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### The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty

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# THE AMERICAN EXPERIENCE WITH EMPLOYEE NONCOMPETE CLAUSES: CONSTRAINTS ON EMPLOYEES FLOURISH AND DO REAL DAMAGE IN THE LAND OF ECONOMIC LIBERTY

Kenneth G. Dau-Schmidt,<sup>†</sup> Xiaohan Sun,<sup>††</sup> and Phillip J. Jones<sup>†††</sup>

*“Open, competitive markets are a foundation of economic liberty. But markets that suffer from a lack of competition can result in a host of harms. In uncompetitive markets, firms with market power can raise prices for consumers, depress wages for workers, and choke off new entrants and other upstarts.” FTC Commissioner Rohit Chopra<sup>1</sup>*

## I. INTRODUCTION

Agreements not to compete are generally an anathema to free market advocates. Independent profit maximization is one of the fundamental assumptions of the neoclassical economic model and necessary to its conclusion that markets yield results that are Pareto efficient.<sup>2</sup> Consistent with this theory, and practical experience, agreements among competitors, or potential competitors, to divide a market, or fix price or quantity are per se violations under our antitrust laws.<sup>3</sup>

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The authors would like to thank Professors Duarte Abrunhosa e Sousa and Matthew W. Finkin for arranging comparative volume on this important topic and giving us the chance to participate in this important project. Professor Dau-Schmidt would like to dedicate this article to his father, Glenn Dau-Schmidt, who, despite the miles, taught him: how to use tools, build a pinewood derby car, fix a bike, work on a farm, repair a sink, build a tree house, work hard, play cards, take care of family, play with kids, be a wonderful father, and age gracefully.

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1. Rohit Chopra (FTC Commissioner) remarks on noncompetes and other issues related to competition in the labor market: [https://www.ftc.gov/system/files/documents/public\\_statements/1408196/chopra\\_-\\_comment\\_to\\_hearing\\_1\\_9-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf).

2. Under the First Theorem of Welfare Economics, competitive markets yield pareto efficiency. PAUL A. SAMUELSON ET AL., Chapter 8 ECONOMICS (20<sup>th</sup> ed. 2020); ANDREU MAS-COLELL ET AL., EQUILIBRIUM AND ITS BASIC WELFARE PROPERTIES, MICROECONOMIC THEORY Ch 16 (1995).

3. RUDOLF CALLMANN & LOUIS ALTMAN, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:33 (4<sup>th</sup> ed. 1983); Sherman Antitrust Act, 15 U.S.C. § 1 (1890).

Despite this fact, even some ardent free market advocates have argued on behalf of the enforcement of covenants not to compete in the employment relationship.<sup>4</sup> The traditional economic argument in favor of enforcing noncompetes assumes that labor markets are competitive and workers freely enter into such agreements in return for higher wages associated with work in research on behalf of the employer and/or access to employer developed trade secrets and customer contacts.<sup>5</sup> This arrangement is desirable to the employer because it helps protect his or her investment in research, trade secrets, and customer contacts, against appropriation if the employee were to leave to work for a competitor.<sup>6</sup> It is argued that society also benefits from such arrangements because the increase in production from the employer's investment in research and customer contacts more than make up for societal losses due to the constraints on the employee's labor mobility.<sup>7</sup>

However, economic theory also embraces a more sinister view of such agreements. Given their constraints on labor mobility, there is a natural concern that employers might use noncompetes to limit labor market competition and perhaps product market competition. Recent discussions of labor market monopsony power have cited the potential role of noncompetes in extending employer power by creating "market friction" that prevents employees from selling their labor to the highest valued use.<sup>8</sup> Under this view, the covenant not only allows the employer to pay the employee less than a competitive wage, but also raise the recruiting costs of competitors,

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4. *Outsource Int'l, Inc. v. Barton*, 192 F.3d 662, 669–70 (7th Cir. 1999) (Posner, J., dissenting); Jonathan M. Barnett & Ted Sichelmann, *The Case for Noncompetes*, 87 U OF CHIC. L. REV. 953 (2020); Michael Pierce, *The Value of a Per Se Rule Against Enforcing Noncompetition Agreements*, 2 BUS. & BANK. L. J. 39, 65–72 (2014).

5. Evan Starr, JJ Prescott & Norman Bishara, *Noncompete Agreements in the US Labor Force*, 64(1) J. OF LAW & ECON. 53(2021)(draft at 2); Maureen B. Callahan, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703 (1985); Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEG. STUD. 93 (1981).

6. In a perfect market, the employee would finance all generally valuable training and pay or bond for access to employer trade secrets, but in the real-world employees are liquidity constrained from financing such investments. See Rubin & Shedd, *supra* note 5.

7. In essence the covenant not to compete solves the employer's "investment hold-up problem" and allows the employer and employee to split the cooperative surplus created by combining the employee's labor and the employer's capital. *Id.*

8. U.S. Council of Economic Advisors, *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, Issue Brief (2016). The argument that covenants not to compete reinforce monopsony power is based on a simple extension of prior research on search frictions. As several authors have found, employer monopsony power can arise from between-employer search costs. Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257 (1998); ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* (2003). Because covenants not to compete raise between-employer search costs it follows that such covenants can increase monopsony power. Starr, Prescott & Bishara (2021), *supra* note 5, at 7 in draft. See also, Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419, at 428–30 (1992) on employer monopsony power and collective bargaining.

allowing the employer to charge higher prices.<sup>9</sup> Concern about noncompetes is particularly acute when they are imposed on employees after acceptance of an offer of employment, clearly challenging the assumption that they are freely accepted in return for higher wages.<sup>10</sup> In such cases, a covenant not to compete can serve as an intertemporal conduit of monopsony power, translating the employee's short-term disadvantage in the lack of alternative offers into long-term employer monopsony power.<sup>11</sup> Viewed in this light, a noncompete is a socially costly restraint on the employee's freedom to apply his or her labor to the highest valued use and receive a competitive wage.<sup>12</sup>

Which of these two economic views of employee noncompetes is true, and under what circumstances, is an empirical question. The answer to this question is important in determining whether such agreements should be enforceable, and, if so, under what circumstances. This question is of growing importance as the use of noncompetes has grown in our economy. Once largely confined to contracts incident to the sale of a business or contracts for highly compensated managers, professionals or research staff, the use of noncompetes has spread across the American economy until they now cover 20% of American employees<sup>13</sup> including many positions without access to valuable appropriable information such as a hair stylist, yoga instructor, lawn sprayer, temporary warehouseman, sandwich-maker, dog-walker and even volunteer camp counselor and unpaid intern.<sup>14</sup> Moreover, it seems that few of these noncompetes are the result of bargained for exchange and many are imposed by the employer after the job has been accepted and without additional compensation.<sup>15</sup> The sheer number of these agreements

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9. John M. McAdams, *Non-Compete Agreements: A Review of the Literature* 5 (Dec. 31, 2019) (unpublished manuscript); ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).

