

## Fundamentals of Employment Law

Co-sponsored by:  
The Labor and Employment Law  
Section and the Litigation Section of  
the DC Bar

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## Employment At-Will Doctrine

- An employee is "at-will" if there is no definite term of employment.
  - *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith of Washington, D.C. v. Beards*, 680 A.2d 419 (D.C. 1996)
  - *Weaver v. Harpster*, 975 A.2d 555 (Pa. 2009)
  - *Cave Hill Corp. v. Hiers*, 570 S.E.2d 790 (Va. 2002)
  - *Samuels v. Tschechtelin*, 763 A.2d 209 (Md. 2000)

## Limits of the Employment At-Will Doctrine

- DC, MD, VA and PA recognize limitations to the at-will doctrine
- Terminated employees can bring claims based on:
  - Wrongful discharge
  - Breach of contract
  - Breach of implied covenant of good faith and fair dealing
  - Promissory Estoppel

## Wrongful Discharge

- D.C., MD, VA, and PA each recognize the common law tort of wrongful discharge in violation of public policy as an exception to the presumption of at-will employment.
  - *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997) (en banc).
  - *Adler v. Am Standard Corp.*, 432 A.2d 464 (Md. 1981).
  - *Bowman v. State Bank of Keysville*, 331 S.E.2d 797 (Va. 1985).
  - *Geary v. U.S. Steel Corp.*, 319 A.2d 174 (Pa. 1974)

## Prima Facie Case of Wrongful Discharge

- In the District, a plaintiff must prove:
  - He or she engaged in protected activity (either refusal to violate the law or reporting matters of public concern, such as illegal or unsafe conduct);
  - The employer took an adverse action against the plaintiff; and
  - Causation (i.e., that the employee's conduct was the sole reason for their termination).
    - *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C. 1997) (en banc).

## Oral Contracts

- Oral promises may limit an employer's right to terminate employees at-will in very limited circumstances
- Oral promises that are not definitive and limited in duration will not be enforced against an employer
- DC courts will not enforce an employment contract that violates the statute of frauds, i.e., contracts that cannot be performed within a year
- VA courts have rejected the notion that an implied contract can be based in an oral promise

	<h2>Implied Contracts</h2>
7	<p>– DC, MD and VA courts recognize that at-will employment can be unilaterally modified by statements issued in</p> <ul style="list-style-type: none"> <li>■ Employee handbooks</li> <li>■ Personnel manuals</li> <li>■ Company documents</li> </ul>

	<h2>Implied Contracts</h2>
8	<ul style="list-style-type: none"> <li>■ Employers can defeat implied contracts <ul style="list-style-type: none"> <li>– By showing that the employee failed to comply with employment policy guidelines - <i>Domen v. Nat'l Rehab. Hosp.</i>, 925 F. Supp. 830 (D.D.C. 1996)</li> <li>– By using disclaimers that specify, unambiguously, that an employee's employment remains at will despite statements in applications, handbooks, and other similar company communications that might be construed to the contrary. - <i>Smith v. Union Labor Life Ins. Co.</i>, 620 A.2d 265 (D.C. 1993) <ul style="list-style-type: none"> <li>■ Courts that find a handbook disclaimer to be ambiguous or otherwise imprecisely drafted will give it no effect</li> </ul> </li> </ul> </li> </ul>

	<h2>Implied Contracts</h2>
9	<ul style="list-style-type: none"> <li>■ To prove that an implied contract exists, an employee must show that the employee and the employer <u>clearly</u> intended to form a contract.</li> <li>■ To make this showing the employee must establish that the communication from the employer to the employee contained unequivocal provisions establishing that the employer intended to be bound.</li> </ul>

	<h2>Implied Contracts</h2>
10	<ul style="list-style-type: none"> <li>■ A recent D.C. case found no implied contract to provide severance where the employer's policy and procedure manual stated that "this is not a contract of employment," "employment with the Red Cross is on an at-will basis," and the "Red Cross <i>may</i> provide severance pay." <ul style="list-style-type: none"> <li>– <i>Powell v. Am. Red Cross</i>, 518 F. Supp. 2d 24, 44 (D.D.C. 2008).</li> </ul> </li> </ul>

