

TO COMPETE OR NOT TO COMPETE: DRAFTING & ENFORCING EFFECTIVE NON-COMPETE AGREEMENTS & TRADE SECRET PROTECTIONS

presented by

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TARGET MARKETS
PROGRAM ADMINISTRATORS ASSOCIATION
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❖ THINGS TO KNOW:

- ❖ WHAT is it?
- ❖ WHY have it?
- ❖ WHO needs it?
- ❖ WHEN do I need it?
- ❖ WHERE is it effective?



NON-COMPETE AGREEMENTS V. CONFIDENTIALITY AGREEMENTS



NON-COMPETE	CONFIDENTIALITY
Restricts competition.	Restricts information disclosure.
Limits ability to work.	Allows ability to work anywhere.

Useful tools that shield businesses from potential harm caused by current and/or former employees when used in tandem as part of employment documentation.

GET IT IN WRITING

“A familiar and eminently sensible proposition of law is that when the parties set down their agreement , in a clear, complete document, their writing should as a rule be enforced according to its terms.”

Bitonti v. Tyco Healthcare Group, L.P.
37 Misc.3d 1222(A) (N.Y. Sup. Ct. Suffolk Cnty. Nov. 7, 2012)



IT'S ALL FUN & GAMES UNTIL YOUR BUSINESS GETS HURT.

PRACTICAL POINTER

- It is always wrong for a departing employee to steal client information from an employer.



PRACTICAL POINTER

- If you find client information was taken, **CONSULT COUNSEL.**

Depending on the type of information taken, you may have a data breach.



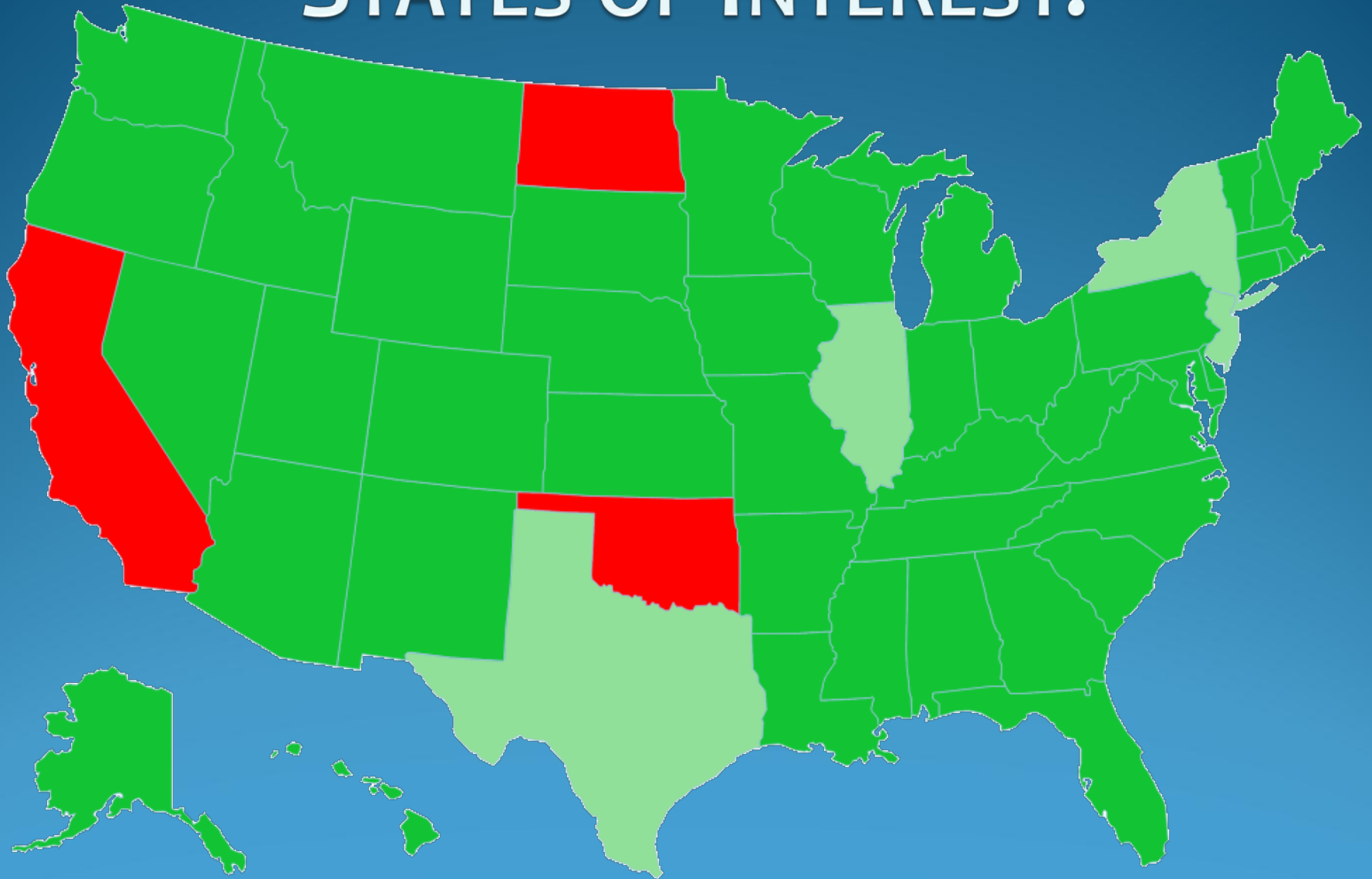
PROTECTION FACTORS:

LEGITIMATE BUSINESS INTERESTS

- **TRADE-SECRETS**
- **CONFIDENTIAL INFORMATION**

Generally considered factors
included for protection.

STATES OF INTEREST:



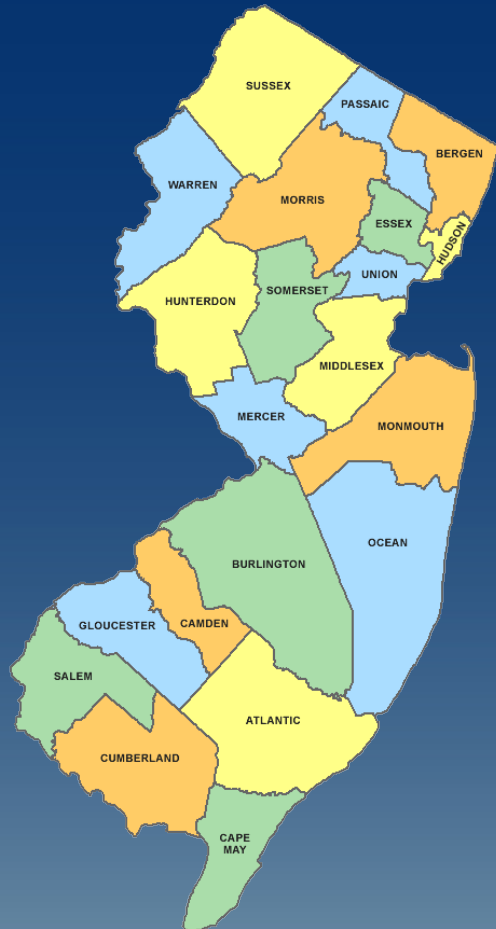
STATES OF INTEREST:



- **ILLINOIS**

- Trade Secrets
- Confidential Information
- **Near Permanent Business Relationships**
- **May require 2-year employment**

STATES OF INTEREST:



● NEW JERSEY

- Trade Secrets
- Confidential Information
- **Goodwill**
- **Low-balling employer's cost**

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STATES OF INTEREST:

New York



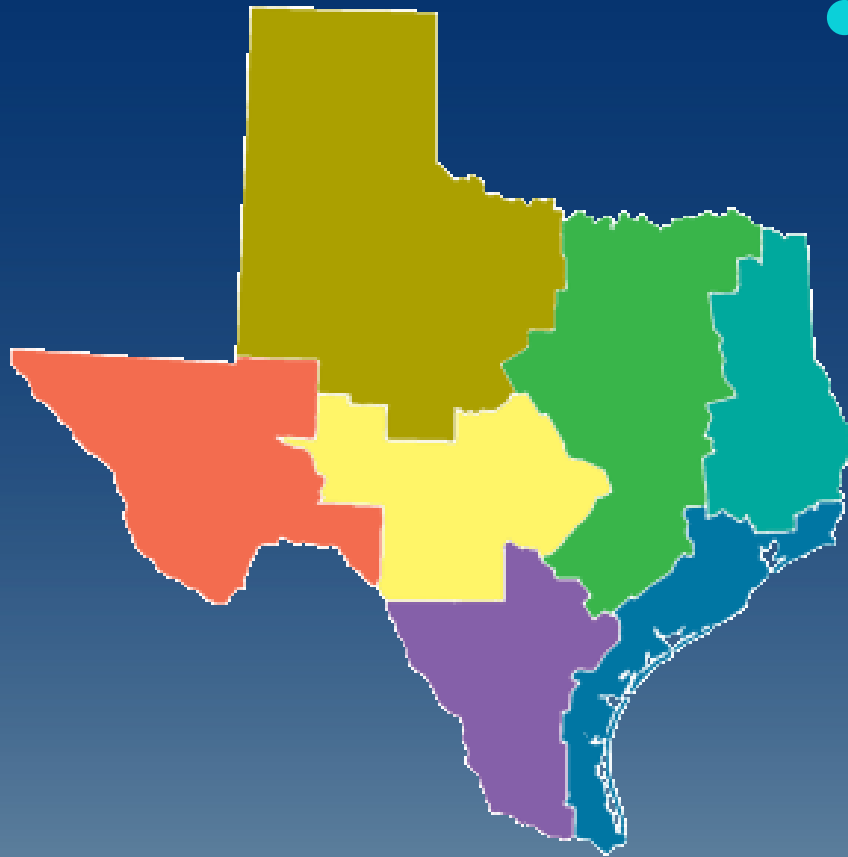
● NEW YORK

- Trade Secrets
- Confidential Information
- **Goodwill**
- **Broadcasters' On-Air Persona**
- **Employee's Unique or Extraordinary Services**

STATES OF INTEREST:

- **TEXAS**

- Trade Secrets
- Confidential Information
- **Goodwill**
- **Special training or knowledge acquired during employment**



STATES OF INTEREST:

NOT PERMITTED IN:



CALIFORNIA



NORTH DAKOTA



OKLAHOMA

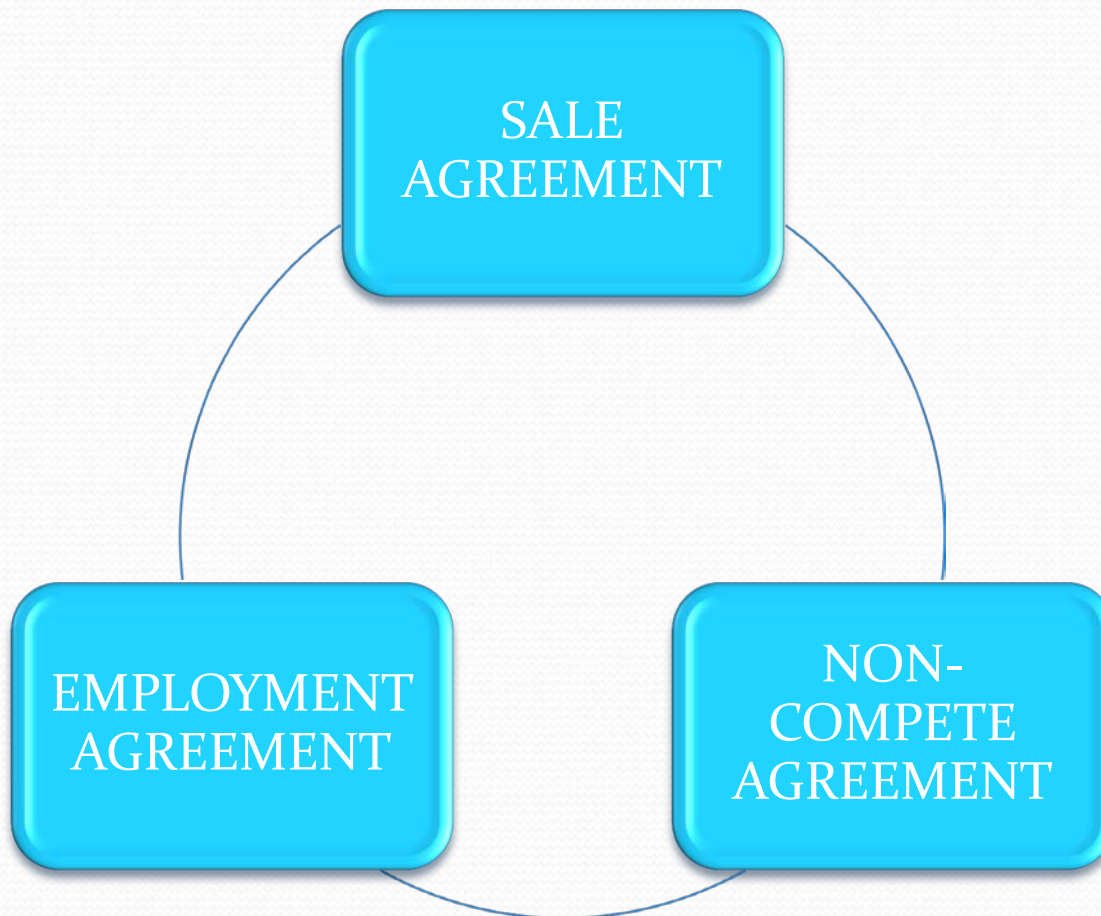
But these States still recognize protection of trade secrets.

SALE OF BUSINESS

- Typically all covenants not to compete made in connection with the sale of a business or a book of business are enforceable.



PRACTICAL POINTER



PROTECTION REQUIREMENTS FOR A VALID NON-COMPETE AGREEMENT

❖ LEGITIMATE BUSINESS INTERESTS:

- Misappropriation of Trade Secrets / Confidential Business Information
- Unique & Extraordinary Employees
- Client Relationships
- Sale of Business

❖ NOT UNDULY BROAD OR OVERREACHING:

- Limited in Time
- Limited in Geographic Scope
- Not Harmful to the General Public
- Not Unreasonably Burdensome to the Employee

LEGITIMATE BUSINESS INTERESTS: MISAPPROPRIATION OF TRADE SECRETS/ CONFIDENTIAL BUSINESS INFORMATION

SIX FACTORS TO CONSIDER TO CONSTITUTE A TRADE SECRET:

1. The extent to which the information is known outside the business;
2. The extent to which it is known by employees and others involved in the business;
3. The extent of measures taken by the business to guard the secrecy of the information;
4. The value of the information to the business and its competitors;
5. The amount of effort or money expended by the business in developing the information; and
6. The ease or difficulty with which the information could be properly acquired or duplicated by others.

Uniform Trade Secrets Act

LEGITIMATE BUSINESS INTERESTS: UNIQUE & EXTRAORDINARY EMPLOYEES

NEW YORK:

Unique customer relationships
Particularly comprehensive knowledge
Impossible/nearly impossible to replace
Loss of employee causes irreparable harm

- ✓ Prosaic Trades – balloon bouquets
- ✓ Unique Trades – singers and recording artists
- ✓ White-Collar Workers – securities brokers, debt collectors
- ✓ Blue-Collar Workers – crop sprayers, tire analysts

LEGITIMATE BUSINESS INTERESTS:

- ✓ **Protecting Business Goodwill**
- ✓ **Confidential Business Information**
- ✓ **Customer Relationships**
- ✓ **Training Costs**

ENFORCEABILITY

POTENTIAL PITFALLS

- **TIMING**

Set the clock!


- **GEOGRAPHY**

There are limits to areas or customers.

- **BURDEN**

Be reasonable to former employee.

CONTACT

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