10. Starr, Prescott & Bishara (2021), *supra* note 5, at 2 in draft; Evan Starr, *Are Noncompetes Holding Down Wages?*, at 7, *Addresses at Unrigging the Labor Market: Convening to Restore Competitive Labor Markets* Harvard Law School (June 13, 2018).

11. Starr, Prescott & Bishara (2021), *supra* note 5, at 2 in draft.

12. Lobel, *supra* note 9.

13. Starr, Prescott & Bishara (2021), *supra* note 5. A more recent, but less comprehensive estimate puts the total percent of the American work force covered by noncompetes at between 27.8% and 46.5%. Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away Their Rights*, ECON. POL'Y INST. (2019).

14. Steven Greenhouse, *Non-compete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, June 8, 2014, at B1; Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Non-compete Agreements*, HUFFINGTON POST (Oct. 13, 2014), [http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete\\_n\\_5978180.html](http://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html); Dave Jamieson, *Doggy Day Care Chain Makes Pet Sitters Sign Non-competes To Protect Trade Secrets*, HUFFINGTON POST (Nov. 24, 2014); Spencer Woodman, *Amazon Makes Even Temporary Warehouse Workers Sign 18-Month Non-competes*, VERGE (Mar. 26, 2015), <http://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-non-compete-contracts>.

15. Micheal Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of No-Compete Agreements*, 68 MANAGEMENT SCIENCE 143 (2021) Starr, Prescott and Bishara found that 29.3% of employees with a noncompete clause first learned of the clause only after they had accepted the job. Moreover, when presented with a noncompete, only 10% of employees report negotiating over the clause. Starr, Prescott & Bishara (2021), *supra* note 5, Table 7.

and the potentially deleterious impact they might have on peoples' careers, our labor market and our economy has provided impetus for possible remedial legislation at both the state and federal levels.<sup>16</sup> Fortunately, there are a number of very good empirical studies that examine the number and circumstance of such agreements and the impact of these agreements on workers, firms and our economy.<sup>17</sup>

In this article, we examine the American experience with employee covenants not to compete. We discuss first their treatment under the common law and statutes codifying the common law. Next, we review the recent empirical literature and discuss its findings with respect to their prevalence in the American workforce and their impact on the affected workers, firms and the economy. Based on this empirical work we conclude that noncompetes are over-used in the American economy having a deleterious effect on employee wages and mobility and the vibrancy of our economy, with no comparable increase in employer investment in research or training. Thus, we find that, for most employees, the negative economic view of noncompetes is more accurate and such agreements are used to extend employer control over employees. Employers also suffer from noncompetes because these agreements have become an obstacle to hiring qualified staff. Finally, we discuss efforts at the state and federal level to regulate the use of noncompetes to ameliorate the abuse of these restrictions. We evaluate these legislative efforts in light of the recent empirical work on the problems caused by noncompetes.

## II. THE AMERICAN COMMON LAW

A "covenant not to compete" or "noncompete" is an agreement between an employer and employee that the employee will not work for a competitor of the employer or start his or her own business in competition with the employer, after leaving employment. Such agreements are generally limited in duration, geographic scope and the scope of the covered activity. A commonly cited example is the covenant Jimmy John's has asked its sandwich-makers to sign:

Non-Competition Covenant. Employee covenants and agrees that, during his or her employment . . . and for a period of two (2) years after . . . termination, . . . he or she will not have any direct or indirect interest in or perform services for . . . any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style,

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16. See *infra*, note 145, and accompanying text. Empirical estimates of the percent of the American workforce covered by noncompetes vary from 18.1% to 27.8%. Starr, Prescott & Bishara (2021), *supra* note 5, (18.1%); Colvin & Shierholz, *supra* note 13, (27.8%).

17. McAdams 2019, *supra* note 9.

pita and or wrapped or rolled sandwiches and which is located within three (3) miles of . . . any such other JIMMY JOHN'S® Sandwich Shop.<sup>18</sup>

Such a covenant may be part of a written “four corners” employment contract, an enforceable employee handbook, or a separate signed agreement among the oral and written representations that constitute the employment contract.<sup>19</sup>

In the United States there is no federal law that is currently used to regulate employment noncompetes. Eric Posner has made a convincing argument that policing noncompetes should be part of the Department of Justice (DOJ) competition policy under the Sherman Act, but to date such enforcement has been scarce and ineffective.<sup>20</sup> Labor market concentration is also not currently part of the merger review process for either the DOJ or the Federal Trade Commission (FTC).<sup>21</sup> Similarly, despite the fact that 18 State Attorneys General have petitioned<sup>22</sup> the FTC to adopt rules regulating noncompetes as an “unfair method of competition” under the Federal Trade Commission Act,<sup>23</sup> nothing has yet come of this proposal.

Instead, in the United States, covenants not to compete are governed by state common law and statute. Although three states and the District of Columbia have passed statutes prohibiting the enforcement of noncompetes,<sup>24</sup> and at least fourteen more states have enacted statutory schemes that vary significantly from the common law,<sup>25</sup> thirty-three states still treat the question of the legality of noncompetes under the common law standard with

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18. K. DAU-SCHMIDT ET AL., *LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE* 239-40 (6<sup>th</sup> ed. 2021).

19. M. ROTHSTEIN ET AL., *EMPLOYMENT LAW* 710 (3<sup>rd</sup> ed. 2005).

20. Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 *ANTITRUST L.J.* 165 (2020). However, the antitrust laws pose an obstacle to employers' use of “no-poach agreements.” The DOJ has brought cases against several tech companies, including Apple and Google, for labor market collusion. Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopoly and Collusion*, *THE HAMILTON PROJECT* 4 (2018). The FTC has also brought cases against firms that tried to collude in the labor market for nurses and fashion models. Federal Trade Commission (FTC). 1995, June. “Council of Fashion Designers of America.” Press Release, Federal Trade Commission, Washington DC. Finally, the DOJ and the FTC issued joint guidance that it is illegal for firms to agree not to hire each other's employees or to restrict wages. *ANTITRUST DIV., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS* 3 (2016).

21. Krueger & Posner, *supra* note 20, at 4; *see also*, Suresh Naidu, Eric A. Posner, & E. Glen Wey, *Antitrust Remedies for Labor Market Power*, 132 *HARV. L. REV.* 536 (2018); Hiba Hafiz, *Interagency Merger Review in Labor Markets*, 95 *CHI. KENT L. REV.* 37 (2020).