	<h2>Implied Contracts</h2>
11	<ul style="list-style-type: none"> <li>■ In a recent Maryland case, a pregnant new-hire was ordered onto bed rest and consequently terminated. The employee claimed that oral assurances that she could reapply and be hired after giving birth created a contract. The court disagreed, finding that 1) she failed to provide adequate consideration and 2) mere promissory language does not establish the intent to alter her status as an at-will employee. <ul style="list-style-type: none"> <li>– <i>Eichelberger v. Sinclair Broadcasting Group Inc.</i>, No. L-08-77, 2009 U.S. Dist. Lexis 62690 (D. Md. July 21, 2009).</li> </ul> </li> </ul>

	<h2>Implied Covenant of Good Faith and Fair Dealing</h2>
12	<ul style="list-style-type: none"> <li>■ DC courts have recognized a claim for breach of the covenant of good faith and fair dealing in employment claims. - <i>Paul v. Howard Univ.</i>, 754 A.2d 297 (D.C. 2000).</li> <li>■ MD and VA do <u>not</u> recognize the implied covenant of fair dealing with regard to termination by either side in an at-will employment relationship <ul style="list-style-type: none"> <li>– <i>Suburban Hosp., Inc. v. Dwiggins</i>, 596 A.2d 1069 (Md. 1991)</li> <li>– <i>Sneed v. American Bank Stationery Co.</i>, 764 F. Supp. 65, 67 (W.D. Va. 1991)</li> </ul> </li> </ul>

## Implied Covenant of Good Faith and Fair Dealing

- "Under the law of the District of Columbia, the mutual promise to employ and serve creates a contract terminable at the will of either party. Unless the parties agree to enter into a contract for a fixed duration or a written contract for permanent employment, the employment will be regarded as terminable at will . . . every contract is deemed to contain an implied covenant of good faith and fair dealing that means that neither party shall do anything that would have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" *Drain v. Virtual Geosatellite Holdings, Inc.*, 631 F. Supp. 2d 32, 39 (D.D.C. 2009).

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## Promissory Estoppel

- DC courts have recognized promissory estoppel as a limitation to the employment at-will doctrine.
- To prove promissory estoppel, an employee must show:
  - the existence of a promise;
  - that the promise reasonably induced reliance; and
  - that the promise was relied on to the detriment of the employee.

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## Promissory Estoppel

- PA courts do not recognize a cause of action for promissory estoppel in the context of at-will employment.
- In VA, promissory estoppel is not a cognizable cause of action and the Commonwealth has expressly declined to create such a cause of action.

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## Key Considerations in Hiring

Business Needs

- Attracting the most qualified candidates
- Identifying the best match for the position
- Limiting the burden of hiring process on the company

Legal Requirements

- Anti-discrimination laws
  - Disparate Treatment
  - Disparate Impact
- Americans With Disabilities Act
  - Accommodation Requirements
  - Unlawful Questions



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## Finding the Best Candidate

### Identifying and Communicating Job Requirements

- Functional Job Descriptions
  - Key Duties
  - Key Skills
  - Reverse engineer: what would disqualify a candidate?
- Job Qualifications
  - Minimum Qualifications
  - Preferred Qualifications
  - Avoid Disparate Impact Liability
  - Key Principles: *Job-Related & Avoiding Inconsistent Standards*




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## Finding the Best Candidate

### Targeting Outreach


- Think internally and externally
- Best and diverse recruiting sources and methods
- Make your application form a screening tool
- Accessible alternatives
  - web accessibility initiative
  - phone vs. paper vs. web



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## Legal Requirements and Pitfalls


