

Employee Mobility in 2026:

Developments in Restrictive Covenants
and Retention Pay Laws

What a law firm
should be.

Presenters



**JACK
BLUM**

*Shareholder
Polsinelli*

Washington, DC

202.772.8483

jack.blum@polsinelli.com



**JASON
WEBER**

*Shareholder
Polsinelli*

Dallas, TX

214.754.5741

jweber@polsinelli.com



**PATRICIA
DONKOR**

*Senior Corporate Counsel
Steampunk*

McLean, VA

202.599.5776

patricia.donkor@steampunk.com

Agenda

- Latest Developments in the World of Restrictive Covenants
- Practical Steps for Employers to Protect the “Crown Jewels”
- Trends in Stay or Pay Agreement Enforcement



Latest Developments in the World of Restrictive Covenants

Types of Restrictive Covenants

- Noncompete agreements
- Nonsolicitation of:
 - Customers
 - Employees
- Inventorship/Assignment agreements
- Stock Option/Severance Pay agreements
- Stay or Pay Agreements



Benefits of Restrictive Covenants

- Protect trade secrets and proprietary information known by employees
- Retain customer goodwill and relationships developed by employees
- Prevent appropriation of business lines through “lift outs” and mass poaching
- Retain employees that the company has invested in developing

What is Happening with the FTC?

- FTC's 2024 Final Rule banning nearly all non-competes appears dead for now
 - Enjoined by courts – FTC abandoned appeal in 2025
- FTC is embracing a case-by-case non-compete focus
 - Particularly overbroad/non-tailored non-competes, esp. with low paid workers
 - Anti-competitive activity like covenants that entrench monopolies or coordination among competitors
 - Sensitive industries like health care

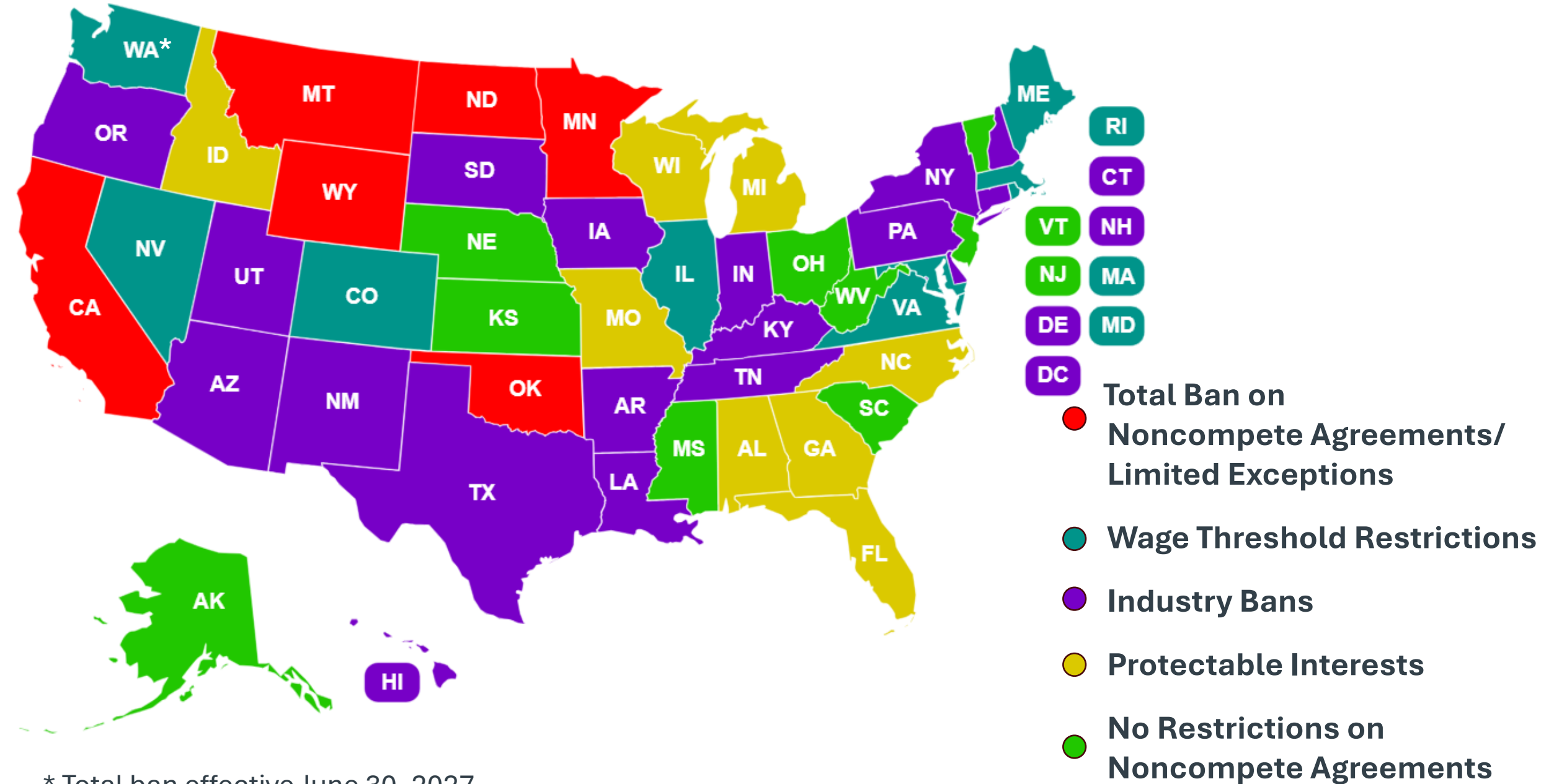
What About the NLRB?