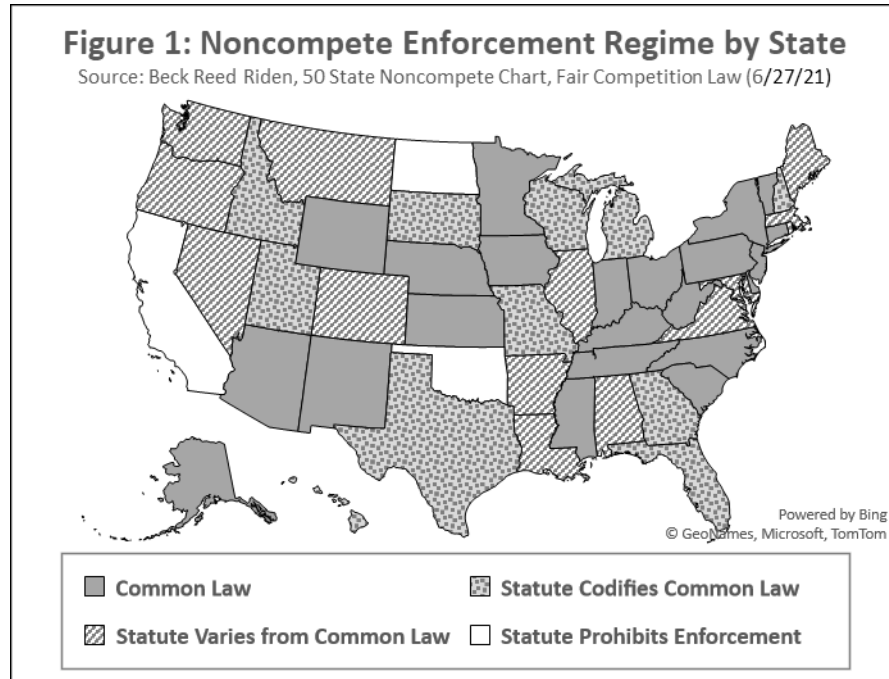
22. *Federal Trade Commission Hearings on Competition and Consumer Protection in the 21st Century, Public Comments of 18 State Attorneys General on Labor Issues in Antitrust* (July 15, 2019).

23. Federal Trade Commission Act, 15 U.S.C. § 45 (a) (1) (1914).

24. *See* N.D. CENT. CODE ANN. § 9-08-06 (West, Westlaw through legislation effective Jan. 1, 2020); CAL. BUS. & PROF. CODE § 16600 (West, Westlaw through Ch. 1 of 2020 Reg. Sess.); OKLA. STAT. ANN. tit. 15, § 219A (West, Westlaw through First Regular Session of the 57th Legislature (2019)); and D.C. CODE § 32-1301 et seq (2021).

25. Alabama, Arkansas, Colorado, Illinois, Louisiana, Maine, Maryland, Massachusetts, Montana, Nevada, Oregon, Rhode Island, Virginia, and Washington. Stewart J. Schwab, *Report to the Study Committee on Covenants Not to Compete*, Uniform Law Commission, Appendix Table A-1 (12/13/2019) (updated by the authors).

eleven of these states codifying that standard (See Figure 1).<sup>26</sup> In this section we outline the American common law doctrine on the enforcement of covenants as represented in court opinions and states statutes.



#### A. Noncompetes Are Presumed Invalid, Subject to Reasonableness

The earliest cases in both the United Kingdom and the United States established the common law principle that any restraints on competition were departures from the principle of economic freedom and therefore void and unenforceable.<sup>27</sup> This principle derived as much from the judges' abhorrence to the idea that men could sell their economic liberty as it did from the economic mischief such agreements might

26. The states codifying the common law test are: Florida, Georgia, Hawaii, Idaho, Michigan, Missouri, New Hampshire, South Dakota, Texas, Utah, and Wisconsin. The states relying primarily on the common law without significant statutes include: Alaska, Arizona, Connecticut, Delaware, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia, and Wyoming. Virginia still relies primarily on the common law standard but has an important exception for low wage workers. *Id.*

27. Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 631–32, 644 (1960) (discussing *Dyer's Case*, Y.B. Mich. 2 Hen. 5, f. 5, pl. 26 (C.P. 1414)); *Colgate v. Bacher*, Cro. Eliz. 872, 78 Eng. Rep. 1097 (Q.B. 1602); *Lawrence v. Kidder*, 10 Barb. 641 (N.Y. Sup. Ct. 1851); and *Keeler v. Taylor*, 53 Pa. 467, 470 (1866).

make.<sup>28</sup> Interestingly, the restraints that prompted this strong pronouncement were almost all restraints on employees that left their employer; “cases of ‘unethical’ masters attempting to prolong the traditional period of subservience of an apprentice or journeyman”.<sup>29</sup> However, the courts later developed the idea that covenants not to compete that were “ancillary” to a valid agreement could be enforceable in limited circumstances, and thus treated employment noncompetes in a fashion similar to covenants not to compete pursuant to the sale of a business, partnership agreements, assignments of patent rights, and leases of business property.<sup>30</sup>

The case of *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711), which involved a covenant not to compete incident to the sale of a bakery, announced the “rule of reason” that governed covenants not to compete ancillary to another contract. In this case, the Queen’s Bench held that restraints on trade were *presumed* invalid, but this presumption could be overcome by a showing that the restraint was *reasonable* in furtherance of the underlying contract, such restraints being necessary for the sale of a business at a fair price.<sup>31</sup> However the court made it clear that the burden of showing a just reason might be greater in the case of a covenant ancillary to an employment contract because such covenants are subject to “great abuses . . . from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come up to set up for themselves.”<sup>32</sup> Thus, even in the case that gave birth to the “rule of reason,” the Judges realized there was need for particular skepticism in the case of a noncompete ancillary to an employment contract. The court’s opinion was the most cited analysis of the problem of noncompetes on both sides of the Atlantic for the next 250 years.<sup>33</sup> By the end of the nineteenth century, this rule of reason analysis was well entrenched in both Great Britain and the United States.<sup>34</sup>

In the surge of cases that attended the industrial revolution, with its increase in labor mobility and reliance on contract to mediate the employment relationship, the courts further developed the idea of “reasonable restraints” and distinguished the common law test for noncompetes ancillary to an employment contract from that for

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28. *Id.* at 650. “[A]greements that restrict an employee from competing with his or her employer upon termination of employment are judicially disfavored because ‘powerful considerations of public policy . . . militate against sanctioning the loss of a[person’s] livelihood.’” *Brown & Brown, Inc. v. Johnson*, 980 N.Y.S.2d 631, 637 (App. Div. 2014) (*quoting* *Reed, Roberts Assocs. v. Strauman*, 335 N.E.2d 590, 593 (N.Y. 1976)).

29. *Id.* at 632.

30. *Id.* at note 3.

31. 1 P. Wms. at 182, 186, 24 Eng. Rep. at 348, 349.

32. 1 P. Wms. at 190, 24 Eng. Rep. at 350.

33. *See* *Blake*, *supra* note 27, at 629.