- **Recordkeeping**
  - One-year retention requirement for “any personnel or employment record made or kept by an employer”
  - Two-year retention period for government contractors with 150+ employees
  - Includes interview notes
  - Ledbetter Fair Pay Act: records relating to pay decisions should be kept *indefinitely*
  - Do not write it down if you would not want a jury to see it



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## Legal Requirements and Pitfalls


- **Employment Selection Tests**
  - Uniform Guidelines on Employee Selection Procedures (1978)
  - Renewed EEOC attention to Employment Testing: [http://www.eeoc.gov/policy/docs/factemployment\\_procedures.html](http://www.eeoc.gov/policy/docs/factemployment_procedures.html)
  - Does the test disproportionately impact a protected group?
  - Validation studies required to show that test is “job-related and consistent with business necessity”
  - Need evidence, not opinions
  - **Bottom line:** No tests without HR approval



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## Legal Requirements and Pitfalls

- **Setting Compensation Equitably**
  - Ledbetter Fair Pay Act
  - Disparate impact
    - starting salaries
    - negotiating differences
  - Consistent criteria
- **Fair Labor Standards Act**
  - Exempt vs. non-exempt
  - Individual liability
- **Other Compensation Issues**
  - Commissions
  - Bonuses
  - Advances or Relocation Stipends



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## Legal Requirements and Pitfalls


- **Avoiding Lawsuits From Former Employers**
  - Intellectual Property Agreements
  - Non-Competition/Non-Solicitation Agreements
- **Background Checks**
  - FCRA consent
  - Risky questions
    - arrests
    - impairments



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## Doing Your Homework

- **Reference checks**
  - Authorization for disclosures
  - Revealing questions
    - eligibility for rehire
    - comparative questions
    - most stellar?
    - cause for concern?
  - Conditional Offers
  - Verifying documents
- **Certifying truth of application**




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## Questions to Avoid

- **Disability**
  - No pre-offer questions
- **Pregnancy**
- **Personal Life**
  - Children & Marriage
  - National Origin
  - Religion
  - Age

Instead...

- Focus on Job Purpose
- Don't Make Assumptions
- Don't Overpromise



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## What You *Should* Say

**Questions**

- Understanding of the nature of this job?
- Ever been asked to leave a job?
- Ever had an internal complaint made about you?
- Any reason cannot meet hours/travel/physical demands?
- Resume gaps?
- Circumstances that need explanation?

**Information**

- Full disclosure
- Consistency




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## Risky Areas

**Stay in Control of the Interview**

- Steer the conversation back on track
- Avoid taking the bait
- “That’s not something we consider”
- “Not something I can promise”
- “Will need to get back to you on that”



**Avoid negative characterizations**

- Defamation
- Skill match, confidence levels, comparative qualifications

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## Transition to the Hire

**Choose Best Qualified Candidate**

- Document basis for choice
- Customer preference issues
- Job-related factors only

**Offer Letter**


- At-will employment
- Conditional offers
- Contract and promissory estoppel
- Signs on to company policies
- Ancillary agreements
  - non-compete
  - intellectual property



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## Background of FLSA


- Fair Labor Standards Act (FLSA) was enacted in 1938 to protect employees from substandard wages, oppressive working hours, and detrimental working conditions. 29 U.S.C. § 202(a).
- Department of Labor updated the FLSA exemption regulations in April 2004.



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## Requirements under the FLSA


- Under FLSA, employers must:
  - Pay minimum wage to employees
  - Pay overtime to employees who work more than 40 hours in a work week
  - Ensure accurate record-keeping
- Regulations identify and exclude certain employees (exempt) from coverage



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## Types of Positions

- Non-Exempt Employees
  - covered under the FLSA for time-and-one-half overtime
- “Common Enterprise” Employees
  - must be paid time and half for all work at ANY of the enterprises