- 2023 NLRB General Counsel memorandum stated position that non-competes and other restrictive covenants can chill NLRB Section 7 rights for employees to engage in protected activity
- Significant because NLRB action would allow affirmative “make-whole relief” for an unlawful agreement, not just invalidating the agreement
- Non-compete memorandum rescinded in Feb. 2025 with change in administration
- Unlikely that the NLRB will focus on this issue in the Trump administration

Enforcement at the State Level

- The trend of state-level limitations on non-competes and restrictive covenants remains intact
- New ban on non-competes in Washington, severe limitation in Wyoming – joining prohibitions in California, Minnesota, North Dakota, Oklahoma
 - Bans under legislative consideration in New York, New Jersey, Maryland, Illinois, Ohio, and Tennessee
 - Virginia – banned for non-exempt employees – sales employee issue
- Many states have enacted or expanded limitations in the healthcare sector - Arkansas, Colorado, Indiana, Louisiana, Montana, New Hampshire, Oregon, Utah, and Texas
- Bucking the trend – Florida and Kansas enacted laws in 2025 making non-competes **easier** to enforce

Current State Enforcement

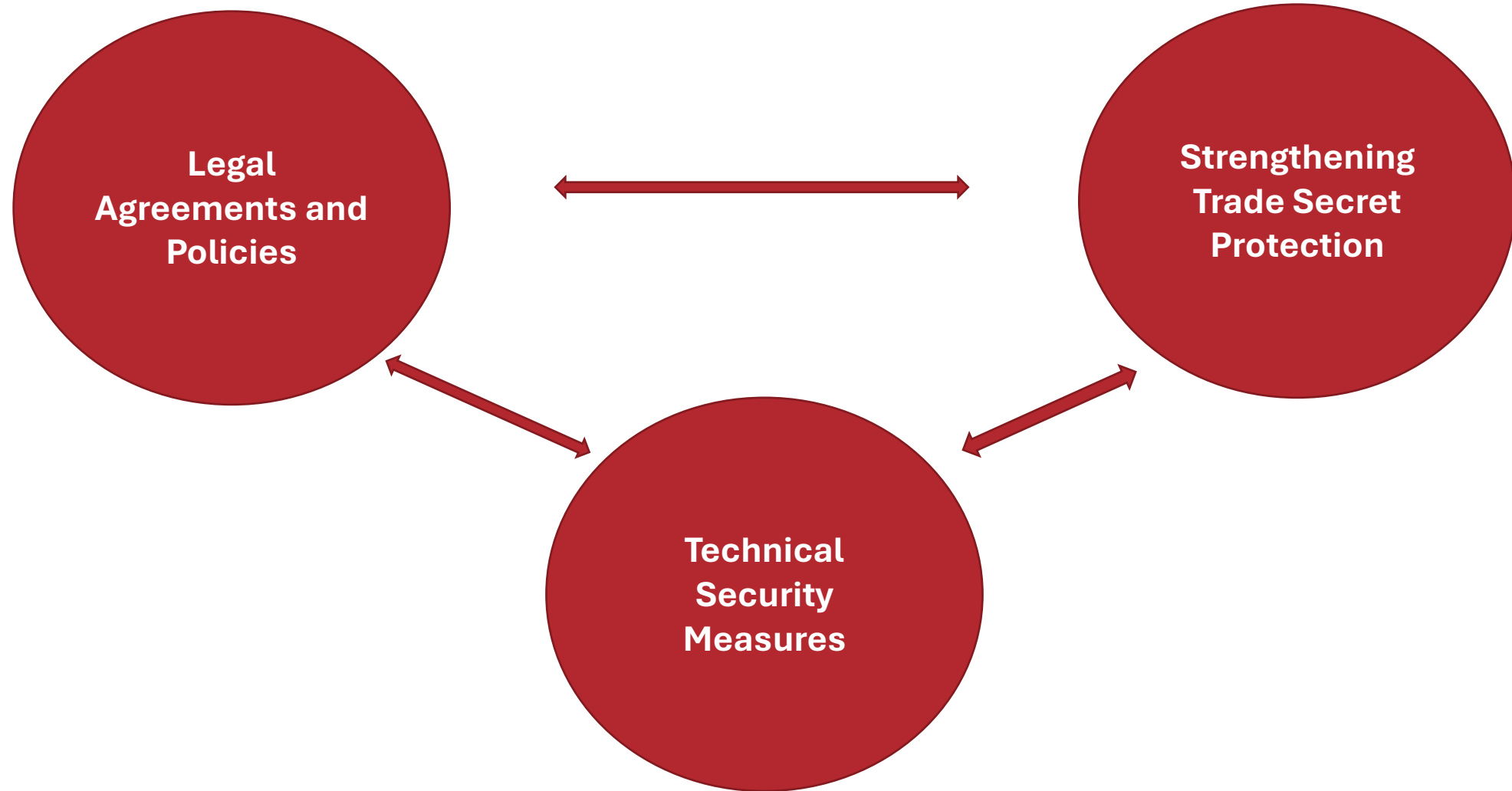


Delaware Chancery Court Trends

- Delaware is a popular choice of law and venue selection due to corporate incorporation and the State's priority on freedom of contract
- In recent years, several negative cases from the Chancery Court have rejected the enforcement of restrictive covenants
- Issues that are tripping up employers:
 - Prohibition on competition with corporate affiliates
