Unedited transcript of

Featured Panel: An Update on Non-Competition Agreements in Massachusetts—a Year After the Effective Date

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>>: Hey, folks. We're going to get going. So first, let me give you my welcome. I love this conference every year for among other reasons as we just saw this morning. It allows you to have missed things during the year and now you know about it, and that will continue throughout the day. You might notice, as we move into our next panel, which is an update on non-comp in Mass. a year after - a little more than a year after the statute's in place to give us a sense of where we are and maybe where we're going since we definitely know a little more now. Wonderful. So as we are moving through this, I - you can see we're a little bit late. I'm going to be very limited on introducing our panelists, other than to say, you know, Attorney Russell Beck, your honorable Mitchell Kaplan. Thank you, Your Honor, for being here. And, oh, we actually - can ask you guys - I'm sorry - to shift down one? Just because I have to manage the computer.

>>: Of course. I'll - you stay. I'll move.

>>: Yeah, we should have switched those. And Attorney Max Perlman will I'll be presenting on this, and we were joking up here. You know, we always identify folks in this conference as, primarily, a practitioner representing employees, primarily practitioner representing employers. But in this universe, as Max just so brilliantly noted, this panel, at least relative

to the practitioners, are agnostic and dispassionate, at least with respect to which side they're representing in any given battle. So without more...

>>: The right side.

>>: The right side. I'll turn it over to them. Thank you. And...

>>: I think they're representing justice in the American way.

>>: That's exactly right.

>>: Thank you, Jackie. So the other chairs of this conference, Jackie Kugell and Kathy Michon, asked us to come and talk about all the myriad developments in the case law on this new statute in the last year or so. We got to find something else to do with our hour.

>>: We're done.

>>: There are some cases. We'll talk about those. What will pause briefly, I think. So what we're gong to talk about - we'll talk about the new law. And you've probably heard either Russell or me give an hour-long presentation on what the requirements are. We're going to a truncated version because you've probably already heard it and experienced with the new law has to offer. We're going to talk about the limited case law. And then we're going to deal with issues that we expect to be litigated and some approaches that you might take in litigation but also at the drafting stage. In particular, we're going to spend a lot of time with the new consideration requirements, which are going to be, I think, hotly contested, if not the most hotly contested issue. So with that, I'll turn it over to Russell Beck. But before I do, just want to - if you guys don't know - I'm sure you've all recognized Russell. But if you don't, he's been sitting on the coffee table in your reception area for the last couple months as the cover boy for Super Lawyers magazine. So...

>>: Oh, I'm done. I can only go downhill. OK, so let me turn the slides. There we go. All right, so first thing We've got little action items.

>>: All right, we're going to do them one at a time. So, I think, last year when we talked about this, I had said that we're going to probably confuse you more than you were when you came in. That's going to continue. We just don't have a lot of case law so we're now working on, kind of, the best experience that we've been able to come up with based on, you know, many conversations with lots of lawyers. So you're getting kind of this collective wisdom, but please feel free to chime in, feel free to reject whatever we suggest and offer alternatives because this really is - as you'll see in a moment we just don't have case law around this yet. There are only a few cases and none provide any real meaningful guidance just yet. So first let's talk about the scope. I'm going to run through these very, very quickly, but please raise your hand if you have any questions. But we're just going to talk about the general scope of the statute and what its requirements are. So with regard to the scope, what's in, what's out? It covers just non-competes. It doesn't cover non-solicitation agreements, it doesn't cover no-rate agreements, it doesn't cover no-hire agreements. It doesn't cover the count - in the context of a sale of a business or of any part of a business where the - where you've got a significant owner of a significant amount who receives a significant consideration or benefit from the sale. It doesn't apply to non-competes that are outside the scope of an employment relationship, but which would include contractors. We're here in Massachusetts, everybody's an employee anyway. It doesn't include forfeiture agreements, it doesn't include non-disclosure agreements, it doesn't cover invention assignment agreements, it doesn't cover garden leave clauses. Hold the thought, we're coming back to that, but just pause on that one. It doesn't cover agreements made in the context of the cessation or separation from employment as long as the person is given seven business days notice to consider it. If they're not, then it is covered as a non-compete and it does not apply to - and they have seven business days to consider and rescind, sorry, their acceptance of it if they've accepted it. And it does not apply to agreements not to reapply for a job. Also, who's exempt from the agreements - from non-competes? Anyone who is non-exempt under the FLSA, student interns, anyone who has been terminated or laid off without cause, anyone who is 18 years of age or younger. All right. So now you know what's in and what's out. What are the legitimate business interests? They're the same that have always existed, the protection of trade secrets, confidential information and goodwill.