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	<h2 style="text-align: center;">Types of Positions</h2>
31	<ul style="list-style-type: none"> <li>▪ Exempt Employees are not covered by FLSA.</li> <li>• Examples: <ul style="list-style-type: none"> <li>▪ Executive Exemption <ul style="list-style-type: none"> <li>• Exempt: CEO and General Manager</li> <li>• Non-Exempt: Electrician and Car Wash Manager</li> </ul> </li> <li>▪ Administrative Exemption <ul style="list-style-type: none"> <li>• Exempt: CFO and HR Director</li> <li>• Non-Exempt: Clerical Employee and Messenger</li> </ul> </li> <li>▪ Professional Exemption <ul style="list-style-type: none"> <li>• Exempt: Physician and Attorney</li> <li>• Non-Exempt: Paramedic and Field Technician</li> </ul> </li> </ul> </li> </ul>

	<h2 style="text-align: center;">Common Violations of FLSA Overtime Requirements</h2>
32	<ul style="list-style-type: none"> <li>▪ Misclassifying all IT employees as exempt because of the common misperception that all jobs involving computers are necessarily highly complex and require exceptional expertise.</li> <li>▪ Misclassifying pharmaceutical sales representatives as “exempt” under the “Outside Sales” exemption merely because the term “sales” is included in the title of the employees’ position.</li> <li>▪ Misclassifying an employee as “exempt” merely because the employee’s job title includes the term “manager.”</li> <li>▪ Requiring employees to work “off the clock” without pay.</li> <li>▪ Refusing to pay overtime to an employee where overtime was not approved in advance.</li> </ul>

	<h2 style="text-align: center;">Partial Day Docking</h2>
33	<ul style="list-style-type: none"> <li>▪ Generally, an employer cannot reduce an employee’s pay for a partial day because doing so would convert an FLSA exempt employee into a non-exempt employee, thereby rendering the employee eligible for overtime pay.</li> </ul>

	<h2 style="text-align: center;">Scope of FLSA Exemptions</h2>
34	<ul style="list-style-type: none"> <li>▪ Exemptions are narrowly construed against employers, and should be limited to those situations that <u>plainly and unmistakably come within the terms of the exemptions</u>. <i>McCloskey &amp; Co. v. Dickinson</i>, 56 A.2d 442 (D.C. Ap. 1947).</li> <li>▪ To qualify as an exempt employee, an employee must meet <u>both</u> the “duties test” <u>and</u> a “salary basis test” for specified exemption.</li> </ul>

	<h2 style="text-align: center;">How to avoid common mistakes when classifying employees</h2>
35	<ul style="list-style-type: none"> <li>▪ Do not equate the exercise of <u>skill</u> with the exercise of <u>discretion and independent judgment</u>.</li> <li>▪ Do not designate an employee as exempt under the professional exemption merely because the employee has an advanced degree .</li> <li>▪ Do not designate an employee as exempt under “computer employee” exemption merely because the employee’s job title references computers.</li> <li>▪ Do not automatically equate “salaried” with “exempt.”</li> <li>▪ Conduct a thorough job-analysis.</li> </ul>

	<h2 style="text-align: center;">Recent Developments in FLSA Law</h2>
36	<ul style="list-style-type: none"> <li>▪ The Wage and Hour Division of the DOL has moved away from issuing opinion letters under the Fair Labor Standards Act. Instead, DOL will issue Administrator Interpretations, aimed at industries or categories of employees.</li> <li>▪ Requests for letters will be responded to by providing reference to statutes, regulations, interpretations, and cases but without an analysis of the facts presented.</li> </ul>

	<h2 style="text-align: center;">Recent Developments in FLSA Law</h2>
37	<ul style="list-style-type: none"> <li>■ The administrative exemption under 29 U.S.C. § 213(a)(1) does not apply to mortgage loan officers. <ul style="list-style-type: none"> <li>– Administrator’s Interpretation No. 2010-1.</li> </ul> </li> <li>■ Under the administrative exemption, “the indispensability of an employee’s position within the business cannot be the <i>ratio decidendi</i> for determining whether the position is directly related to the employer’s general business operations.” <i>Desmond v. PNGI Charles Town Gaming, LLC</i>, 564 F.3d 688, 692 (4th Cir. 2009)</li> </ul>