34. Blake argues that *Mitchel v. Reynolds* was the dominant case on noncompetes until the end of the nineteenth century, by which time the “rule of reason” for judging such contracts ancillary to another contract was well established on both sides of the Atlantic. *Id.* at 644. *See for example*, *Homer v. Graves*, 7 Bing. 735, 131 Eng. Rep. 284 (C.P. 1831); *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535, affirming [1893] 1 Ch. 630 (C.A. 1892); *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73 (1869); and *Mandeville v. Harman*, 42 N.J. Eq. 185, 7 Atl. 37 (Ch. 1886).



noncompetes ancillary to other agreements.<sup>35</sup> Although a covenant not to compete is always necessary to the successful sale of business goodwill, it is only sometimes important in the employment of a worker and then only under fairly definable circumstances.<sup>36</sup> Thus, early on, the courts determined that, in employment cases, the employer must show some “legitimate interest” in having a covenant not to compete as a prerequisite to applying a test of reasonableness.<sup>37</sup> Legitimate interests included: the sale of a business by the employee to the employer, engagement of the employee to do research on behalf of the employer, or employer investments in confidential business information, customer relations or the reputation of the employee.<sup>38</sup> This requirement of a legitimate employer interest would naturally go on to shape the test of reasonableness in employment cases since the covenant’s breadth of coverage in duration, geography and proscribed activities could only be reasonable to the extent necessary to protect the legitimate interest,<sup>39</sup> with a minimum of necessary burden on the employee.<sup>40</sup> In considering the reasonableness of the constraint, American courts have also considered whether there is evidence of a bargained-for exchange,<sup>41</sup> the circumstances of the termination,<sup>42</sup> and whether the covenant violates the public interest<sup>43</sup> or works an undue hardship on the employee.<sup>44</sup>

Perhaps one of the best statements of the modern American common law test for covenants not to compete ancillary to an employment contract was made in the case of *Buffkin v. Glacier Group*, 997 N.E. 2d 1 (Ind. Ct. App. 2013). In that case, the Court declined to enforce a noncompete against a “headhunter” who had been employed to find candidates to fill jobs at IT firms under contract with his employer and was then later employed in the same capacity by another firm with different

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35. The “rule of reason” has developed somewhat differently in its many applications under American law. Perhaps its marquee application came in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911) where the Supreme Court used it to interpret Section 1 of the Sherman Act to prohibit only “unreasonable restraints” on trade, in which the anti-competitive effects of the restraint exceeded its pro-competitive effects.

36. See Blake, *supra* note 27, at 646–47.

37. See, e.g., *Arthur Murray Dance Studios, Inc. v. Witter*, 62 Ohio L. Abs. 17, 28, 105 N.E.2d 685, 691 (C.P. 1952).

38. See Blake, *supra* note 27, at 653–74.

39. *Arthur Murray Dance Studios, Inc.*, 105 N.E.2d at 691. See Annot., 43 A.L.R.2d 94, 144–45 (1955); see also, Blake, *supra* note 27, at 676–80.

40. See, e.g., *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 42 S.E.2d 352 (1947); see also, Blake, *supra* note 27, at 683–84.

41. See, e.g., *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770 (Mo. 2014) (“The first relevant principle of consideration is that it is a bargained for exchange.”); *Insulation Corp. of America v. Brabston*, 667 A.2d 729, 733–34 (Pa. Super. 1995) (higher scrutiny required for covenants between employer and employee due to unequal bargaining power).

42. See, e.g., *Arthur Murray Dance Studios, Inc.*, 105 N.E.2d at 700 (considering the circumstances of termination among many other factors); *Missett v. Hub Int’l Pennsylvania, LLC*, 2010 PA Super 178, 6 A.3d 530 (2010).

43. See, e.g., *Eureka Laundry Co. v. Long*, 146 Wis. 205, 209–10, 131 N.W. 412, 413 (1911); *The Cmty. Hosp. Grp., Inc. v. More*, 183 N.J. 36 (2005) (geographic restrictions in physician’s noncompete were injurious to public interest).

44. See, e.g., *N. Star Mgmt. of Am., LLC v. Sedlacek*, 235 N.C. App. 588, 595 (2014); *Nat. Organics, Inc. v. Kirkendall*, 52 A.D.3d 488, 489 (2008); see also, Restatement (Second) of Contracts § 515(b) (Am. L. Inst. 1981).

customers. The court stated that covenants not to compete are “strongly disfavored” and enforceable only if the employer shows a “legitimate protectable interest” and that the covenant is “reasonable” as to its duration, proscribed activities, and geographic scope.<sup>45</sup> Legitimate protectable interests included customer contacts and trade secrets, but not training in general skills.<sup>46</sup> In judging the reasonableness of the restraint, the court should consider the scope of the employer’s legitimate interest.<sup>47</sup> In this case the court found that the employee had no access to the firm’s customers and had benefited merely from on the job training in general skills. As a result, the employer’s legitimate interest was negligible and certainly inadequate to support a three-year, nationwide prohibition on working in any capacity for a firm in employee recruiting.<sup>48</sup> The court also saw fit to remind us that contractual provisions should be narrowly construed against the drafter (here the employer) and that the employee’s “agreement” that the terms of the covenant were “reasonable” was inconsequential to the court’s determination.<sup>49</sup>

### *B. The Prerequisite of an Employer Legitimate Interest*

As discussed in the previous section, an employer showing of a legitimate protectable interest is a prerequisite to enforcement of a covenant not to compete. Without a legitimate employer interest, there is no need to gauge the reasonableness of the constraint. The two clearest instances of employer legitimate interest are the sale of a business by the employee to the employer<sup>50</sup> and where the employee is specifically engaged to conduct research on behalf of the employer.<sup>51</sup> These cases are generally limited to high paid employees and easily identifiable transactions in which the noncompete is an essential feature because the employee has already been paid for business goodwill or the employer is trying to protect research investments. Indeed, in the case of a sale of a business, the noncompete is generally ancillary to the transfer of the business and its goodwill, not the employment of the seller, and so that this case does not even need to be treated under the doctrine of employment noncompetes.<sup>52</sup> In the case in which an employee is specifically engaged to undertake research for the employer, the traditional common law remedy is for the employer to negotiate agreements and “holdover agreements” requiring the

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45. Buffkin v. Glacier Grp., 9–11 (Ind. Ct. App. 2013) 997 N.E.2d 1.

46. *Id.* at 10–11.

47. *Id.*

48. *Id.* at 13–15.

49. *Id.* at 15.

50. See Restatement (Third) of Employment Law: Protectable Interests for Restrictive Covenants § 8.07 cmt. e (Am. Law Inst. 2015); see also, Dominic Wenzell, D.M.D. P.C., v. Ingram, 228 P.3d 103, 111 (Alaska 2010); and Hospital Consultants, Inc. v. Potyka, 531 S.W.2d 657 (Tex. Civ. App. 1975).

51. Blake, *supra* note 27, at 629; Universal Winding Co. v. Clarke, 108 F. Supp. 329 (D. Conn. 1952).

52. See, e.g., Zimmer Melia & Assocs., Inc. v. Stallings, No. 3:08-0663, 2008 WL 3887664 (M.D. Tenn. Aug. 21, 2008); Pope v. Rosenberg, 2015 WY 142, 361 P.3d 824, 829 (Wyo. 2015).

assignment of any copyrightable or patentable discoveries.<sup>53</sup> These agreements are generally negotiated in advance of employment with employees who have other employment options and such agreements are readily enforceable. Noncompetes are sometimes used in addition to agreement requiring the reassignment of copyrights and patents.

