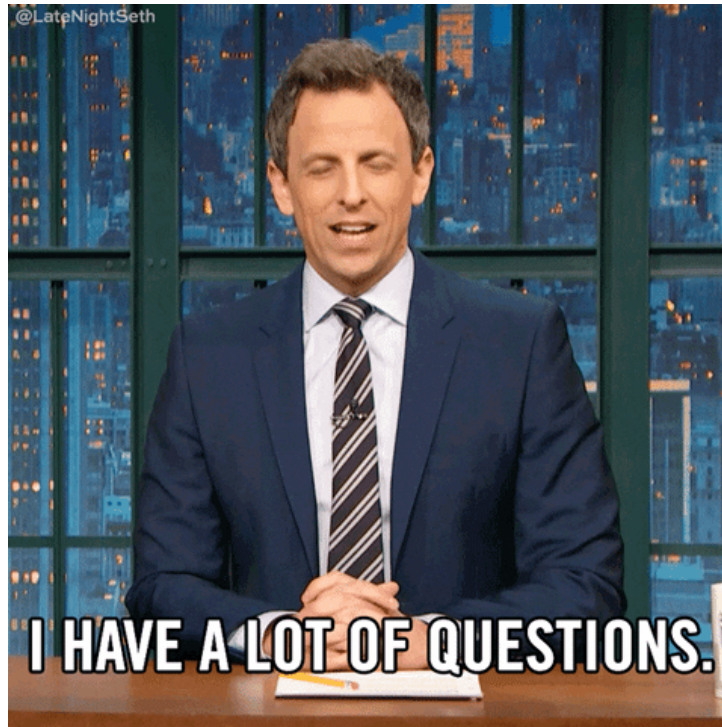


# Two Big Takeaways

1. Covenants tailored to employee's specific role
2. Judicious enforcement strategy



# Questions?



# Bradley