	<h2 style="text-align: center;">Recent Developments in FLSA Law</h2>
38	<ul style="list-style-type: none"> <li>■ Drug sales reps may be exempt depending on their actual duties. <ul style="list-style-type: none"> <li>– Compare <i>Kuzinski v. Schering Corp.</i>, 604 F. Supp. 2d 385 (D. Conn. 2009) (not exempt under outside sales exemption – reps cultivate relationships, do not make actual sales), with <i>Smith v. Johnson &amp; Johnson</i>, 593 F.3d 280 (3d Cir. 2010) (senior rep exempt under administrative exemption where duties required her to “form a strategic plan,” and function without direct oversight.)</li> </ul> </li> </ul>

	<h2 style="text-align: center;">Recent Developments in FLSA Law</h2>
39	<ul style="list-style-type: none"> <li>■ A district court held that an employee engages in protected activity when she files an erroneous but good faith complaint with a state wage-hour office. <ul style="list-style-type: none"> <li>– <i>Randolph v. ADT Sec. Servs., Inc.</i>, ___ F. Supp. 2d ___, 15 Wage &amp; Hour Cas. 2d 1811 (D. Md. 2010).</li> </ul> </li> </ul>

	<h2 style="text-align: center;">Recent Developments in FLSA Law</h2>
40	<ul style="list-style-type: none"> <li>■ There is a push to reduce misclassification through increased fines and record keeping requirements <ul style="list-style-type: none"> <li>– Employee Misclassification Act of 2010 (S. 3254, H.R. 5107)</li> <li>– Maryland Workplace Fraud Act of 2010</li> </ul> </li> </ul>

41	<ul style="list-style-type: none"> <li>■ An Employment Agreement is in reality a Separation Agreement</li> </ul>

	<h2 style="text-align: center;">Key Terms of Employment Agreements</h2>
42	<ul style="list-style-type: none"> <li>– Title</li> <li>– Scope of Employment <ul style="list-style-type: none"> <li>• Aligns expectations re responsibilities and reporting</li> <li>• Provides guidance “for cause” and “good reason” early contract termination</li> <li>• Balance employer’s need for flexibility with employee’s desire for certainty</li> </ul> </li> <li>– Activities Outside Work - Moonlighting</li> <li>– Integration Clause</li> </ul>

## Term of Agreement

### ■ At-Will

- Employer or employee may terminate the agreement at any time for any legal reason
- In VA, an employer need not give advance notice of termination. "Reasonable notice" does not mean advance notice.
  - *Calquin v. Doodycalls Fairfax VA LLC*, No. 1:09cv543 (AJT/IDD), 2009 WL 2947367, 1, Slip Copy (E.D. Va. Sept. 11, 2009).

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## Term of Agreement

### ■ Terms of Years

- limits termination before an agreed date to specific circumstances
- security to parties
- leverage to attract candidates

### ■ Length of term - ?

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## Termination

### Expiration of Term

- Notice of renewal in writing
- Automatic renewal

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## Early Termination

- "Cause" – What circumstances enable an employer to terminate before expiration of term with no further obligations?
- "Good Reason" – What circumstances enable an employee to terminate before expiration of term without losing benefits?
- Death or Disability
- Voluntary

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## Early Termination (con't)

### "Cause" Definition

- Employers want it broad with substantial discretion
- Employees want:
  - specific and egregious violations
  - notice and opportunity to cure
- Financial Consequence:
  - salary and benefits to termination date

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## Early Termination (con't)

### "Good Reason" Definition

- Employers want:
  - specific
  - written notice and opportunity to cure
- Employees want it broad with substantial discretion
- Financial Consequences:
  - severance
  - benefits
  - stock

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## Early Termination (con't)

- Employers may include language requiring a release in the event of Good Reason termination
  - Also consider "change in control"
- Severance Considerations
- duration left in agreement or set amount
  - mitigation due to new employment

