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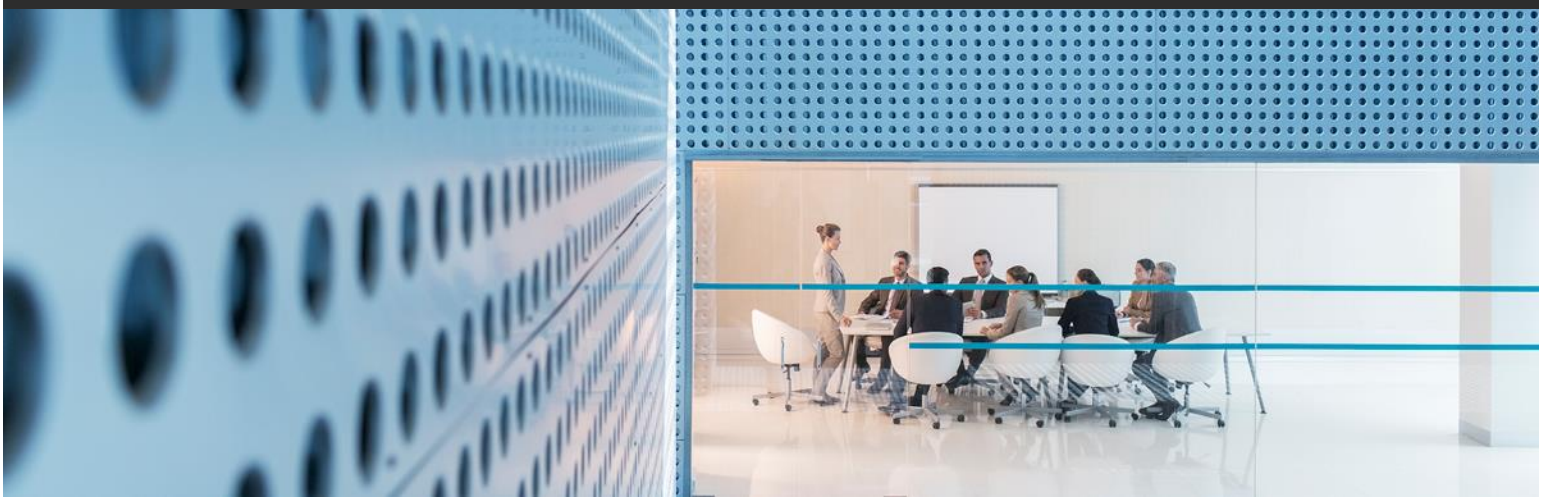

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A Non-Compete Law Roadmap for Tech Start-Ups in Key Jurisdictions

The enforceability of restrictive covenants, particularly non-compete agreements, can be very difficult for employers to navigate, especially for companies in their "start-up" phase. Technology companies in particular face challenges in structuring non-competes that balance their need to attract talent with their need to protect confidential and sensitive information, while preventing unfair competition by former employees. Many states have developed common law precedent as to what constitutes a permissible non-compete, while others have enacted statutes. Emerging technology companies must be aware of the laws in their jurisdictions in order to draft enforceable restrictive covenants that adequately protect business needs. The below chart presents a summary of employee non-competition laws and applicable standards in four states where emerging technology companies often do business: California, Massachusetts, New York, and Texas. Notably, the below chart generally only addresses the enforceability of pure non-competes, and does not focus on non-solicitation or non-disclosure agreements, which can also be utilized to accomplish the goal of protecting a company's business interests in appropriate circumstances. Of course, in addition to the four states covered below, emerging technology companies do business all over the United States, and internationally.