Remember now that trade secrets has been separately defined in our Massachusetts Uniform Trade Secrets Act which passed the same time. The agreement has to be no broader than necessary to protect a legitimate business interest and there are presumptions that you get in the statute now that you didn't have under the common law. And the first presumption is that the agreement will be protecting a legitimate business interest if it is no broader than necessary, number one, and number two it - there is no alternative protection that will suffice, that will be adequate. So non-disclosure agreement is not adequate, non-solicitation agreements not adequate, we actually need a non-compete. Then you got the presumption that it's - that it is necessary to protect the trade secrets. The duration, 12 years - 12 months. Twelve years would be nice depending upon which side you're on. Twelve months unless the individual has breached fiduciary duty or taken property physically or electronically and then it can be extended up to a full term of two years. Geographically reasonable. So it has to be reasonable in relation to the interests that are protected. And that's going to vary if you've got a sales person, right, where they're geographically kind of focused, or a tech person where they are really designing - working on stuff that may actually have worldwide scope. You get the presumption of reasonableness as long as it's tied to where the employee provided the services or where they had a material presence or influence within the past two years. The scope of the restrictions. The reason - it has to be reasonable in terms of the interest protected with respect to how it restricts the individual. As long as they are limited - as long as the agreement is narrowed to protect trade secrets, not confidential information or goodwill, and it restricts the employee from doing the same type of work that they did at any point within the two years prior. That will be deemed - presumed to be reasonable. So if you've got a salesperson you restrict them from being a salesperson that's probably OK. If you restrict them from being a janitor, well we know that's not going to be OK, but we get that presumption. All right. That takes us to consideration and garden leave or other mutually agreed upon consideration. I'm not going to get into those right now because we're going to get into them in a minute. The only thing you need to know right now is the statute says that all non-competes have to either be - it be supported by consideration which is either garden leave clause or other mutually agreed upon consideration. Again, we'll come back to that.

>>: And I'll preview that Russell's brand new - he has a new thought on this issue.

>>: It only took year.

>>: It's probably worth the price of admission for the conference so.

>>: Well we'll see. I expect it to be roundly rejected, but we'll talk about it anyway. The other is that if you ask somebody to sign a non-compete during the term of their employment, so not when they're first signing up, but really at that period in employment where they're more vulnerable they, you know, they've left their old job, they've now come and worked here and you say to them here, sign this. You've got to give them fair and reasonable consideration and that was something that was very important to the legislature at the time. OK. Next are these fairness requirements that are in the statute and that is you have to give - for someone starting work you have got to give them the agreement with the formal written offer or 10 days before the longer of. I'm going to talk about what happens if you fail to do that. The agreement must say that they have the right to consult with counsel, and the agreement can be reformed by a court to the extent that it is overly broad. Formality requirements. It needs to be signed by both parties and venue is going to be - and choice of law are going to be Massachusetts. I'm not going to get into the details other than to say, at least arguably, only the state court in Suffolk County, business litigation of Superior Court, can hear a non-compete case. Federal court can't, good luck. The - that's the venue.

>>: Pesky little constitution might get...

>>: You know, every now and again it does, more and more it seems.

>>: First in a jurisdiction is statutory, not constitutional.

>>: Oh, sorry.

>>: Springing non-competes. The idea there is that if you choose not to

require somebody to sign onto a non-compete, or you don't enforce it maybe because they've been laid off without cause or whatever, the court has the power to - when dealing with a wrongdoer, someone who has violated they're non-solicitation agreement, violated their nondisclosure agreement, breached the fiduciary duties, taken information with them. The court has the power, should it so choose to exercise it, to basically create a non-compete and say you may not work in that job. You have proven yourself untrustworthy and we can't allow you to do that. So that's the springing non-compete. A lawyer I know out in Ohio termed it a time-out non-compete which I actually really liked, a little time-out. And with that I'll turn it back to Max.

>>: OK. Well that was the auctioneer's version of a - of the new non-compete law. It used to take us an hour and a half.

>>: Well, right. There's not a lot more to add.

>>: So this will take much shorter than that. So the cases that have come out that site to the new law fall into one of basically two categories. One, judges saying that that this agreement that we're dealing - that I'm dealing with right now is not covered by the new law because it was signed before October 1, 2018. But there are a couple of interesting cases that you might be able to use for some purposes if you find yourself in litigation that come out of a choice of law context. So the choice of what the employer is trying to enforce choice of law in - usually in Delaware - and the issue of public policy comes up and whether the new statute reflects some sort of a public policy change or difference from Delaware. And in that context, Judge Casper in the NuVasive case found - in the order of dicta, but I think it's something that could be - can be used going forward. And again, in relation to this garden leave issue that we're going to be focusing on in just a few minutes. What she found was that the agreement that was at issue, one of the agreements that was at issue, but the one that she was talking about at the time and in the decision didn't have a garden leave clause. It didn't - it wasn't covered by the new statute, but even if it wasn't. Even if it was covered by it and even though it didn't have a garden leave clause that the other mutually agreed upon consideration was satisfied by the following language. And this is the language from the agreement, in

