Man Overboard: Florida's Changing Non-Compete and Theft of Trade Secrets Landscape

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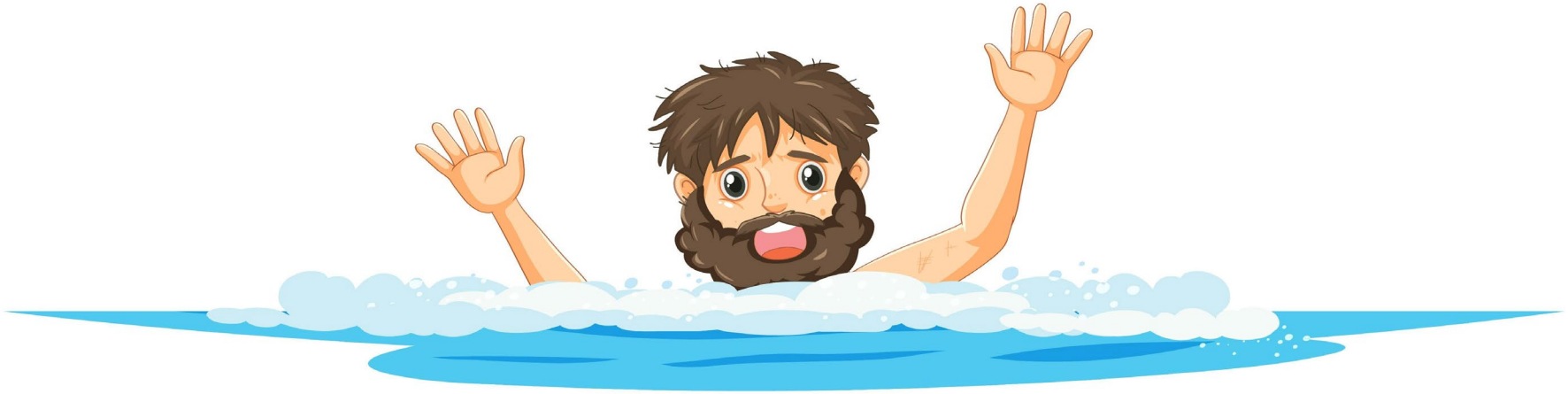

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Agenda

1. CHOICE Act Overview
2. Material Changes to Florida Law brought about by CHOICE Act
3. Panel Discussion over Certain Changes
4. Panel Discussion over Expected Effect on Businesses
5. Takeaways & Recommended Course of Action