Topic	CA	MA	NY	TX
Statutes/ regulations governing non-competes	Sections 16600 to 16607 of the California Business and Professions Code govern non-competes.	Massachusetts Noncompetition Agreement, Act, M.G.L. c. 149, § 24L (effective for agreements made on or after Oct. 1, 2018).	No statute or regulation governing non-competes generally.	Texas Covenants Not to Compete Act, Tex Bus. & Com. Code Ann. §§ 15.50 to 15.52.
Essential Elements	Post-employment non-compete agreements are unlawful except in the context of a sale of a business. *See* Cal. Bus & Prof. Code § 16601. Worth noting, however, is *NuVasive, Inc. v. Patrick Miles,* 2018 WL 4677607 (Del. Ch. Sept. 28, 2018), which supports that a workaround to California's rule against non-competes may exist. Specifically, despite Section 925, an employer may be able to enforce non-California choice of law and venue provisions in pre-2017 non-competes if the employee was represented by counsel. However, the California courts and legislature have not yet spoken on this issue.	To be valid and enforceable, a non-compete agreement must: -be in writing and signed by both the employer and employee; -expressly state that the employee may consult with an attorney before signing; -be provided, if made before employment begins, to the employee by the earlier of either: (a) formal offer of employment; or (b) at least 10 business days before employment begins; -be supported, if made after employment begins but not in connection with termination of employment, by fair and reasonable consideration	New York common law disfavors non-compete agreements as an unreasonable restraint of trade. *Reed, Roberts Assocs., Inc. v. Strauman*, 386 N.Y.S.2d 677, 679 (1976). Courts may enforce a non-compete if the restriction is reasonable. Although courts evaluate non-competes on a case-by-case basis, a non-compete can be enforced only if it: -is no greater than required to protect an employer's legitimate protectable interests; -does not impose undue hardship on the employee; -does not cause injury to the public;	To be enforceable under Texas law, a non-compete must: -be ancillary to or part of an otherwise enforceable agreement when the agreement is made; -be reasonable concerning time, geographical area, and scope of activity to be restrained; -impose no greater restraint than necessary to protect the employer's (or promisee's) goodwill or other business interest. Tex. Bus. & Com. Code Ann. § 15.50(a).

		independent from continued employment; and provided to the employee at least 10 business before agreement is effective; -be no broader than necessary to protect the following legitimate interests of the employer: (a) trade secrets; (b) confidential information that is not a trade secret; or (c) the employer's goodwill.	-is reasonable in: duration; and geographic scope. *BDO Seidman v. Hirshberg*, 690 N.Y.S.2d. 854, 856-57 (1999); *Reed, Roberts Assocs., Inc.*, 386 N.Y.S.2d at 679; *Genessee Valley Trust Co. v. Waterford Grp.*, 14 N.Y.S.3d. 605, 608-9 (4th Dep't 2015); *Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 780 N.Y.S.2d. 675 (3d Dep't 2004). New York courts have recognized the following protectable interests that may be sufficient to support a reasonable non-compete: -employer's trade secrets or confidential information; -employer's goodwill; -employer's interest in preventing loss to a competitor of an employee whose services are special, unique, or extraordinary. *Ticor Title Ins. Co. v. Cohen*, 173 F.3d.	

			63, 70 (2d Cir. 1999); *BDO Seidman*, 690 N.Y.S.2d. at 858-59.	
Burden of Proof	Plaintiff-former employer bears the burden of proving that a statutory exception applies to the general rule prohibiting non-compete agreements. *KGB, Inc. v. Giannoulas*, 104 Cal. App.3d 844, 847 (1980).	Employer has the burden of proof to enforce a non-compete. *Lunt v. Campbell*, 2007 WL 2935864 (Mass. Super. Ct., Sept. 24, 2007).	Party seeking enforcement of the non-compete (typically, the employer) has the burden of proof. *Brown & Brown, Inc. v Johnson*, 25 N.Y.3d 364, 369-370 (2015).	If primary purpose of the ancillary agreement is to obligate the employee to provide personal services, the employer has the burden of proof to show that the covenant is reasonable. Tex. Bus. & Com Code Ann. § 15.51(b).
Circumstances of Departure Relevant	Does not matter whether employer or employee terminates the relationship. Post-employment non-competes are unenforceable in California unless a narrow exception applies.	Employers may not enforce non-compete agreements entered into on or after Oct. 1, 2018, against employees who have been: -terminated without cause; -laid off. M.G.L. c. 149, § 24L(c).	While NY courts are not entirely in agreement regarding whether non-compete agreements are enforceable against employees who have been terminated by the employer without cause, an increasing number of cases seem to find that they are not enforceable under those circumstances. *See, e.g., Buchanan Capital Mkts., LLC v DeLucca*, 41 N.Y.S.3d 229 (1st Dep't 2016) ("covenants [not to compete] are not enforceable if the employer (plaintiff) does not	Unless non-compete says otherwise, whether employee terminated or voluntarily departed is not-relevant.