consideration of my engagement by the company the compensation I receive from the company, including, for example, monetary compensation, company goodwill, confidential information, restricted stock units and or specialized training. So we've been struggling to figure out what other mutually agreed upon consideration means. It appears that Judge Kasper has an idea as to what she - at least what she thinks that that means. The other case I would point out, the other - only other case that I could recommend to you as having anything substantive about it would be the tenant case which was decided by Magistrate Judge Dean and I'll give you the cite here. It's 2019 Westlaw 830482. In that case she's deciding a choice of law issue and the defendant has raised some issues about certain things that weren't in the agreement that the statute now calls for and the judge basically says that that's not a big enough public policy issue. That doesn't represent a public policy shift. And it's a little bit odd, the timing. She looks to the agreement at the time it was signed as a public policy as to - instead of what the current public policy is, which I'm not sure was the right thing to do. But in any event if you're looking to - if you're - if you have a conflict over choice of law this is definitely a case to look out for that. So and I know, Russell, you found a case from earlier this or last month.

>>: Yeah, from a couple of weeks ago. Well no, November 15th. Down in the Eastern District of Pennsylvania the case is Healthcare Services Group vs. Muretta if anybody's interested. And in a footnote the court basically says the court concludes that non competition that the Non-Competition Agreement Act which didn't apply to the non-competed issue because the non-competed issue had been written before. So the Non-Competition Act evinces the interest of Massachusetts in limiting the scope of non-compete agreements, but is insufficient to overcome the other factors for transfer the case. So just another case to be aware of if you're looking at the issue of transferring to or from Massachusetts. It'll obviously become an increasingly clear issue as we move forward in time and more agreements have been written under the statute where we don't have to worry so much about the policy, but actually the actual language of the statute.

>>: So, I mean, that's all we have on the newest caselaw. And Judge Kaplan I'm not going to excoriate you for not deciding more cases to help

us out, but it really would be nice.

>>: The one thing, actually, just for people to be aware of if you're not. So, you know, this is - non-competes have historically, for almost 200 years, been the province of state law. The Feds have started to get involved. We've had - there was a bill passed - a bill filed in 2018 that died that was to ban non-competes federally, that died. In 2019, Senator Rubio filed a bill to ban non-competes for low income workers. And then more recently, judge - Senator Murphy of Connecticut and Senator Young of Indiana filed a bill to ban non-competes period, full stop, ban non-competes. There was a hearing at the house the end of October and there was a hearing a few weeks ago at the Senate on these bills. The FTC is also looking at this and as of right now the FTC seems to think that it's within their province to control, they're at least exploring that and considering all options. So they're going to be holding a hearing January 9th, so if anybody has any interest in going down to D.C. Lynn?

>>: See I (unintelligible) federal act to preempt all the state action or that is to just be there at the right moment. (Unintelligible)

>>: No, they're talking about it as being a floor. I don't know where you go above that floor. It would only apply, obviously, to people engaged in interstate commerce, but who's not at this point. And nothing's passed and there's no reason to believe that it will. It took 10 years here to get anything passed and we tried to do a ban. Twenty-nine states have looked at changing their laws and 19 have, not a single one has banned non-competes despite many, many bills to do that. So I don't think they're going anywhere.

>>: Excellent.

>>: Judge Kaplan, you have anything you want to chime in with?

>>: Well, we can only decide the cases that are brought before us. And I don't think it's surprising that, you know, we don't have litigation yet with respect to contracts that were signed before the latter part of 2018. So, yeah, I will just say this. We had a superior court conference, as we do

twice a year. Last one was a couple of weeks ago and there's always a large educational component. And one of the things that we talked about were the Non-Compete Act and LUTSA. So I'll just - it would be inappropriate to tell you what opinions people thought with respect to open issues, but I will say that we did our best to let all of the Superior Court judges know about the existence of these new statutes. And I was on the panel with two other judges who really practiced extensively in that area before they went on the bench and so I think we tried to highlight for people where we think litigation will arise and where there are open areas in the statute that are ripe for judicial interpretation. So, you know, I think for those of you who are litigating these cases around the state, hopefully, the judges will have an advance understanding of the impact, if any, of the new statutes and where the areas are that the legislature seemed to leave work for the courts.

>>: OK. And then we dive into them.

>>: Let's go into it. So right. So as Russell noted, non-competes have to be supported by a garden leave clause or other mutually agreed upon consideration. Garden leave clause is defined in the statute. I think there's some issues with the definition, but it's defined. Other mutually agreed upon consideration is not and I think we've struggled a lot in the non-compete bar as to what's going to suffice. Is there going to be some sort of a qualitative or quantitative element to that? Or are courts going to be scrutinizing how much? Or is it truly just has to be other and mutually agreed upon. And if so, what does other mean? Does it mean something other than what's also being offered as inducement for the beginning of employment. So let's - we're going to deal with some things that we think we're going to get litigated, but I think we should all be thinking about when we're advising our clients as to how to draft these non-competes. A lot of my clients are saying, you know, I'm just going to scrap it. I don't even want to do the non-compete which I think is - it might be one of the aims of at least some of the drafters of the legislation to reduce the number of non-competes.