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## Compensation & Benefits

- Base Salary
  - Expectations regarding annual increases
- Bonus
  - guaranteed
  - discretionary
- Stock options and other incentive compensation
- Benefits – Medical insurance, life insurance
- Vacation
- 401(K) or Supplemental Executive Retirement Plans
- Auto allowance, financial/estate planning assistance

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## Post Employment Restrictions

- Competition
- Solicitation
  - Customers
  - Employees
- Duration
- Confidentiality
- "Claw Back" provisions for violation

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## Dispute Resolution

- Scope – what will it cover
- Mandatory mediation with notice of claims
- Venue for proceeding
- Choice of Law
- Arbitration
  - number of arbitrators
  - applicable rules
- Attorney's fees

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## Other Considerations


- Federal Tax Considerations
  - Sections 162(m), 409A (restrictions on deferred compensation)
- Other Federal Laws
  - Emergency Economic Stabilization Act of 2009 which includes the Troubled Asset Relief Act
  - American Recovery and Reinvestment Act of 2009


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## Non-competition Agreements


*Non-competition agreements are, in many circumstances, enforceable and should be taken seriously. This rule applies to any non-competition agreement that candidates and employees have signed with previous employers as well as any that you are requiring them to sign as a condition of employment.*


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	<b>Non-competition Agreements</b>
55	<ul style="list-style-type: none"> <li>■ Employers require employees to sign non-competition agreements to prevent employees from taking their talents and the employer's trade secrets to competitors</li> <li>■ Courts critically examine and narrowly construe non-compete agreements</li> </ul>
	

	<b>Is the noncompetition agreement/restrictive covenant enforceable?</b>
56	<ul style="list-style-type: none"> <li>■ An employer seeking to enforce a non-compete must show that the restrictive covenant is supported by consideration</li> <li>■ Courts will likely enforce a non-competition agreement that is <ul style="list-style-type: none"> <li>– narrowly drawn to protect the employer's legitimate business interest</li> <li>– not unduly burdensome on the employee's ability to earn a living</li> <li>– not against public policy</li> </ul> </li> </ul>
	

	<b>Is the noncompetition agreement/restrictive covenant enforceable?</b>
57	<ul style="list-style-type: none"> <li>■ Courts consider <ul style="list-style-type: none"> <li>– The temporal scope of the non-compete</li> <li>– The geographic scope of the non-compete</li> <li>– The clarity and unambiguous nature of the non-compete</li> </ul> </li> <li>■ Courts are less likely to enforce restrictive covenants that hinders an employee's ability to earn a living</li> </ul>
	

	<b>Is the noncompetition agreement/restrictive covenant enforceable?</b>
58	<ul style="list-style-type: none"> <li>■ The District has adopted §§ 186-188 of the Restatement (Second) of Contracts: Restraint of Trade (1981). <ul style="list-style-type: none"> <li>– <i>Deutsch v. Barsky</i>, 795 A.2d 669, 675 (D.C. 2002).</li> </ul> </li> <li>■ A balancing test is used, weighing the burden on each party and the public. <ul style="list-style-type: none"> <li>– Factors include: geographic scope, nature of geographic region and market, length of time, profession, etc.</li> </ul> </li> </ul>
	

	<b>Evolving Public Policy</b>
59	<ul style="list-style-type: none"> <li>■ A covenant is likely to be invalid if "...the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public." <i>Deutsch</i>, 795 A.2d at 675.</li> <li>■ Public policy consideration can defeat enforcement of a non-compete, such as restrictions that would limit access to medical or legal services, or restrict innovation of life-saving products, such as devices that defeat improvised explosive devices.</li> </ul>
	