			demonstrate 'continued willingness to employ the party covenanting not to compete'"); *see also Greystone Funding Corp. v Kutner*, 137 A.D.3d 427 (1st Dep't 2016) ("Assuming, arguendo, that *Post v Merrill Lynch, Pierce, Fenner & Smith* (48 NY2d 84, 397 NE2d 358, 421 NYS2d 847 [1979]) mandates the invalidation of all restrictive covenants in an employment agreement upon the termination of the employee without cause…"). It should be noted that in May 2017, New York Attorney General Eric Schneiderman arranged for legislation to be proposed in the New York legislature which would render non-competes unenforceable upon a termination without cause. This legislation has not passed yet. However, if the termination constitutes a breach of contract by an employer, any post-	

			employment non-compete in that agreement cannot be enforced by the breaching employer. *Cornell v. T.V. Dev. Corp.*, 268 N.Y.S.2d 29, 34 (1966).	
Blue Penciling	No authority exists for courts to reform or blue pencil agreements in the employment context. *D'Sa v. Playhut, Inc.*, 85 Cal.App.4th 927, 935 (2000); *Kolani v. Gluska*, 64 Cal.App.4th 402, 407-08 (1998).	For agreements entered into on or after Oct. 1, 2018, the Massachusetts Noncompetition Act specifically allows courts the discretion to reform or revise a non-compete agreement to render it valid, but only to the extent necessary to protect the employer's applicable legitimate business interests. M.G.L. c. 149, § 24L(c).	NY courts may blue pencil a non-compete if it is overbroad. *BDO Seidman*, 690 N.Y.S.2d at 860. However, courts are not required to blue pencil overbroad non-compete agreements. Courts may simply refuse to enforce an overbroad agreement. *See Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 780 N.Y.S.2d 675, 677-78 (3d Dep't 2004).	A Texas court must reform an overbroad non-compete if it is part of an otherwise enforceable agreement. Tex. Bus. & Com. Code Ann. § 15.51(c). Texas judges must blue pencil unreasonable time, geographic, and scope of activity limitations to make them reasonable and to prevent a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.
Choice of Law	Choice-of-law provisions are not honored by California courts if the outcome would violate California's public policy against non-compete agreements. This is the case	For non-compete agreements entered into on or after Oct. 1, 2018, courts will not enforce any choice-of-law provision if both: -the provision has the effect of avoiding the	New York courts enforce choice-of-law provisions if both: -selected forum has substantial relationship to: the parties; or the transaction; and	Generally, contractual choice-of-law provisions are enforced in Texas, unless either: -provision violates a fundamental public policy of Texas; or