>>: You could always give them the garden leave.

>>: So right, but I've got - so I'm going to talk about some issues that I have with garden leave. So, I mean, the pro on garden leave...

>>: Do you want me to just describe - do you want me to describe the garden leave piece?

>>: Sure, yeah. So you go ahead. Yeah, right.

>>: So you've got a garden leave. In order to qualify as garden leave under the statute it's got to be 50% of this - of the highest salary - salary, not consideration - highest salary that the employee earned during the last two years. It cannot be stopped at the - if, you know, if you've given garden leave the employer cannot say I decided not to continue funding that, you can go to work now. Once you've given it, it goes. The only time that an employer can stop that is if there's been a breach of fiduciary duties or they took property with them on their way out the door, physical or electronic, in which case you may or may not be able to stop it in that first year, you can have it extended for the second year and you definitely don't have to pay for it in the second year. It's got to be paid as wages. I think Max is going to raise a concern about that. And that's really - those are the key pieces.

>>: Sure. And thank you. So good thing about garden leave is there's a certain security that you get when you do garden leave because you're not worrying about what's going to constitute other mutually agreed upon consideration, doesn't matter you've got garden leave. So I have issues with garden leave and I've advised all my clients to steer clear of garden leave. And I have not countenanced any non-compete that has garden leave in it, and here are my reasons. I think there's an internal conflict in the statute. If you look at the definition of garden leave, which is a provision of a non-compete by which an employer agrees to pay the employee during a restricted period provided that such period shall become effective upon termination employment unless the post-employment restriction is waived by the employer. So that connotes that there's some ability to waive it, right? The problem is if you look at another part of the statute, it's Section(v)(7), it says that...

>>: And if anybody is interested in following along I think it's on page 15 in

the book, if you actually want to read through.

>>: It says to constitute garden leave clause within the meaning of this section, the agreement must, except in the event of breach by the employee, not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments. So can you waive it or is it unequivocal? I think there's a conflict there and if the latter provision prevails, hypothetically, and I think maybe equities would come into play. But hypothetically somebody could join one day, resign the next and say pay me my garden leave. It's unequivocal, you can't waive it, it's mine. And even if the employer says well, we're not going to enforce the non-compete you say well too bad. The statute says that you - that it has to be paid, period. So that could be an issue with getting the non-compete enforced, but it's even a bigger issue because the statute expressly incorporates the wage act. And we know on the - I guess on the defense side we would call the wage act a very toxic law. I'm not in the business of incurring more wage act liability for my clients. So you can imagine that same plaintiff joins one day, quits the next, says pay me my garden leave and then sues. Not for the $50,000 of the hundred thousand dollar salary, but for that times three plus attorney's fees. I think it's a bit far-fetched, but I can't tell my clients that that's not going to happen. So that's one of the issues I have with garden leave. I also think whenever you talk to CFOs about this issue and you tell them, OK so I can't tell you that you don't have to accrue on your books a 50% - a half of your severance for every employee that you have a non-compete for. They start to get very nervous from the county standpoint if they feel they need to start accruing that on their books. The possibility of having to pay massive amounts of severance pay in the - under the guise of garden leave. So these are my - those are my issues with garden leave.

>>: There's an accountant that's saying that's not a contingent - that that has to be accrued...

>>: As a contingency, as a possibility, right. Not something that's definitely a liability on the books, but.

>>: Well you might footnote it, but I don't think it could be reflected in the

financial statements. But - and I'm not a CPA, although I represented a lot of them.

>>: Well so in any event those are my issues on garden leave. I think that this is why - and I'm not sure we have this as one of our approaches. One of the things I'm recommending if employers want to take advantage of the concept of garden leave is to have for very important employees that you are willing to pay the 50% of their base pay for the year, to promise to pay that, but give yourself the ability to waive, say specifically in the agreement, this is not garden leave. This is other mutually agreed upon consideration. And it is not wages. I always disclaim that as well. Whether that's going to be effective, I don't know. I could see a court also saying that the other mutually agreed upon consideration is wages under the circumstances. But it's clear that the statute tethers garden leave and the wage act - not just the concept of wages but the wage act. It's in there. So to the extent that you can afford to do the garden leave, one of the - one approach is to do what I call a garden leave equivalent - to pay as much - it'd be hard for a court to say, well, that's not sufficient because the dollar numbers would match up pretty well with garden leave. Yes.

>>: Would your alternative perhaps develop a special contract language for the wage act not only...

>>: (Laughter).

>>: ...To skirt the obligations in the statute given the reference to the wage act?

>>: Well, our argument would be that there's nothing that tethers other mutually agreed upon consideration to the wage act. Perhaps - and I see your point, but perhaps the garden leave - it'll be harder to argue that on the garden leave. But, you know, I would say that - I would argue, if I had to do in court, that there is no tethering of other mutually agreed upon considerations of the wage act. But point well taken.

>>: OK.

>>: This is when it's going to get really good.