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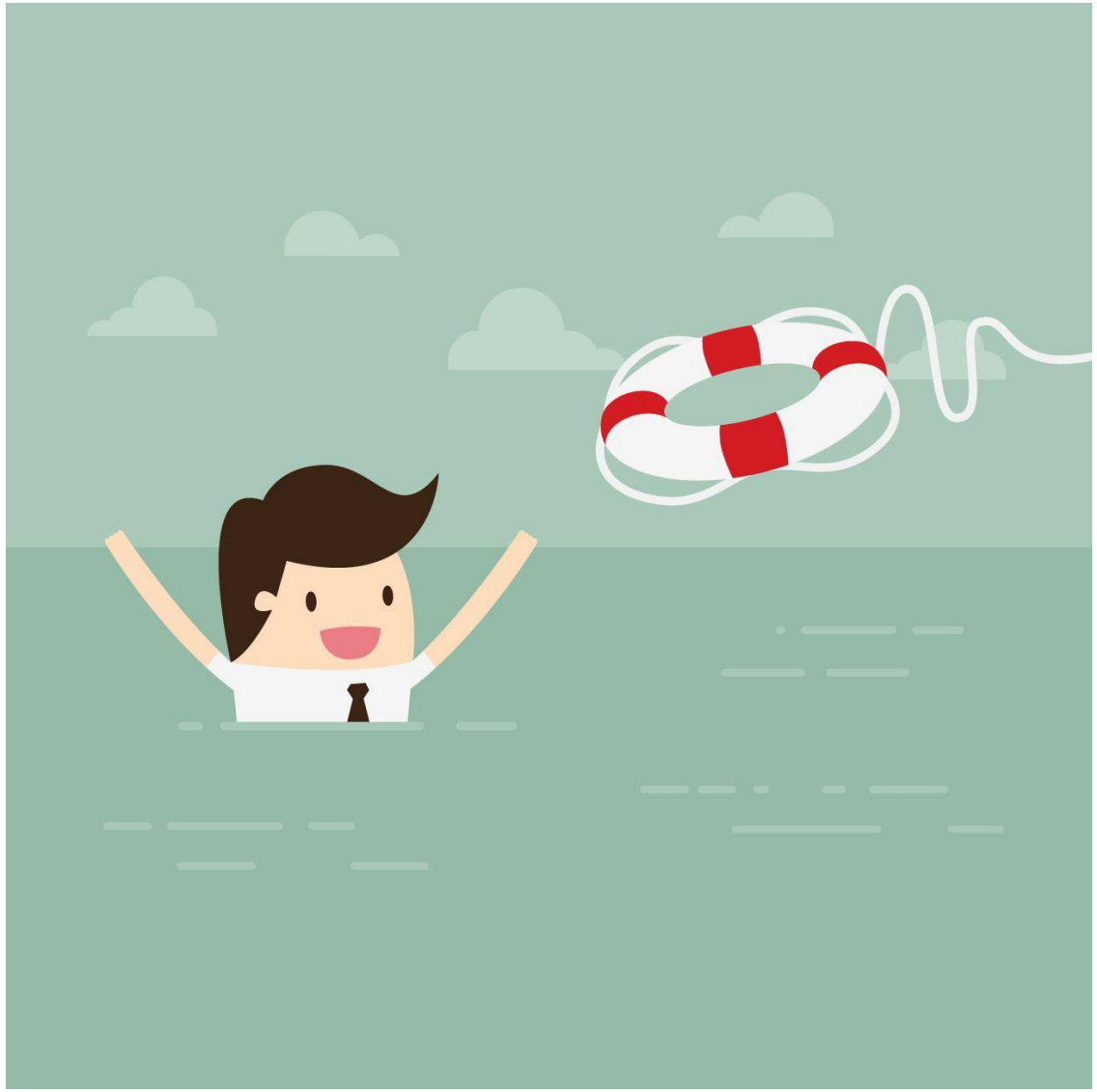
Florida CHOICE Act

- Effective 7/3/25
- Does not replace or repeal Fla. Stat. §542.335 (governing Florida non-competes since late 1990s)
- Essentially rewrites Florida non-compete law for “covered employees”
- Substantial changes to TRO procedures
- Greatly broadens permitted temporal scope of non-competes



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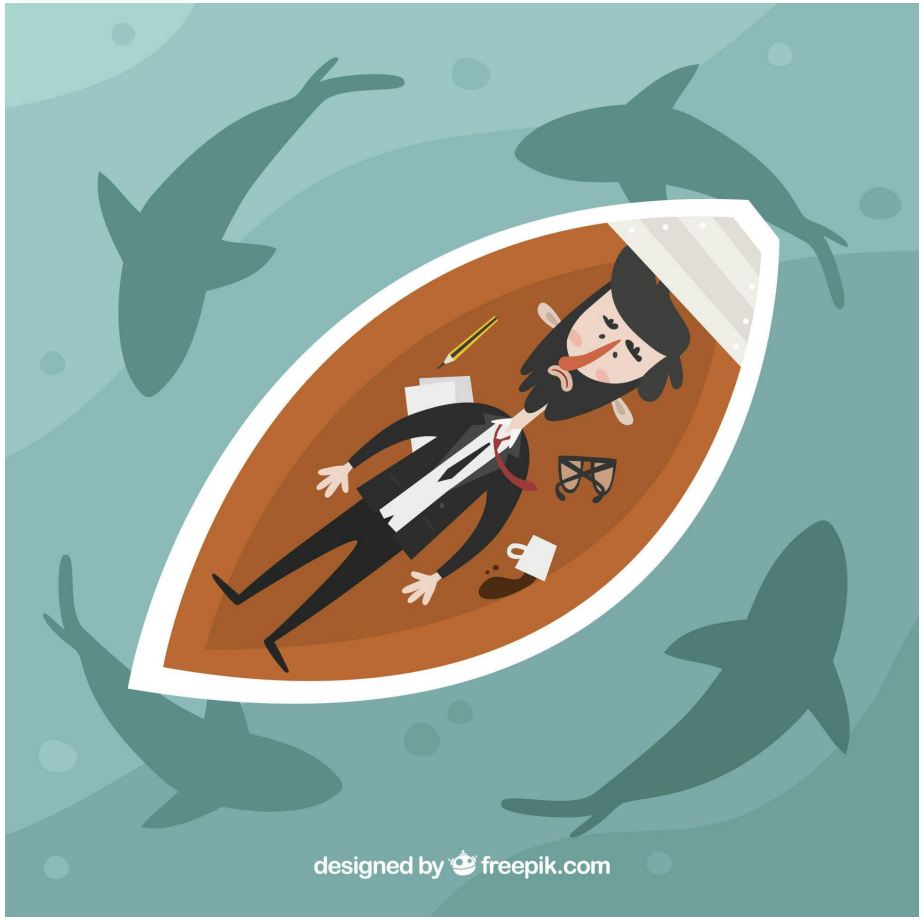
Key Features of CHOICE Act