The harder and more interesting cases are those in which the employer retains the employee to perform services, for which the employee is paid, and the employee's work benefits from the employer's investment in information or relationships that might be appropriable when the employee leaves. The most commonly recognized of such interests, are employer investments in trade secrets, customer contacts and the employee's reputation in the market.<sup>54</sup> To qualify as a legitimate interest under the common law test, a trade secret must meet the common law requirements that: (1) it derives independent economic value from being kept secret, (2) the employer has taken reasonable measures to keep it secret, such as limited access, password protection and confidentiality agreements; and (3) the information is not readily known or ascertainable by the general public or people in the industry.<sup>55</sup> Investments in customer contacts that can qualify include: (1) formal customer lists developed at the employer's expense, which are themselves trade secrets and are treated as such; and (2) customer contacts developed at the expense of the employer where, due to the nature of the work, there is a substantial risk of loss of clientele to the employee if he or she leaves, for example medical care.<sup>56</sup> As a general rule, courts will not protect employer customer contacts absent express contractual restraints,<sup>57</sup> although high ranking officers of a company who occupy a position of special trust may be held to a higher fiduciary duty in such matters.<sup>58</sup> Employer investments in the employee's reputation in the industry are treated as

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53. K. DAU-SCHMIDT ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL Employee (6<sup>th</sup> ed. 2021) at 244; John A. Thomas, *Who Owns the Invention? The Rights of Employers, Employees, and Contractors*, 62 TEX. B.J. 996 (1999). Indeed, courts will sometimes infer an agreement to assign patents if an employee is specifically hired to do research for the employer. *Speck v. North Carolina Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E.2d 139, 19 Ed. Law Rep. 737 (1984).

54. *See, e.g., Gaver v. Scheider O.K. Tire Co.*, 289 Neb. 491, 503 (2014); *Thiesing v. Dentsply Int'l, Inc.*, 748 F. Supp. 2s 932 (E.D. Wis. 2010).

55. *Ikon Off. Sols., Inc. v. Dale* 170 F. Supp. 2d 892, 897 (D. Minn), *aff'd*, 22 F. App'x 647 (8th Cir. 2001); *National Tube Co. v. Eastern Tube Co.*, 13–23 Ohio C.C. Dec. 468, 470 (1902), *aff'd*, 69 Ohio St. 560, 70 N.E. 1127 (1903); *see* Restatement (Second) of Torts § 757, cmt. b (1939). In determining the value of the information, the most important factor is generally the investment of time effort and money the employer has had to make to generate the information. *Kelite Corp. v. Khem Chems., Inc.*, 162 F. Supp. 332 (N.D. Ill. 1958); *Eastman Kodak Co. v. Powers Film Prods., Inc.*, 189 App. Div. 556, 179 N.Y. Supp. 325 (1919). The employer is generally required to undertake all reasonable efforts to keep the information secret. *Excelsior Steel Furnace Co. v. Williamson Heater Co.*, 269 Fed. 614 (6th Cir. 1921); *Arthur Murray Dance Studios, Inc.*, 105 N.E.2d at 709; Restatement (First) Torts § 757, comment b–secrecy (1939).

56. *Allen v. Rose Park Pharmacy*, 120 Utah 608, 237 P.2d 823 (1951). *See also*, *Arthur Murray Dance Studios, Inc.*, 105 N.E.2d at 705–09; *Cent. Indiana Podiatry, P.C. v. Krueger*, 882, N.E.2d 723, 729 (Ind. 2008).

57. *Blake*, *supra* note 27, at 655; RUDOLF CALLMANN, UNFAIR COMPETITION AND TRADE-MARKS 834–49 (2<sup>d</sup> ed. 1950); RISDALE ELLIS, TRADE SECRETS 72 (1953); *supra* note 3, § 157.

58. *Blake*, *supra* note 27, at 655, 661–62.

business goodwill and can qualify as a legitimate protectable interest.<sup>59</sup> For example, an employer's investment in promoting the fame and reputation of a radio disc-jockey or TV personality.<sup>60</sup> As with the sale of a business and employment to do research, the employer's trade secrets, including customer lists, also enjoy protection under the common law doctrine of trade secrets which has been codified in forty-eight states under the Uniform Trade Secrets Act.<sup>61</sup>

Although some courts have held that an employer can use noncompetes to protect "key employees" or to protect investments in training the employee,<sup>62</sup> these are minority positions without general support in the common law.<sup>63</sup> Several courts have ruled that employers cannot enforce noncompetes just because an employee is very skilled and valuable in the industry.<sup>64</sup> It is also well established that an employer cannot use a covenant not to compete to help retain an employee long enough to recoup employer investments in training that are generally valuable.<sup>65</sup> In a perfect labor market, employers would pay for training particular to their job and employees would pay for general training that is of value to multiple employers.<sup>66</sup> However, due to liquidity constraints on employees' ability to borrow to finance education, employers do sometimes pay for general training, the value of which is appropriable by the employee if he or she leaves.<sup>67</sup> Rather than a noncompete, the accepted solution to this problem is for the employer to bind the employee to proportionately reimburse the employer for demonstrable costs, such as tuition and books, if the employee leaves within a reasonable specified period.<sup>68</sup> Finally, courts are more skeptical of covenants not to compete if the employee has not been employed for any significant time before discharge on the theory that, absent a formula or customer

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59. See, e.g., *Post-Newsweek Station v. Brooks*, No. CV 94 704854, 1994 WL 110040 (Conn. Sup. Ct. March 11, 1994) (news anchor); *Daniel v. Trade Winds Travel, Inc.*, 532 So. 2d 653, 654 (Ala. 1988) (travel agent).

60. Cathy Packer & Johanna Cleary, *Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-compete Contracts for Media Employees*, 24 *CARDOZO ARTS & ENT. L.J.* 1073 (2007).

61. The Uniform Trade Secrets Act has been adopted in 48 states and the District of Columbia. The only exceptions are New York and North Carolina. New York protects trade secrets under the common law doctrine and North Carolina has its own protective statute, the "Trade Secrets Protection Act". Fox Rothschild, LLC, National Survey on Restrictive Covenants (July 2020). Uniform Trade Secrets Act §§ 1-12 (amended 1985), 14 *U.L.A.* 529-659 (2005).

62. See e.g., *COLO. REV. STAT.* § 8-2-113.

63. Restatement (Third) of Employment Law § 8.07 (Am. Law Inst. 2015).

64. *Chavers v. Copy Prods., Inc.*, 519 So 2d 942, 945 (Ala. 1988). However, by statute Idaho limits the application of covenants not to compete to "key employees" who are more likely to have benefited from appropriable investments. A "key employee" is defined in the statute as those "who, by reason of the employer's investment . . . have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer . . ." Idaho Code §§44-2702 (1).

65. See *Blake*, *supra* note 27, at 652-53. See, e.g., *Mutual Loan Co. v. Pierce*, 245 Iowa 1051, 65 N.W.2d 405 (1954); *Club Aluminum Co. v. Young*, 263 Mass. 223, 160 N.E. 804 (1928).

66. GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION* 33-51 (3<sup>d</sup> ed. 1993).

67. See *Rubin & Shedd*, *supra* note 5, at 96-97.

68. *Stuart Lichten & Eric M. Fink, Just When I Thought I Was Out: Post-Employment Repayment Obligations*, 25 *WASH. & LEE J. CIVIL RTS. & SOC. JUST.* 51 (2018).

list, the employee has not been employed long enough for the employer to invest in the relationship.<sup>69</sup>

### C. The Reasonableness of the Constraints

Covenants not to compete are enforced only if they are reasonable in their duration, proscribed activities, and geographic scope.<sup>70</sup> The reasonableness of the covenant's constraints are judged in light of the employer's legitimate interest.<sup>71</sup> Constraints are accepted only so far as they are necessary to protect that interest.<sup>72</sup> Whether constraints of a given duration, activity proscription and geographic scope are reasonable depend on the circumstances of the case and the nature of the interest being protected.<sup>73</sup> For example, in judging the reasonableness of geographic constraints, it matters whether the interest to be protected is a customer list or a production methods trade secret. The geographic area necessary to protect a customer list would extend only to the area over which existing customers did business. However, to effectively protect the value of a trade secret in production processes, a reasonable geographic area might be world-wide since once the process is known outside the firm it could easily spread back to the employer's current market.<sup>74</sup> In protecting customer contacts, generally an employer can only restrict the employee from dealing with customers the employee actually served at the firm, not just any customer of the employer.<sup>75</sup> By court opinion or statute, several states have established a presumptively reasonable duration, or a maximum duration, for covenants not to compete; most often two years.<sup>76</sup>

69. See Russell Beck, *Employee Non-competes A State-by-State Survey*, FAIR COMPETITION L. (Jun. 7, 2021), <https://faircompetitionlaw.com/wp-content/uploads/2021/06/Noncompetes-50-State-Survey-Chart-20210607.pdf> ("Illinois may require two years of employment before any noncompete can be enforced.").

70. See, e.g., *Market\*Access Int'l, Inc. v. KMD Media, LLC* 72 Va. Cir. 355, 3 (2006) ("Central to the reasonableness of these agreements is whether there are reasonable limits on duration, geographic area and whether the scope of the restrictions is narrowly tailored to protect the employer's interest."); *Outdoor Lighting Persps. Franchising, Inc. v. Harders*, 228 N.C. App. 613, 623 (2013).

71. See, e.g., *Smart Corp. v. Grider*, 650 N.E.2d 80, 83 (Ind. App. 1995) ("A covenant not to compete must be sufficiently specific in scope to coincide with only the legitimate interests of the employer . . ."); *Veramark Techs., Inc. v. Bouk*, 10 F. Supp. 3d 395, 406 (W.D.N.Y. 2014).

72. See, e.g., *Id.*; *Allright Auto Parks, Inc. v. Berry*, 219 Tenn. 280, 285-86 (1966) ("It is generally agreed that, before a noncompetitive covenant will be upheld as reasonable and therefore enforceable, the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer.").

73. See, e.g., *Cent. Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 956 (1993) ("Courts evaluate [noncompetes] differently because of the difference in the nature of the interests sought to be protected.").

74. See, e.g., *Kadant Johnson, Inc. v. D'Amico*, No. CIV.A. 10-2869, 2012 WL 1605458 (E.D. La. May 8, 2012) ("Where an employer has business interests throughout the world, a non-competition agreement without a specified geographic scope is not unreasonable.").

75. See, e.g., *DataType Int'l, Inc. v. Puzia*, 797 F. Supp. 274, 285 (S.D.N.Y.).

76. See, e.g., *TP Grp.-CI, Inc. v. Vetecnik*, Civil Action No. 1:16-cv-00623-RGA, 2016 U.S. Dist. LEXIS 138980, \*5 (D. Del. Oct. 6, 2016) ("Delaware courts have routinely found restrictive covenants with a duration of two years to be reasonable in duration."); LA. REV. STAT. ANN. § 23:921. See also, Beck, *supra* note 69, updated by Beck Reed Riden, 50 State Noncompete Chart (6/27/21) <https://beckreedriden.com/50-state-noncompete-chart-2/>. (Alabama (2 years), Arkansas (2 years),

In judging the reasonableness of a covenant not to compete, some courts have considered whether alternative remedies including less restrictive covenants, could adequately protect the employer's legitimate interest and impinge less on the employee's economic freedom.<sup>77</sup> As previously mentioned, almost all the recognized legitimate employer interests have alternate means of protection. Noncompetes incident to the sale of a business are enforceable on their own terms.<sup>78</sup> Patentable discoveries made by research employees with the employer's resources can be made subject to assignment and holdover agreements.<sup>79</sup> The appropriation of trade secrets is actionable in all fifty states and the District of Columbia,<sup>80</sup> and can also be protected through confidentiality agreements.<sup>81</sup> Customer lists are protectable as trade secrets and customer relations are protectable through non-solicitation agreements.<sup>82</sup> These alternative solutions seem preferable to a general noncompete clause because they ask the employer to identify and protect their interest in advance of the enforcement of the clause and they impose only the restrictions on the employee that are necessary to protect that interest. Moreover, they generally do not need the specification of geographic or durational parameters.<sup>83</sup> Only in cases where these interests would inevitably be undermined by the employee working for a competitor, or in which proof problems would prevent these less restrictive methods from being effective might a noncompete be warranted. The only recognized legitimate employer interests that have no alternative remedy to a noncompete are employer investments in employee goodwill with customers and the public at large.

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Georgia (varying), Idaho (18 months), Louisiana (2 years), Michigan (1 year), Oregon (12 months), South Dakota (2 years), and Washington (18 months)).

77. *Hartman v. W.H. Odell and Assocs., Inc.*, 450 S.E.2d 912, 918–920 (N.C. Ct. App. 1994); *DataType Int'l, Inc. v. Puzia*, 797 F. Supp. 274, 285–286 (S.D.N.Y. 1992) (upholding a nonsolicitation clause but declining to enforce a noncompetition covenant); *Farr Assocs. v. Baskin*, 530 S.E.2d 878, 882 (N.C. Ct. App. 2000) (invalidating a worldwide clause and declaring that a reasonable clause would cover only those clients with whom the employee actually dealt).

78. C. T. Drechsler, *Enforceability of covenant against competition, ancillary to sale or other transfer of business, practice, or property, as affected by territorial extent of restriction*, 46 A.L.R.2d 119 (1982).

79. *Ownership of Invention*, 37 No. 2 Corp Couns Quarterly ART 4 (2021); Steven Chersensky, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, 81 CALIF. L. REV. 597 (1993).

80. Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; and Barbara J. Van Arsdale, 42 Am. Jur. 2d *Injunctions § 72. Persons subject to restrictions on taking trade secrets for purposes of injunction against use or disclosure of such information* (2022).