>>: (LAUGHTER)

>>: Well, good or really bad. So just a little bit of background on the statute. The - back in the prior legislative session before the statute was passed, the last time it fell apart, the two options for language that were before the House and the Senate subcommittee trying to resolve the language were the House version that said that what we see in the statute now which is noncompetes need to be supported by garden leave or other mutually agreed upon consideration. And the other mutually agreed upon consideration needs to be stated in the agreement, and then it defines garden leave. The Senate version said that it needed to be - that noncompetes needed to be supported by garden leave or other mutually agreed upon consideration which needed to be of equal or greater value than garden leave. That was ultimately what killed the bills back in 2018 - twenty - what? - seventeen, 16 - 2016. And now fast forward to 2018 when it was passed, and the language that they used was the language from the House which did not tether garden leave to other mutually agreed upon consideration, right? So now we're left with this quandary. Why did they put garden leave in here and say that you need to have it supported by garden leave with this whole elaborate definition wage act issues and all of that if you can just have some other mutually agreed upon consideration? The other question that it raises is, why is - remember I said what was exempted, what the act does not cover? It does not cover garden leave clauses. Well, why does it say that and then later say that the noncompete has to be supported by either a garden leave or other mutually agreed upon consideration? So as you try to puzzle through all of that, the only way that I've been able to reconcile 99% of the language - there's still a little bit that's difficult to reconcile - but everything else is to say that the legislature laid out this garden - this elaborate garden leave piece in order to say, if you do that - don't worry about the statute - we're going to go back to preexisting law and you're going to be evaluated under preexisting law, just like, the legislature said, if we're at a juncture where we're at the end of employment, then - and the employee is given seven business days to revoke their acceptance - you don't have to comply with the other requirements of the statute. So if you do garden leave, in order to reconcile

all the language in the statute, it would pull out - it would take that exemption from noncompete definition - garden leave - you've now satisfied the exemption. Your noncompete is now subject to old noncompete law. If you don't give garden leave, you then have to give something else. What's that other thing? Other mutually agreed upon consideration. And when you enter into a noncompete at the beginning of employment, you must comply with all the statutory requirements. You can give the other mutually agreed upon consideration. There's no standard for what that means, but the person has the time they receive the offer or ten business days - the greater of - to consider it. And that addresses a lot of where we see the problem, right? The problem is they get handed on the first day - no more. They now have the time to get it, to evaluate it, to consult with a lawyer if they want to. The people who really can't afford to do that, the nonexempt people, they're out of the statute already. So now we're talking about people that the legislature says it's OK to bind them to a noncompete. So other mutually agreed upon consideration, you've got plenty of time to consider it. Take the job. Don't take the job. You haven't necessarily left your old job because you would just received an offer. That also dovetails with the language and it reconciles the language for an employment - a noncompete that's given to somebody during the term of their employment. So during the term of your employment the legislature said you need to be given fair and reasonable consideration. That's not a standard that applies to a noncompete otherwise. And the reason that the legislature did that was that's a particularly vulnerable time, right? The employees already working there. If you're going to say to them, take it or leave, that's really tough. So the legislature says, we've got to protect that group of people, and the way we're going to protect them is fair and reasonable consideration. So this actually squares up all of the language. The only language that it doesn't square up is it winds up being a bit circular where it says a noncompete needs to be supported by garden leave. If your garden leave, then it's not a noncompete. So it's still a little bit circular, but at least every part of the statute is given meaning whereas otherwise it's not.

>>: So if you have garden leave...

>>: Yeah.

>>: ...That means you have a two-year noncompete. That means you can have noncompete for nonexempts?

>>: No. So the question of whether you can have a noncompete for a nonexempt, I think, is somewhat of an interesting question - right? - because the courts generally don't enforce those. But let's put that piece aside for a minute. On the issue of a two-year agreement, you're still bound by the preexisting Massachusetts law the same way you would be bound by that in the context of a separation from agreement and all the same questions. Can the nonexempt people be bound by an agreement entered into at the end of employment that - where they're given seven business days to think about it and to rescind? So I think, though, you know, whether you think it's good policy or bad policy, it certainly addresses all the language in the agreement and in the statute.

>>: Particularly, the - and I think we had not talked about this until...

>>: Oh, I think about five minutes before.

>>: ...About five minutes before. And I've never heard this theory before...

>>: Just because I thought...

>>: ...You've probably talked for hundreds and hundreds of hours about this. The one most compelling thing to me is that it addresses language that we've always kind of just thrown away - the exemption of garden leave from the definition of noncompete, which we've always kind of just kind of laughed and thought that must be meaningless language. But, yeah.

>>: No. And I think the problem is - and please, participate in the conversation because this is something that I know a lot of people in the audience have really struggled with this, struggled with the question of, why if other mutually agreed upon consideration is not tethered to garden leave, which legislative history demonstrates that - if they're not tethered together, why then have this whole definition of what garden leave is? Why was there an exemption for garden leave in what is a noncompete and

what is not a noncompete? Why have another definition for garden leave? And the only way to reconcile all of that and to make that language makes sense - that is to not just write out garden leave out of the statute - is this approach. And what has bothered me for the past almost 2 years at this point with that language - with the Senate language - with the House language is how to reconcile, you know, the use of that term garden leave, the whole definition and to have it as an exemption. This is the only way that reconciles it. Yeah. Yeah.