 - Not treating covenants in equity agreements under a more lenient standard
 - Questioning consideration when equity is subject to forfeit or buyback on termination
 - Vague scope of restrictions – “competitive or substantially similar products or services”
 - Reluctance to enforce choice of law for non-Delaware employees when only connection is incorporation
- Two recent Delaware Supreme Court cases revived dismissed non-compete cases

Practical Takeaways for Employers

With Less Reliable Non-Competes, How Can Employers Protect Themselves?



Strengthening Agreements and Policies

- The days of the “one size fits all” agreement are over
- Agreements should be tailored to different sub-sets of employees:
 - By geographic location
 - By job function
- Do you actually need a non-compete or is a non-solicitation or NDA sufficient?
- Bolstering related policies:
 - Confidentiality
 - Conflicts of interest
 - Information security

Strengthening Trade Secret Protections

- Trade secret means essentially any type of information if:
 - The owner of the information has taken reasonable measures to keep such information secret; and
 - The information derives independent economic value from not being generally known or readily ascertainable to competitors
- Difficult question in some cases – **What are your trade secrets?**
 - What is the “secret sauce” that gives your company an advantage over a competitor providing similar products or services?
- Audit competitive information that is potential trade secret material:
 - What is it? Identify, describe, and document processes and methods alleged to be trade secrets
 - Who has access to the information?
 - How it is being protected?