	particularly when California-based employees are involved. *See Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal.App.4th 881, 895-96 (1998). For all contracts entered into, modified, or extended on or after Jan. 1, 2017, involving any person who primarily resides or works in California, choice-of-law and choice-of-venue contract provisions are prohibited if they apply another state's law or require adjudication in another state as a condition of employment. Cal. Lab. Code, § 925.	requirements under the act; -the employee is or has been for at least 30 days prior to the termination: a resident of Massachusetts; or employed in Massachusetts. M.G.L. c. 149, § 24L.	-application of the selected forum's law does not run contrary to a fundamental policy of a state with materially greater interest than the forum state. *U.S. Merch., Inc. v. L&R Distribs., Inc.*, 996 N.Y.S.2d 83, 84 (2d Dep't 2014); *Marine Midland Bank, N.A. v. United Missouri Bank*, N.A., 643 N.Y.S.2d 528, 530 (1st Dep't 1996).	-contract bears no reasonable relation to the chosen state. Tex. Bus. & Com Code Ann. § 1.301; *Transperfect Translations, Inc. v. Leslie*, 594 F. Supp. 2d. 742, 749 (S.D. Tex. 2009).
Consideration	Not applicable, as non-competes are not enforceable in California and are void against public policy, unless narrow exception applies. Cal. Bus. & Prof. Code § 16600.	Massachusetts courts have determined that the employment relationship itself is sufficient consideration for a non-compete agreement signed at the beginning of the employment relationship. *Stone Legal Res. Group, Inc. v. Glebus*, 2003 WL 914994,	Initial employment, and under certain circumstances, continued employment, suffices. *Gazzola-Kraenzlin v. Westchester Med. Group, P.C.*, 10 A.D.3d 700, 702 (2d Dep't 2004); *Zellner v. Stephen D. Conrad, M.D., P.C.*, 589 N.Y.S.2d 903, 907 (2d Dep't 1992) (Continued employment	To be considered sufficient in Texas, consideration must give rise to the employer's interest in restraining the employee from competing, and the covenant must be designed to enforce the employer's consideration or return promise. *See Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d. 644, 649-

		at * 5 (Mass. Super. Ct. 2002). For agreements signed after hire, continued employment is <u>not</u> sufficient consideration as required under the Massachusetts Noncompetition Agreement Act. M.G.L. c. 149, § 24L(b)(ii).	sufficient consideration "where discharge was the alternative or where the employee remained with the employer for substantial time after covenant signed."). Payments to the employee. *Lenel Sys. Int'l, Inc. v. Smith*, 966 N.Y.S.2d 618, 621 (4th Dep't 2013). Intangibles, including the employee's receipt of increased: -knowledge; -skill; or -professional status. *Arthur Young & Co., v. Galasso*, 538 N.Y.S.2d 424, 427 (Sup. Ct. New York Co. 1989).	50 (Tex. 2006) (explaining that an employer's promise to provide confidential or proprietary information in exchange for the employee's reciprocal promise not to disclose such information would meet the requirement).
Time Range	Not applicable, as non-competes are not enforceable in California and are void against public policy, unless narrow exception applies. Cal. Bus. & Prof. Code § 16600.	Massachusetts Noncompetition Agreement Act prohibits a restricted period of longer than one year from the date the employment ends. A restricted period may extend to a maximum of two years only if the employee:	Courts have repeatedly held that six months or less is reasonable. *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999); *Natsource LLC v. Paribello*, 151 F.Supp.2d. 465, 470-71 (S.D.N.Y. 2001).	Time restrictions ranging from two to five years have repeatedly been enforced in non-competes. *See Brink's Inc. v. Patrick*, 2014 WL 2931824, at * 5 (N.D. Tex. June 26, 2014).

		-breached her fiduciary duty to the employer; or -has unlawfully taken the employer's property, either physically or electronically.	Courts have found longer restrictions to be either reasonable or unreasonable depending on facts of particular case. *See*, *e.g.*, *Good Energy, L.P. v. Kosachuk*, 49 A.D.3d 331, 332 (1st Dep't 2008) ("The covenant not to compete is reasonable in terms of duration, five years, but unreasonable in terms of geographic area, the entire United States, since Good Energy operates in only eight states.").	
Geographic Restrictions (or other scope of enforcement)	Not applicable, as non-competes are not enforceable in California and are void against public policy, unless narrow exception applies. Cal. Bus. & Prof. Code § 16600.	Under the Massachusetts Noncompetition Agreement Act, a geographic restriction is presumed reasonable when the reach is limited to regions where, for the last two years of employment, the employee: -provided services; -had a material presence of influence. M.G.L. c. 149, § 24L(b)(v).	When determining whether a non-compete is reasonable in its geographic reach, New York courts focus on the facts and circumstances of each case.	Limitations based on the former employee's territory during employment are valid. *Goodin v. Jolliff*, 257 S.W.3d. 341, 352 (Tex. App. Fort Worth 2008, no pet.). Another approach, applicable in some circumstances, is to limit the geographic restriction to the area of the employer's operations.