>>: Is it possible that the exclusion of garden leave from the statute is the - kind of the more traditional garden leave of, you know, you're still employed for six months or three months, but obviously, you still have (unintelligible) loyalty, etc.? But, you know, historically, traditionally that was what garden leave was. You weren't terminated. You were kind of, you know, on the bench.

>>: I agree with you. First of all, I agree with you that that's certainly an argument that can be made. I also agree with you that that is historically the way that garden leave has been used. However, when defining garden leave, this language that says, you know, 50%, blah, blah, blah, the intro to that is in order to qualify, I think, as garden leave under this section, 24L, you must do these things. So now you're qualifying as garden leave under that statute.

>>: You know, I have a case before me. And I won't be a judge very much longer, so I don't think it makes any difference. But that was my understanding - that the concept that it wasn't to apply to is I'll keep paying you and you're my employee, but you can't come to work and - you know, that that's what was generally - and this statute is not meant to address - if that's what you want to do, if you want to tell your employee, don't come to work anymore for the next however many months, you can do that. We're not - the statute is not intended to stop you from doing that if that's what you want to do. If you want to build that in to your noncompete situation, if anybody wants to do that, then here's - I guess I would only say the following. You know, when you're switched from sitting out there in the courtroom to sitting behind the bench, one of the things that dawns on you is that all of those elaborate constructs that you try to sell the court on -

you know, they're interesting, they're novel, they might, you know, somehow work if you, you know, in the most intellectually way, address it. But now you're trying to do - figure out in general, you know, what is it that the legislature was trying - if it's clear and unambiguous, it's clear and unambiguous. Otherwise, you're trying to get to a reasonable result. You're not trying to get to an oddball result.

>>: And if I may, Your Honor. So on that, the reason that this - and I know I only have a few more months to convince you...

>>: (LAUGHTER)

>>: ...But the reason that that makes sense in this context is - again, step back to what the legislature was trying to do. They're trying to protect people from the abuses of the - of noncompetes. So where are the abuses? It's those low-wage workers, the younger workers, all that kind of stuff, so those are pulled out. It's the notice requirements and all that. That's pulled out. And then they say, look; if you're going to pay somebody 50% of their salary to be restricted and they can go work somewhere else as long as they're not violating the noncompete, you've taken care of that fairness piece. You've taken care of that. If you're not going to do that - and notice that it's not offset by some other salary, right? So somebody goes to work at a noncompetitive company doing the same thing and earning more money, they're still getting their 50% as long as they're complying with the noncompete. So as long as you're doing that, go ahead, and we don't care because now the old law will take care of you. But if you're not going to do that, then you need to be subject to this new restriction. Anyway - and it fits because it also fits within - this is only - we're talking about in the context of when somebody is signing onto the noncompete, right? Because we know that if you're already there, you need to have fair and reasonable consideration. If you don't read it this way, that fair and reasonable consideration requirement which is when somebody is really vulnerable, which suggests that other mutually agreed upon consideration doesn't need to be fair or reasonable because they're less vulnerable at that point, so this actually scares them altogether.

>>: Right. I don't - people make whatever argument they want. I don't think

that one would - that's probably a very good argument to say that, you know, by definition, if they entered into a contract, it's mutually agreed upon or, you know, I give you, in addition to all the things that I was, otherwise, going to give you, a peppercorn. I mean, you can make that argument if you want. I don't - you know, I don't think that it sounds like a real appealing argument to make. But...

>>: Which is a perfect segue to our next...

>>: We did have a question, though, back there.

>>: Oh, please.

>>: I was thinking back about a year ago of how on this topic (unintelligible). But the similar conversation came up when two of the legislatures on the path were asking, you know, what do you mean by this? And they're like, it's (unintelligible).

>>: (LAUGHTER)

>>: And that was days after the low reported that it had passed. And I thought, oh, it did what it had. It missed the deadline. So I think some of this - their - the inference we grew was, well, (unintelligible). It's going to have to be fixed...

>>: Right.

>>: ...We don't know (laughter).

>>: And I agree with you. When you step back and what was really going on, you had people who wanted to get rid of noncompetes, you had people who wanted to keep them as they are. And, you know, this issue became the focal point for them. They couldn't agree...

>>: The clock rang.

>>: ...The clock rang. Exactly. We'll go with the House version. Yeah.

>>: Another question.