- Substantial expansion of permissible non-compete term (up to four years)
- Heightened administrative requirements upon presentment
  - At least seven days' written notice before execution of agreement
  - Mandatory written notice informing employee of right to consult consul
  - Employee must acknowledge, in writing, receiving confidential information or access to customer relationships
- Act offers program choices to employers (garden leave versus none)
- Applies to "covered employees", who are defined to earn two times the annual mean wage of all occupations in Florida, currently $62,990 (meaning CHOICE Act only applies to employees earning $125,980 or more)
- Almost guaranteed employer "win" if required to enforce.

Old v. New: §542.335 & CHOICE Act



- Presumptions of validity different
  - §542.335 presumed agreements less than six months valid and over two years invalid
  - CHOICE Act – silent regarding term length, but finding that NDAs and non-solicitation restrictions are "inadequate to protect" "confidential information and client relationships."
- Jurisdictional requirements different
  - §542.335 – burden on the party party seeking to enforce to plead and prove a legitimate business interest; TRO dependent on traditional equitable evaluation by court
  - CHOICE Act – court is required to preliminarily enjoin employee upon application by employer; burden on employee seeking to dissolve TRO to show by clear and convincing evidence application of limited considerations
- Award of attorney's fees (§542.335 – prevailing party; CHOICE Act – prevailing party, but odds stacked heavily in employer's favor)
- Who it applies to (§542.335 – a host of scenarios; CHOICE Act - only "covered" employees).

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Key Features – Non Competes

- Allows restrictions of up to 4 years
- Either through a garden leave provision or a traditional non-compete
  - Garden leave is geography agnostic. Essentially employee provides extended notice so employee never leaves employer's employ
  - Traditional non-compete requires geography be defined in agreement.
- Certain notice requirements exist (failing to provide renders agreement unenforceable)
- Open questions
  - How does CHOICE Act and §542.335 coexist?
  - Does the CHOICE Act apply to independent contractors?