	<b>Enforceable Non-Competes</b>
60	<ul style="list-style-type: none"> <li>■ <b>1. Minimize the use of "one-size-fits-all" restrictive covenants.</b> While it is advisable for employers to require <u>all</u> employees to sign non-disclosure/confidentiality agreements upon commencement of their employment (or thereafter), non-competes and other types of restrictive covenants are not necessary or suitable for all employees. Indeed, many employers do not have a true legitimate business reason for asking lower-level administrative employees to sign such agreements, and they will probably be unenforceable. In contrast, certain managers, directors, officers, and other executives may be appropriate candidates for broad non-competes, and salespersons and others involved in customer relationships are suitable candidates for customer restrictions.</li> </ul>
	

	<b>Enforceable Non-Competes</b>
61	<p><b>2. Do not over-step your true legitimate business interests.</b> Non-competes and other restrictive covenants are generally enforceable to the extent they serve to protect the employer's legitimate business interests. They should be limited in terms of scope, geographic scope and duration. The more limited, the more enforceable.</p>

	<b>Enforceable Non-Competes</b>
62	<p><b>3. Limit the use of broad non-competes where customer restrictions will suffice.</b> Traditional non-competes (where an employee is absolutely barred from working for a competitor) are more difficult to enforce in court than restrictive covenants limited to protection of customer relationships. Salespersons, in particular, are oftentimes perfect candidates for customer restrictions in lieu of broad non-competes.</p> <p>In addition, in some states, non-competition agreements are particularly disfavored and additional considerations come into play.</p>

	<b>Enforceable Non-Competes</b>
63	<p><b>4. Include clauses designed to provide notice to the former and future employer.</b> It is useful to include provisions that require notification by the departing employee of the identity of his or her new employer and anticipated duties. Early notice of this information gives you an opportunity for enforcement or threatened enforcement if necessary. Also, by requiring the employee to notify his or her new employer of the restrictive covenants, you have a better chance of that employee not being hired or employed in violation of his or her enforceable covenants.</p>

	<b>Examples</b>
64	<p>For example, in <b>Virginia</b>, provisions limiting an employee for working for a competitor in <i>any capacity</i>, have been held to be unenforceable. Therefore, it is important that employers who desire non-competition provisions limit the employees from providing the same or similar services that he/she is performing for that employer for a competitor. <u>This is the single biggest issue that we have seen recently with non-competes governed by Virginia law.</u> It is important to understand that while some courts may narrow the scope of a non-compete (called blue-penciling), Virginia will not, but instead will simply hold the non-competition agreement invalid.</p>

	<b>Examples</b>
65	<ul style="list-style-type: none"> <li>• <i>Omniplex World Servs. Corp. v. US Investigations Servs., Inc.</i>, 270 Va. 246 (Va. 2005): affirmed lower court's holding that a non-competition agreement provision that prohibited an employee from performing "any services. . . for any other employer in a position supporting OMNIPLEX's Customer" overbroad and not enforceable--because the provision precluded the employee from working for any business that provided support of any kind to the Customer--not only security staffing businesses that were in competition with Omniplex. Therefore, for example, the restriction would prohibit the employee from working as a delivery person for a vendor, even though the vendor was not a staffing service competing with Omniplex.</li> </ul>

	<b>Examples</b>
66	<ul style="list-style-type: none"> <li>• <i>Modern Environments, Inc. v. Stinnett</i>, 263 Va. 491 (Va. 2002): affirmed the lower court's ruling that a covenant that "prevented the former employee from working in any capacity for a competitor of her former employer" was overbroad.</li> <li>• <i>Redden v. Liptau</i>, Nos. CH-2005-4914 &amp; CL-2008-13395, 2010 Va. Cir. Lexis 32 (Fairfax County Cir. Feb. 16, 2010): upheld a covenant because it was (1) narrowly drawn to protect the employer's legitimate business interest, (2) not unduly burdensome on the employee's ability to earn a living, and (3) not against public policy. The court also observed that an employee could not seek relief from a covenant when he was terminated for conversion.</li> </ul>