>>: Maybe I'm missing something - and I probably am missing something because you're already very precise and this comment is very imprecise. But by your logic and Judge Kaplan's peppercorn comment, why would the party prove too much in the sense of by that logic if the language read - why wouldn't that logic leave the garden leave segment out of that phrase garden leave or mutually agreeable consideration? That is, by that logic, the company and the employee agreeing to any mutually agreeable consideration of the peppercorn and that would pass on to the statute. And then you have to ask, well, why is garden leave in there because that along with almost anything else (unintelligible) mutual consideration, doesn't that phraseology suggest that the term garden leave is meant to inform suggested (unintelligible) the nature of the other mutually agreeable consideration should be that it's something along the lines of garden leave?

>>: And we only have 10 more minutes so...

>>: I'll answer that, and we'll move on to the next if that's all right. Are you going to give an answer?

>>: Yeah, yeah. I do. Can you just summarize the question?

>>: Yeah. So the question really comes down to, if you can give anything else and it doesn't have to be tethered to or relative to what garden leave is, isn't that really kind of what the statute would require? I mean, essentially. I know it's more nuanced, but the idea is if you have these two things in there and you can simply avoid the whole garden leave thing by just having something that's a peppercorn, doesn't that render the language - the garden leave language meaningless? And the answer to that is that's exactly why this definition avoids that problem. And it also - this definition is consistent with the legislative history which did tether the two together and then that was rejected. So with that, I'm happy to talk about this at any point afterwards. And certainly, people, if you disagree, agree, just want to talk about it anytime, I'm happy to do that. I'm sure Max

is as well. Judge Kaplan, I won't speak for you, at least until you're off the bench.

>>: (LAUGHTER)

>>: Go ahead, Max.

>>: All right. So let's talk - I have clients who don't want to commit to a whole lot of consideration for a noncompete. Maybe they've got some employees that, for the most part, a nonsolicitation will take care of it but don't want to forfeit the ability to have a noncompete under certain circumstances. So what I recommend to those clients is maybe you pay a small amount upfront. And every time I've spoken on this topic, I always poll the audience. And how many people think $1,000 would suffice as other mutually agreed upon consideration? And it's almost usually nobody raises their hand on that, on whether $1,000 would suffice. It's the virtual peppercorn under the circumstances. But I think there's some value to having even this small amount of consideration because you may run into a judge who says, it suffices under the language of the statute. Other - it's other. It's mutually agreed upon. Check and check, so you get to enforce. But the other impact is just as I cannot tell my client whether or not that $1,000 would be sufficient, the employee's lawyer is not going to be able to tell them that they a clean bill of health. So it could serve even in an agreement that's got a very light consideration to it - could serve as a deterrent. And you may never know how well it serves as a deterrent, but there may be employees who refrain from competition out of fear of having that consideration judged to be sufficient.

>>: Do you want to do the rest because I've given - I've spoke a lot...

>>: OK. So payments during and after the restricted period, so another way that we're dealing with this - I think I alluded to it earlier - kind of a garden leave equivalent. Sometimes it's not - isn't the entire amount you agree to pay, a certain amount during the restricted period or a lump sum after a restricted period if they sign an affidavit that says that they've complied with all of their obligations or maybe a hybrid, meaning you pay during the restricted period and then half of the sum and then the other half

after they sign an affidavit at the end of the restricted period. Again, there's no way to know whether this would suffice. Some courts may think that that something else is required. It's just - it's impossible to know. And then I've done this a few times as well - hybrid upfront and after. Just cover your bases. Give a thousand bucks on the way in the door and also have some consideration that gets paid out after the employee is gone from the company. So there's that. The apportion - oh yeah, the apportionment approach, this is your terminology, but - so sometimes to cheat on this, the employer will take the same amount that they've been paying people for years and say, instead of a $100,000 salary, they'll say, oh, we're going to pay you a $90,000 salary and $10,000 for the noncompete. So you see that - you see clients wanting to do that - pay the exact same amount they always have but have it look like it's something additional. I don't know. I could see there being some considerable discovery in a case as to what, in the past, certain people in that same position had made, what their consideration was to see whether it was actually additional consideration - other mutually agreed upon consideration,

>>: Well, let me give you the two-second rationale for it, right? Two seconds is that at every time that somebody takes a job, they are agreeing to certain things and they are being compensated in exchange and receiving certain things. One of the things that they're agreeing to, if you've asked them to sign a noncompete, is a noncompete. The payment that they're being made to come take the job subject to a noncompete was call it $100,000 last year. This year, we say, hey, look; we're going to now have to allocate that portion that you were already getting paid and here's the amount whatever the percentage is. So that's the way you would think about it. Whether that's persuasive to anybody or not, you know, obviously, you can decide for yourselves. And ultimately, Judge Kaplan will decide...

>>: Will decide for you.

>>: (LAUGHTER)

>>: Better than nothing, I think. And again, you're going to benefit from a certain to turn effect whether or not, ultimately, your approach would be judged to be legitimate. So the last thing has to do with a case that I'm

working on now. I don't see opposing counsel here, so I'll - and I'm not going to name him or her. But I got - I was - I told counsel, hey, you're noncompete's not enforceable because there are a few problems with it. Here - and I outlined a few including the fact that there was no additional consideration. And the lawyer got back to me and said, well, the court has the power to modify. And so I was like, power to modify to add a garden leave or consideration. And I mean, I put that down there just so I could tell that story basically.