81. Richard E. Kaye, *Cause of Action for Breach of Confidentiality or Nondisclosure Agreement in Employment Contract*, 47 COA2d 115 (2011); Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627 (1999).

82. David L. Johnson, *The Parameters of "Solicitation" in an Era of Non-Solicitation Covenants*, 28 ABA J. LAB. & EMP. L. 99 (2012); DONALD J. ASPELUND & JOAN E. BECKNER, *EMPLOYEE NONCOMPETITION LAW* Chapter 9 (2014).

83. *Sperry Rand Corp. v. Rothlein*, 241 F. Supp. 549, 564, 143 U.S.P.Q. (BNA) 172 (D. Conn. 1964). *See generally*, Sayko, Jr., *New and Terminating Employees*, 14 AIPLA Q.J. 50, 57–58 (1986).

*D. Evidence of a “Bargained-for Exchange”:  
Additional Consideration and the Timing of the “Offer”*

The potential benefits of restrictive covenants to employees and society at large are most transparent when the covenant is the result of a bargained for exchange between the employer and employee in which the employee receives higher wages in exchange for the constraint because the employee’s productivity is increased through his or her utilization of the employer’s potentially appropriable investments in research, customer contacts and reputation. Although a similar exchange is theoretically possible through an employer unilateral offer after the beginning of the employment relationship in a labor market in which the employee had viable alternative jobs, one must have a very optimistic view of the efficient operation of the labor market to rely on this possibility.

With a more realistic appreciation of the limitations of labor markets, judges and legislators have worried that covenants imposed by employer unilateral offer, without significant additional consideration, especially after the employee has given up other options and begun work at the firm, represent an effort to increase or extend employer bargaining power and exploit the worker.<sup>84</sup> In such circumstances, employee noncompetes might be viewed as contracts of adhesion which are subject to more scrutiny by the courts.<sup>85</sup> In most American states, the continuing employment of an employee can act as adequate consideration for a covenant not to compete that is unilaterally imposed by an employer even after the employee has already begun work for the employer.<sup>86</sup> However, a growing number of jurisdictions are skeptical of such arrangements, with fourteen requiring additional consideration, especially if the covenant is imposed after the employee begins work for the employer.<sup>87</sup> Moreover, at least nine states now require, through court opinion or statute, that a covenant not to compete be raised before the acceptance of the job offer in order to be effective.<sup>88</sup> As will be discussed later in this article, the empirical

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84. Starr, Prescott & Bishara (2021), *supra* note 5, at 2 in draft; Starr, *supra* note 10, at 7; *see e.g.*, *Timenterial, Inc. v. Dagata*, 277 A.2d 512, 515 (Conn. Super. Ct. 1971) (refusing to enforce a restrictive covenant because it lacked consideration when the employee signed it five days after beginning employment); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 541 (Wyo. 1993) (declaring that the “better view, even in the at-will relationship, is to require additional consideration to support a restrictive covenant entered into during the term of the employment”).

85. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1242–43 (1983).

86. *See, e.g.*, *Clark v. Liberty Nat’l Life Ins. Co.*, 592 So. 2d 564, 567 (Ala. 1992); *Water Servs. v. Midland Research Labs., Inc.*, 596 F. Supp. 412, 415 (E.D. Ark. 1984); *Ackerman v. Kimball Int’l, Inc.*, 652 N.E.2d 507,509 (Ind. 1995).

87. Michael Selmi, *Trending and the Restatement of Employment Law’s Provisions on Employee Mobility*, 100 CORNELL L. REV. 1369, 1380–81 (2015). *See, e.g.*, *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 903 (Mont. 2008) (after employment has begun, a noncompete requires independent consideration); *Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 540 (Wyo. 1993) (continued employment alone does not provide the necessary consideration to support a noncompete entered into after the employment relationship has begun).

88. States with judicial holdings that noncompetes must be raised before acceptance of the job offer include Connecticut, North Carolina and Wyoming. States with statutes requiring that noncompetes be raised before acceptance of the job offer include Illinois, Maine, Massachusetts, New Hampshire, Oregon, and Washington. Beck Reed Riden, 50 State Survey (6/27/21).

work to date suggests that the growing skepticism of unilaterally imposed covenants after the employee has already started work is warranted.<sup>89</sup>

### *E. The Circumstances of the Employee's Separation from Work*

American courts have also weighed the circumstances under which the employee's work is terminated in deciding whether to enforce a covenant not to compete. If an employee is terminated without cause, courts are hesitant to enforce a noncompete under the argument that if the employee really had access to an appropriable interest of the employer, the employer would not arbitrarily discharge the employee.<sup>90</sup> Presumably the payment of a significant "garden leave" to the discharged employee during the period of the noncompete might convince a court that the employer did have a legitimate protectable interest.<sup>91</sup> Recent Washington and Massachusetts statutes specify that such noncompetes are unenforceable if the employee is laid-off or discharged without cause.<sup>92</sup> On a related note, if the employee leaves because the employer commits a material breach of the employment contract, for example not paying the employee, American courts will generally not enforce an otherwise binding noncompete.<sup>93</sup> However, in such cases the result is more often an application of the "clean hands doctrine" than an assessment as to whether the employer has a legitimate protectable interest.<sup>94</sup> A contrary result would leave the employee economically vulnerable to his or her tormentor.

### *F. Considering the Competing Interests of the Employee and the Public*

Even if the employer has a legitimate interest and the covenant is reasonable in duration and scope, a court may not enforce the noncompete if it imposes undue hardship on the employee or is injurious to the public.<sup>95</sup> In considering these competing interests, the courts and state legislatures have shown much more concern for the public's interest than they have for the burden on employees.

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89. See *infra* note 172 and accompanying text.

90. Wrigg, 362 Mont, *infra* note 316, at 507. (absent evidence the employee appropriated trade secrets, it is difficult to establish a legitimate business interest for enforcement of a noncompete when the employer initiates the termination without cause); Arakelian v. Omnicare Inc. 735 F. Supp. 2d 22, 41 (S.D.N.Y. 2010) ("[e]nforcing a [noncompete] when the employee has been discharged without cause would be 'unconscionable' because it would destroy mutuality of obligation").

91. See Charles A. Sullivan, *Tending the Garden: Restricting Competition Via "Garden Leave"*, 37 BERKELY J. EMP. & LAB. L. 293 (2016); Greg T. Lembrich, *Garden Leave: A Possible Solution to the Uncertain Enforceability of Restrictive Employment Covenants*, 102 COLUM. L. REV. 2291 (2001).

92. WA ST 49.44.190; Mass. Gen. Laws c. 149, §24L.

93. See, e.g., Licocci v. Cardinal Assocs., Inc., 492 N.E.2d 48, 52 (Ind. App. 1986) (In the context of noncompetes, "[a] party first guilty of a material breach of contract may not maintain an action against the other party . . . should that party subsequently breach the contract."); Francorp, Inc. v. Siebert, 126 F. Supp. 2d 543, 547 (N.D. Ill. 2000).