Is the "inevitable disclosure" doctrine recognized?	The doctrine of inevitable disclosure was specifically rejected in California because it creates an after-the-fact covenant not to compete restricting employee mobility. *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1449 (2002).	Massachusetts courts have not recognized the inevitable disclosure rule. A Massachusetts federal court declined to apply a broad interpretation of inevitable disclosure in a preliminary injunction ruling, finding the doctrine: -may be used to establish irreparable harm after a party seeking an injunction already proved a likelihood of success on the merits; -is not a basis for future misappropriation of trade secrets. *U.S. Elec. Servs., Inc. v. Schmidt*, 2012 WL 2317358, at *8-9 (D. Mass. June 19, 2012).	NY courts have recognized the inevitable disclosure doctrine. However, courts rarely enforce a non-compete based on the inevitable disclosure of trade secrets when there is no evidence of actual misappropriation of trade secrets by the departing employee. *See Marietta Corp. v. Fairhurst*, 301 A.D.2d 734, 737 (3d Dept's 2003). "Mere knowledge of the intricacies of a business is simply not enough … factual allegations must be enough to raise a right to relief above the speculative level." *Janus et Cie v. Kahnke*, 2013 WL 5405543, at * 4 (S.D.N.Y. Aug. 29, 2013).	Texas courts have not adopted the inevitable disclosure doctrine, and the doctrine is not a blanket rule applicable even to nondisclosure provisions in Texas. *DGM Servs., Inc. v. Figueroa*, 2016 WL 7473947, at * 5 (Tex. App. - Houston [1st Dist] Dec. 29, 2016, no pet.).
Other Agreements	Agreements not to solicit customers are not per se unlawful in California. However, they must be very narrowly drawn and are not enforced if they are so broad in effect as to amount to a non-	Non-disclosure and confidentiality agreements are also explicitly excluded from coverage under the Massachusetts Noncompetition Agreement Act. M.G.L. c. 149, § 24L(a). Thus, such	Confidentiality (in the form of a non-disclosure provision) is another form of protection available to employers in NY. It prevents only the use or disclosure of trade secret and confidential	Non-solicitation agreements are analyzed by Texas courts as a covenant not to compete because of their similar purpose and effect. *Shoreline Gas, Inc. v. McGaughey*, 2008 WL 1747624,

	compete. *Kolani*, 64 Cal.App.4th at 407. Generally, regardless of how narrowly a non-solicitation agreement is drafted, California courts will not enforce agreements not to solicit customers unless either: -client is protectable as trade secret; or -enforcement is otherwise necessary to protect the trade secrets belonging to the employer. *Thompson v. Impaxx, Inc.*, 113 Cal.App. 4th 1425, 1429, 1432 (2003).	agreements are not subject to the same restrictions as non-competes.	business information the employee acquired during employment. Because non-disclosure agreements are less likely to be a restraint of trade, they are treated more deferentially than non-competes under New York law. *U.S. Re Cos., Inc., v. Scheerer*, 838 N.Y.S.2d. 37 (1st Dep't 2007).	at * 10 (Tex. App. – Corpus Christi, April 17, 2008, no pet.) Purpose of non-disclosure agreements differ from that of non-competes, because non-disclosure agreements prevent only the disclosure of trade secrets acquired by the former employee during employment. Thus, treated differently and more readily enforced because non-disclosure is not a restraint on trade. *Shoreline Gas*, 2008 WL 1747623, at *10-11.
Agreements entered into at or post-termination	Non-competes not enforceable in California and void against public policy, unless narrow exception applies. Cal. Bus. & Prof. Code § 16600.	Non-compete permitted as part of severance agreement, provided seven business-day period of revocation provided. M.G.L. c. 149, § 24L	Employee Choice Doctrine: NY courts recognize the employee choice doctrine, which provides that breach of a non-compete will result in forfeiture of certain specified benefits. Under this doctrine, courts analyze breach of a non-compete as a contract issue and will not inquire into the reasonableness of the non-compete	Under Texas law, the consideration that the employer gives in the non-compete agreement must have a "reasonable relationship" to the employer's interest in restraining the employee from competing. Interestingly, a monetary payment at termination will not suffice.