>>: (LAUGHTER)

>>: The court can modify to protect a legitimate business interest. I don't think anyone would say that that statute permits a court to modify to restate consideration or add consideration to make the agreement sufficient under the statute. OK. So now Russell and I are going to talk about - it seems like a minor issue, but it's come up way more times than it should. So the statute requires you to provide the noncompete to the employee on the earlier of two dates - the date of the formal offer of employment or 10 days before they start. So I'll just bring all these up. What happens if you don't give the non-compete with a formal offer? It's like a breach in the space-time continuum or something like that. What do you do in that case, because you've already lost that opportunity? You can't do the earlier of any more. So, one of the things that I tell my client is make your non-compete and your offer letter one electronic file, so you don't have two separate documents. One is always going to go with the other. But in the case that you - if you mess up, or your client messes up and says, hey listen, we issued these offer letters, we need the person to sign a non-compete. What do we do?

>>: You're asking me? (Laughter)

>>: So, here are the approaches I've come up with. I mean, you can ask for a waiver, although it's not clear one way or the other as to whether a waiver would be effective under the circumstances. The other two things is to retract the offer and reissue a new offer. And I've even had circumstances where I've asked the employee to confirm that the offer has been rescinded, and that the formal offer, for purposes of the statute, is

this new offer that is accompanied by a non-compete. And the other approach, what was it? Oh, yes. Treat the person as an existing employee, which would require you to then issue them fair and reasonable consideration for the non-compete, which-

>>: Have you actually advised somebody to do that?

>>: (LAUGHTER)

>>: I have - no, I've never - I've never done that, and it would be a very unpopular piece of advice.

>>: It seems to me, if the offer is accepted, then the offer is accepted and it doesn't have the non-compete. But that, if it's not accepted, you're always free to - I mean, contract law still applies. If you've made somebody an offer and they haven't accepted it and they say, you know, I don't like it. I mean, it'd be the same thing if you offered somebody 125,000 dollars a year and they don't accept it, then you look at the marketplace and say that I just overpriced this offer by 25 grand. There's nobody out there offering more than a 100,000 for this person with this benefit. They haven't accepted the offer. You have the right to rescind that offer and say, you know, you didn't accept it. We've looked at the marketplace, we're going to only offer you- no, I don't think bizarre outcomes should be anticipated with this kind of situation. If it's accepted, then there's really probably nothing you can do about it and you don't have a non-compete.

>>: Well, we've had those too.

>>: Yeah.

>>: And usually what we'll have the- we'll ask the employee to rescind their acceptance of the offer.

>>: Well, they could if you, I mean, you could have mutually agreed that that's out the door and you're going to include a non-compete and give more money.

>>: Yeah. Fair and reasonable consideration, I think that's what you have to do.

>>: And well, and if a waiver is permitted by the statute, which there are arguments on both sides of that, you could presumably ask them to agree, for some additional consideration, to waive that notice period.

>>: Yeah. All right. So, a few drafting tips. A defined cause in your agreement, there's some legal support for a pretty liberal definition of cause. It's just cause. It's in the Cline v. Harvard Fellows case. The statute doesn't define cause. Usually our employment documents define cause as being quite- it has to be something very, very extreme to amount to cause. But you're not tied to that. You can define cause in more of a liberal manner. And it's going to matter because if not terminated for cause, you have no shot at enforcing your non-compete.

>>: So, just in terms of general reaction, I think you can define cause lots of ways. I think if you define cause as you just weren't as good at this job as I thought you were going to be, I don't think one would find that that was consistent with what was intended by this statue.

>>: And that that may be the case.

>>: And that's what's happening.

>>: Yeah. I would take a shot at it anyway, because it's such an important issue.

>>: You know, you can put whatever language you want in there, it doesn't seem to me that that's what the legislature was after with respect to an undefined term.

>>: If - so, we can benefit from certain presumptions under the statute. To the extent you want to go beyond the presumptions, my advice would be to start to make that case in the agreement. Say why you're going beyond the presumptions. Especially when it's an important employee that you can actually justify putting the time in to customize the agreement. And just -

so, you're signaling to the judge, we know about the presumptions. We would have done it if it was efficient, but it's not and here's why, and get the employee to sign off on it. Other drafting tips?

>>: Yeah, I know we're holding you from lunch. So, I'm very cognizant of that. I'm going to speak very quickly again. Draft narrowly, identify the consideration, don't forget the DTSA whistleblower requirements, and please make sure both the employee and the employer sign. Done.

>>: Thank you.

>>: (APPLAUSE)

>>: So, we are on lunch break. We should be back at 1:15 to kick it off with an update in pay equity law. And folks who are on the faculty, you're invited to lunch upstairs. Otherwise, we'll see everybody in an hour. Have a good lunch.