Protecting Your Business Throughout the Employment Lifecycle

- Employers can take steps at every stage of the employment relationship to protect their competitive interests:
 - Pre-hire
 - During employment
 - Post-separation

Best Practices at the Onboarding Stage

- Identify agreements applicable to the candidate
 - Risk matrix:
 - How valuable is the opportunity to hire the candidate?
 - How enforceable is the agreement?
 - Is the former employer likely to perceive a threat?
 - Will the candidate's employment cause a direct loss?
- Onboarding guidelines expressly instructing new employee not to engage in “bad acts”
- Structuring positions to mitigate risk



Best Practices During Employment

- Security measures to “close the barn door”
 - Also necessary to meet the “reasonable efforts” of secrecy requirements under trade secret statutes
- Limiting access to sensitive information (sales, R&D, etc.) to employees with need to know
 - E.g., should every sales employee have access to entire customer list/data?
- BYOD issues - how to ensure company can monitor and control employee use of personal devices and accounts?
- Limitations on channels to extract data (personal emails, Dropbox, USBs, etc.)

Best Practices in Offboarding

- For employees with customer relationships, have a plan to transition and fortify the company's business with those customers – don't let the employee beat you to the punch
- Tighten protocols for cutting off employee system access and retrieving devices
- Program to forensically review system activity of separated employees for suspicious activity
- Reminder of obligations and company's expectation of compliance

The Cease and Desist Letter

■ Issues in Sending to Former Employees:

- Who sends – inside or outside counsel?
- Whether to send to the new employer or not?
- Investigation and specific facts are critical
- What is the endgame?

■ Issues When Receiving from a New Employee's Former Employer:

- Preservation of documents and ESI
- Analysis of possible exposure
- Who submits the response?
- How to address the former employer's concerns?

Current Trends in Stay or Pay Agreement Enforcement

Stay or Pay Agreements

- Latest trend in employment regulation addresses agreements requiring employees to pay/repay employer if they separate from employment within a certain period
- Designed to address scenario where employee must repay employer for mandatory job-specific training, but language sweeps in and prohibits or regulates many common employee benefits:
 - Sign-on bonuses
 - Forgivable promissory notes
 - Retention bonuses
 - Relocation bonuses/assistance
 - Tuition assistance or reimbursement
- Although well-intentioned, these laws may limit employers' ability to offer programs that are beneficial to employees, and may also cause tax consequences to the extent repayment obligations are eliminated



Stay or Pay Agreement Enforcement Trends

- Generally being treated as “backdoor noncompetes” and unfair restraints on mobility
- At the federal level – similar to non-competes:
 - FTC’s final rule enjoined
 - NLRB – Biden-era memos rescinded
 - Focus shifted to case-by-case enforcement
- Emerging state bans – Connecticut, California, New York (effective February 13, 2027)
- Other states have restrictions – Pennsylvania, Colorado, Wyoming, Indiana

California Stay or Pay Law

- Applicable to agreements entered after January 1, 2026
- With some exceptions, prohibits employers from including in any employment contract a requirement that “workers” repay a “debt” if the employment relationship ends
- Notable exceptions:
 - Tuition assistance – must be separate agreement, cannot be condition of employment, specific repayment amount, repayment must be prorated, triggered by involuntary termination only if “misconduct”
 - Bonuses/monetary payments – must be “at outset of employment” (what about retention bonuses or in-service relocation?), procedural requirements, separate agreement, prorated, requirement for misconduct
- Private right of action (including class actions) – entitled to actual damages or \$5,000 per affected worker, whichever is greater, upon prevailing



New York Stay or Pay Law

- Passed, criticized, and immediately amended – now effective February 13, 2027
- Prohibits employers from requiring, as a condition of employment, that an employee execute an “employment promissory note” – defined as agreement for employee to repay employer if they leave before a specific time
- Notable exceptions:
 - Tuition assistance – exact same requirements as California
 - Bonuses/monetary payments – fewer requirements than California, no prorating, but repayment not required if involuntary termination other than for misconduct or job duties or requirements “were misrepresented to the employee”
- No private right of action

QUESTIONS?



POLSINELLI®

What a law firm
should be.™



Polsinelli PC provides this material for informational purposes only. The material provided herein is general and is not intended to be legal advice. Nothing herein should be relied upon or used without consulting a lawyer to consider your specific circumstances, possible changes to applicable laws, rules and regulations and other legal issues. Receipt of this material does not establish an attorney-client relationship.

Polsinelli is very proud of the results we obtain for our clients, but you should know that past results do not guarantee future results; that every case is different and must be judged on its own merits; and that the choice of a lawyer is an important decision and should not be based solely upon advertisements.

© 2025 Polsinelli® is a registered trademark of Polsinelli PC. Polsinelli LLP in California. Polsinelli PC (Inc.) in Florida.