			provision, as it does not preclude post-termination competition. The employee choice doctrine applies to voluntary terminations by an employee where the employer conditions the employee's receipt of post-employment benefits on the employee's compliance with a restrictive covenant and the employee has a choice of either: -working for a competitor and forfeiting the post-employment benefits; or -accepting the benefits and not working for a competitor. *Morris v. Schroder Capital Mgmt. Int'l*, 825 N.Y.S.2d 687, 700-01 (2006). A restrictive covenant, including a non-compete, will be enforced without regard to its reasonableness when it satisfied the elements for application of the	The holding in *Exxon Mobil Corp. v. Drennen*, 452 S.W.3d. 319 (Tex. 2014) set up another option, akin to the New York employee choice doctrine. The court held that the agreement did not prohibit the employee from competing, but created significant incentives for the employee to decide (on his own) not to compete. Specifically, if the employee engaged in certain competitive activities, he forfeited restricted stock awarded to him during employment. Texas Supreme Court did not view this arrangement as a non-compete agreement because the employee could choose to compete and forfeit stock.

			employee choice doctrine.	
Remedies	Although there is no California case law addressing remedies available to employers that enforce post-employment non-competes, courts have explored remedies in cases involving post-employment unfair competition by a former employee. These cases typically arise after an employee has taken the employer's alleged trade secrets and used them to compete against it for another employer or in the former employee's own business. *See Reeves v. Hanlon*, 33 Cal. 4th 1140, 1155 (2004). These cases support the availability of: -Injunctive relief (*Reeves*, 33 Cal.4th at 1151; *ReadyLink Healthcare v. Cotton*, 126 Cal.App. 4th 1006, 1015-16 (2005)); -Actual damages for lost profits (*Klamanth-Orleans Lumber v. Miller*,	If the employee breaches the non-compete, a court may award the employer: -injunctive relief (*Shipley Co. v. Clark*, 728 F. Supp. 818, 827-28 (D. Mass. 1990); *Packaging Indus. Grp., Inc. v. Cheney*, 405 N.E.2d 106, 112 (Mass. 1980)). -damages, including lost profits and out-of-pocket (*Nat'l Merch. Corp. v. Leyden*, 348 N.E.2d. 771, 774-75 (Mass. 1976); *My Break Baking v. Jesi*, 214 N.E.2d.53, 56 (Mass. 1966)).	An employer's remedies for an employee's breach of a non-compete may include: injunctive relief and/or monetary damages.	Texas courts may award the employer damages or injunctive relief, or both, for an employee's breach of a non-compete. Tex. Bus. & Com. Code Ann. § 15.51(a). If reformation of the non-compete is required for enforcement, the court may award injunctive relief, but not damages for any breach before the reformation. Tex. Bus. & Com. Code Ann. § 15.51(c). A Texas court may award the employee costs and reasonable attorney's fees incurred in defending an action to enforce the non-compete if the court finds that the employee establishes that the employer knew at the time of the execution of the agreement that the non-compete did not contain reasonable limitations as to time, geography, and scope of