	<b>Examples</b>
67	<ul style="list-style-type: none"> <li>• <i>Lampman v. Dewolff Boberg &amp; Assocs., Inc.</i>, 319 F. App'x 293 (4th Cir. 2009): covenant unenforceable because it lacked a geographic limitation or valid substitute and prohibited employment with entities that did not compete the employer; employer lacked a legitimate interest in prohibiting competition in portions of the world in which they did not operate. The employer did not commit negligent misrepresentation by omission when it neglected to tell the employee that he was a candidate for termination and a supervisor told the employee to keep his head down and keep doing a good job.</li> </ul>

	<b>Resignation vs. Discharge</b>
68	<ul style="list-style-type: none"> <li>■ Courts in DC, MD and VA have not adopted a bright line rule on the enforceability of non-competes in termination cases</li> <li>■ PA courts may not enforce non-compete agreement where employee was terminated. <i>Insulation Corp. of Am. v. Brobston</i>, 667 A.2d 729 (Pa. Super. 1995).</li> </ul>

	<b>Blue Pencil Rule</b>
69	<ul style="list-style-type: none"> <li>■ DC and MD allow courts to “blue pencil” or strike objectionable provisions from the restrictive covenant and enforce the remaining valid provisions</li> <li>■ PA will modify an otherwise overbroad clause</li> <li>■ VA law prevents courts from revising or “bluepenciling” overly broad portions of a non-compete to sever unenforceable provisions.</li> </ul>

	<b>Strategies for Contesting and Defending Against Non-Compete Agreement Litigation</b>
70	<ul style="list-style-type: none"> <li>■ Consider Filing a Declaratory Judgment Against the Employer</li> <li>■ Assert the “Unclean Hands” Defense</li> <li>■ Potential Tort Liability for Attempting to Enforce an Unenforceable Non-Compete</li> <li>■ Request the Inclusion of a Garden-Leave Provision</li> <li>■ Examine evolving public policy</li> </ul>

	<b>Consider Non Solicitation Agreements as an Alternative</b>
71	<p><b>Employers should consider Non-Solicitation Agreements as an Alternative to Non-Competes</b></p> <p><b>Customers:</b></p> <ul style="list-style-type: none"> <li>- Former, Current, Prospective</li> </ul> <p><b>Employees:</b></p> <ul style="list-style-type: none"> <li>- Former (how former?)</li> <li>- Current</li> </ul>

	<b>Avoiding Liability in Hiring Employees Subject to Restrictive Covenants</b>
72	<ol style="list-style-type: none"> <li>1. Ask candidates during the interview process whether he/she has any Employment Agreements. Do not simply ask the candidate whether he has any restrictive covenants that apply—look at the agreement itself. The candidate may be incorrect.</li> </ol>

	<p align="center"><b>Avoiding Liability in Hiring Employees Subject to Restrictive Covenants</b></p>
73	<p>2. <b>Seek professional guidance.</b> If it appears that the candidate is subject to an applicable restrictive covenant—seek advice <u>before</u> hiring the candidate. <b>DO NOT SIMPLY ASSUME THAT THE RESTRICTIVE COVENANT IS NOT ENFORCEABLE.</b></p>

	<p align="center"><b>Avoiding Liability in Hiring Employees Subject to Restrictive Covenants</b></p>
74	<p>3. <b>Options/Risks.</b> If it appears that the candidate is subject to an enforceable non-competition covenant, it is time to evaluate next steps. It may be best not to hire that employee or to require a letter from his or her former employer that that employer acknowledges that the restrictive covenant is not applicable to or will not be enforced against your organization before hiring the individual. Otherwise, you risk a costly legal battle.</p>

	<p align="center"><b>Avoiding Liability in Hiring Employees Subject to Restrictive Covenants</b></p>
75	<p>4. <b>Best practices for all new hires.</b> It is always a good idea to have new hires sign a simple agreement that states that they agree not to disclosure to you, or use any confidential/proprietary information of their prior employer. If the Employee is subject to a limiting condition (such as not selling to a particular client), but still may work for you, a statement that he or she agrees that he or she will not engage in the restricted activity should also be included in this agreement.</p>