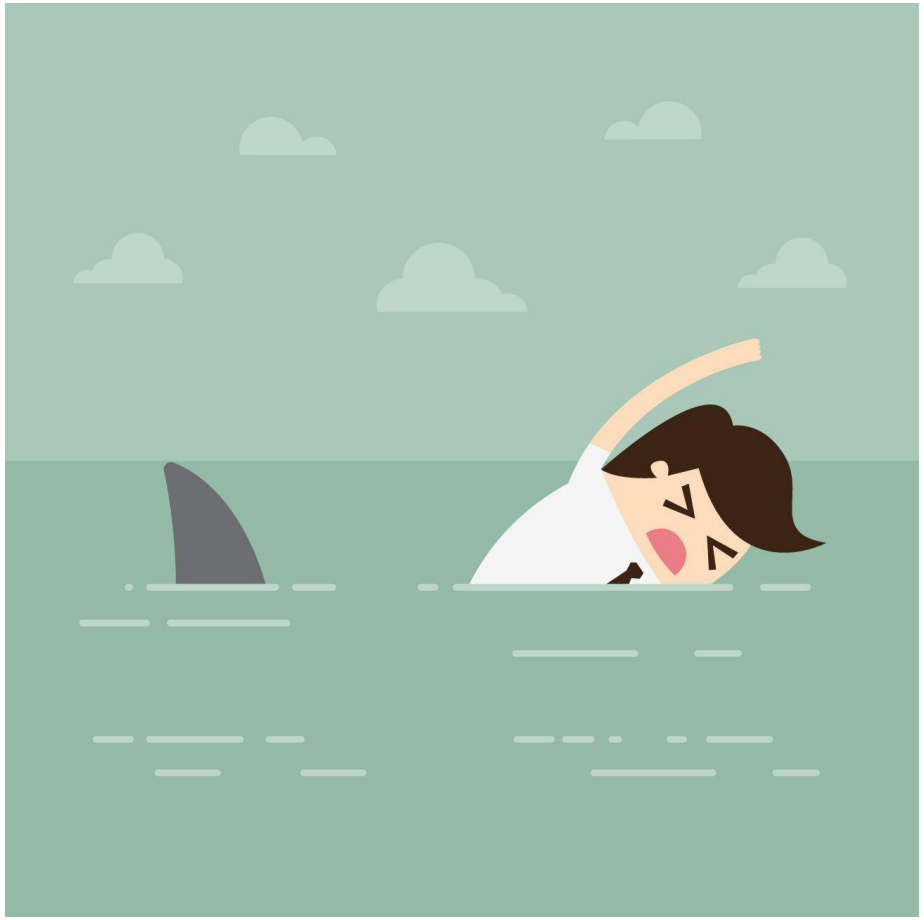
Key Features – Garden Leave

- Garden leave requires employer to pay the employee to sit on the sideline, but does not include discretionary incentive compensation
- Act is ambiguous on whether benefits must be provided
- Employee need not continue to provide work for employer after first 90 days of notice period
- Employee may engage in “nonwork activities” during notice period, but term not defined
- Employee may work for another employer during notice period, with the permission of the employer.
- Notice period may be reduced at employer’s discretion and upon written notice, but noncompete restriction only lasts so long as leave is paid.

Key Feature – Judicial Discretion

- Court ***required*** to enjoin employee where employer seeks to enforce a "covered" agreement.
- Court may only modify or dissolve preliminary injunction where employee or new employer prove by clear and convincing evidence, without providing any confidential information that:
  - Employee will not provide any services similar to ones provided by former employer during three years prior to garden leave beginning or noncompete starting
  - Will not use former employer's confidential information
  - New employer not engaged in or planning on business similar to prior employer; or
  - Former employer not paying garden leave salary and benefits and failed to cure
- Employer can also prospectively withhold or reduce garden leave salary/benefits for "gross misconduct" but term undefined.
- Fee shifting still available (like §542.335), but very hard for employee to "prevail."

Key Feature – Choice-of-Law & Venue



- Act purports to eliminate conflicts of law in favor of application of this statute
- Many states have statutorily voided out-of-state choice-of-law and venue provisions impacting employees in those states.
  - California, Massachusetts, Minnesota, Colorado, Washington
  - How does CHOICE Act square with these prohibitions? Does this reward first-to-file litigation?
  - How does CHOICE Act square with choice-of-law and venue analysis?

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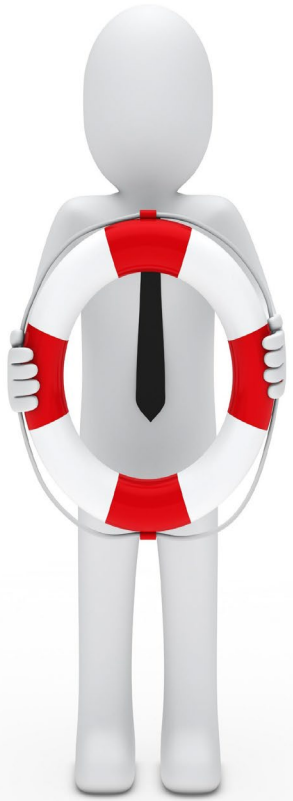
Expected Impact on Businesses

- Impact on current non-compete agreements?
- Potential impact on recruitment?
- Potential ambiguities in the statute
  - §542.335 remains good law; how does presumption of invalidity for agreements over two years square with new statute?
  - Salary threshold definition differs in statute (some places county, some places state). How do employers respond?
  - Statute applies to covered employees, defined as meeting a “salary” threshold. How do employers respond to independent contractors?



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Key Takeaways & Recommendations

1. Act appears ripe for judicial challenges due to ambiguities and scope. It may necessitate employers to proceed with caution in reformulating restrictive covenant program.
2. Employers adopting new programs reliant on CHOICE Act must ensure they comply with notice provisions for covered employees.
3. Due to county-versus-state ambiguities regarding pay figure, adopters should err on higher income number.
4. Despite removal of legitimate business test, employers may still want to craft program to fit legitimate business test and four-years may be longer than necessary to protect interests.
5. Employers should consider the impact on employee recruitment and morale if deciding to adopt CHOICE Act prohibitions.

Any Questions?

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Thank You!

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