	87 Cal.App.3d 458, 466 (1978)); -Damages based on unjust enrichment (*Morlife, Inc. v. Perry*, 56 Cal.App.4th 1514, 1519, 1528 (1997)); -Liquidated damages, if appropriate (*Weber, Lipshie & Co.*, 52 Cal.App.4th at 649); -Punitive damages (*Cummings Medical Corp. v. Occupational Medical Corp.*, 10 Cal.App.4th 1291, 1294 (1992)).			activity; the limitations imposed a greater restraint than necessary to protect the employer's goodwill or other business interest; and the employer sought to enforce the non-compete to a greater extent than was necessary. Tex. Bus. & Com. Code Ann. § 15.51(c). Employers should be aware that employees and their new employers may seek to use the Texas Citizens Participation Act (TCPA) (Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-.011) to dismiss an employer's non-compete-related claims such as tortious interference and non-solicitation early in the litigation. Employers should discuss the potential applicability of this recently amended statute with experienced counsel before initiating a lawsuit that includes these types of related claims.

				However, in this regard, it should be noted that effective Sept. 1, 2019, the TCPA will no longer apply to cases that seek recovery for misappropriation of trade secrets or corporate opportunities; or seek to enforce a non-disparagement agreement or a covenant not to compete.
What must an employer show when seeking preliminary injunction for purposes of enforcing non-compete?	Not applicable, as non-competes are not enforceable in California and are void against public policy, unless narrow exception applies. Cal. Bus. & Prof. Code § 16600.	To get a preliminary injunction, the employer must prove: -likelihood of success on the merits; -irreparable harm if the injunction is denied; -risk of irreparable harm to the employer. *Packaging Indus.*, 405 N.E.2d. at 111-12. As a general rule, a breach of a non-compete agreement tied to trade secret concerns triggers a finding of irreparable harm. *Aspect Software, Inc. v. Barnett*, 787	To obtain a PI in New York, a party must prove: -likelihood of success on the merits; -irreparable injury if the injunctive relief is not granted; -balance of equities weighs in favor of the employer. *Doe v. Axelrod*, 73 N.Y. 2d. 748, 750 (1988).	Texas courts have held that the Texas Covenants Not to Compete Act governs only final remedies and does not preempt the law that generally applies to preliminary relief. *Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d. 230, 235 (Tex. App. - Houston [1st Dist.] 2003, no pet.). To obtain a PI, the applicant must prove: -a cause of action against the defendant; -a probable right to the relief sought; -a probable, imminent, and

		F.Supp. 2d 118, 130 (D. Mass. 2011).		irreparable injury in the interim. *Cardinal Health*, 106 S.W. at 235.

In sum, it is important for any emerging technology company to think critically about whether it wants to utilize non-compete agreements, and the pros and cons of doing so from a business and hiring perspective. If an emerging technology company decides that restrictive covenants are appropriate for its business needs, it must then carefully consider the jurisdictions where it operates or seeks to operate in order to determine whether the use of such agreements makes sense from a legal perspective.

The above chart outlines just some of the legal considerations which need to be critically analyzed including what is necessary to ensure such agreements if entered into with employees are enforceable, including required consideration, how broad in scope (geographic and activity) such agreements can be, what constitutes a reasonable duration, and under what circumstances such agreements may be disfavored or barred altogether. Employers also need to review what remedies are available in the event a former employee breaches such an agreement, and consider their appetite for pursuing such remedies.

Perhaps most importantly, emerging technology companies need to examine exactly what they are trying to accomplish by entering into such agreements, and whether those business goals can be attained by use of alternative means, such as a non-disclosure or non-solicitation agreement, which may avoid more stringent legal requirements. What should be apparent to any company is that the use of a form non-compete agreement across multiple jurisdictions, subject to varying legal standards and expectations in the marketplace, is usually not a prudent practice.

Contact your GT lawyer for more details on the above chart, and the enforceability of non-competes in your particular jurisdiction.

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