94. *Id.*

95. See Blake, *supra* note 27, at 648–49 citing Annot., 43 A.L.R.2d 94, 144 (1955); see also, *supra* note 44; 820 I.L.C.S. §§90/1-90/10; ME. REV. STAT. Ti. 26, c. 7, §599-A; MD. CODE, LAB. & EMPL. § 3-716; WIS. STAT. ANN. § 103.465.



Although the consideration of “undue hardship” on the employee is accepted in many jurisdictions, it is rarely the basis on which a noncompete is voided.<sup>96</sup> More often “undue hardship” is mentioned in conjunction with some other failure of the covenant to meet the common law test, for example if the employer has failed to show a legitimate protectable interest<sup>97</sup> or when the employee has been fired without cause.<sup>98</sup> Indeed, Florida has expressly legislated that courts should not take employee hardship into account in evaluating whether to enforce a noncompete.<sup>99</sup> However, some states have recently reaffirmed this consideration in statutes governing noncompetes.<sup>100</sup> Factors that courts have cited in looking for “undue hardship” on the employee include whether the covenant bars the employee’s sole means of support, whether the covenant stifles the employee’s inherent skill and experience, the proportionality of benefit to employer and detriment to employee, and the need for the employee to change his calling or residence.<sup>101</sup>

Conversely, although certainly not the typical case, it is not hard to find cases in which a noncompete is invalidated because it frustrates the “public interest,” even though the covenant satisfies the other common law requirements.<sup>102</sup> The public interest is most often successfully invoked to void a noncompete where a very small number of persons or firms provide an important good or service to a distinct market, for example a doctor providing medical services in a small town or rural area.<sup>103</sup> Indeed, some courts subject restrictive covenants affecting healthcare professionals to a higher degree of scrutiny based on public interest.<sup>104</sup> Moreover, eleven states and the District of Columbia have statutes specifically limiting or voiding noncompetes for physicians.<sup>105</sup> Another sixteen states and the District of Columbia

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96. *See, e.g.*, *Marcam Corp. v. Orchard*, 885 F. Supp. 294, 298 (D. Mass. 1995) (holding that a noncompetition covenant covering the entire United States did not work an undue burden on the employee because he could move to London or work in the United States for a noncompetitor); *see also*, *Beck, supra* note 69. (States with statutes or cases discussing undue hardship include Illinois, Kentucky, Maine, Maryland, Minnesota, Nevada, Tennessee, West Virginia, etc.).

97. *See, e.g.*, *Chavers*, 519 So., *supra* note 64, at 945 (holding that a covenant unnecessary to protect any legitimate interest also worked an “undue hardship”).

98. *MacIntosh v. Brunswick Corp.*, 215 A.2d 222, 225–226 (Md. 1965) (holding that restrictive covenant imposed “undue hardship” on employee in part because employee was fired “through no fault of his own.”).

99. FLA. STAT. ANN. § 542.335(g)(1). *See, e.g.*, *N. Am. Products Corp. v. Moore*, 196 F. Supp.2d 1217, 1231 (M.D. Fla. 2002) (holding that the district court was precluded from considering potential economic hardship faced by an ex-employee when determining whether to grant a preliminary injunction.).

100. *See e.g.*, NEV. REV. STAT. § 613.195–200; RSA 275:70, 275:70-a; R.I. GEN. LAWS §§ 28-59-1-3.

101. *See Beck, supra* note 69 (Alaska and Nebraska).

102. *See, e.g.*, *Odess v. Taylor*, 211 So. 2d 805, 810-812 (Ala. 1968); *Cnty. Hosp. Grp., Inc. v. More*, 869 A.2d 884, 900 (N.J. 2005).

103. *See, e.g.*, *Odess v. Taylor*, 211 So. 2d 805, 810–812 (Ala. 1968) (interpreting state statute to prohibit restrictive covenants among medical professionals).

104. *See, e.g.*, *Sammarco v. Anthem Ins. Cos., Inc.*, 723 N.E.2d 128, 132 (Ohio Ct. App. 1998), overruled on other grounds, 839 N.E.2d 49, 54 (Ohio Ct. App. 2005) (“[R]estrictive covenants that . . . limit a physician’s ability to practice medicine . . . are scrutinized more carefully than similar covenants restricting other types of employment.”).

105. Colorado, Connecticut, Delaware, Idaho, Massachusetts, New Hampshire, New Mexico, Rhode Island, Tennessee, Texas and West Virginia. *See Schwab, supra* note 25 at Appendix Table A-2.

have restrictions on covenants not to compete for other professions, most notably broadcasters.<sup>106</sup> The American Bar Association Model Rules of Professional Conduct prohibit noncompetes for attorneys, and this rule has been successfully adopted in all states.<sup>107</sup> The American Bar Association's prohibition on lawyer noncompete agreements is intended to protect attorneys' "professional autonomy" and "the freedom of clients" to select counsel of their choice.<sup>108</sup>

*G. Severability and the Possible Reform of Unreasonable Constraints:  
Blue Pencils, Red Pencils, and Equitable Reform*

The general contract doctrine of severance has had important consequences in the field of employee restraints since the inception of the rule of reason. In the first employee case after *Mitchel v. Reynolds*, the court enforced the covenant only after applying a "blue pencil" to strike a portion of the restraint which was unreasonably broad in geographic area.<sup>109</sup> Under the doctrine of severability, if a contract contains both enforceable and unenforceable promises, the court can sever the unenforceable promises, as long as they are not "essential," and enforce the remaining valid provisions.<sup>110</sup> A promise is considered "essential" if the parties would not have made the contract without it.<sup>111</sup> In severing the non-essential unenforceable terms, the court wields the emblematic "blue pencil."<sup>112</sup> Parties sometimes include "severability clauses" in a contract to specify that certain clauses are "essential" or to try to influence the process of severance, but generally courts make their own determination on these issues.<sup>113</sup> The purpose of the doctrine is to allow the parties to salvage enforceable promises rather than void the entire contract over lack of legal sophistication and honest mistakes. Severance is unavailable if the "circumstances

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106. The states limiting or voiding noncompetes on broadcasters include: Arizona, Connecticut, Illinois, Maine, Massachusetts, New York, Oregon, Utah and Washington. *See* Schwab, *supra* note 25 at Appendix Table A-3. Other exempted professions include: "professionals" (Alabama), medical, veterinary and social workers (Arkansas), technology workers (Hawaii), government contractors (Illinois), accountants (Louisiana), nurses, social workers and psychologists (Massachusetts), secretaries and clerks (Missouri), in-house counsel and psychologists (New Jersey), health professionals (New Mexico), home healthcare workers (Oregon), beauticians and cosmetologists (Vermont). Beck Reed Riden, 50 State Noncompete Chart (6/27/21) <https://beckreedriden.com/50-state-noncompete-chart-2/>.

107. The American Bar Association Model Rule of Professional Conduct 5.6 prohibits a lawyer from making "a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship . . ." *See also*, American Bar Association Standing Committee on Ethics and Professional Responsibility, *Obligations Related to Notice When Lawyers Change Firms*, Formal Opinion 489 (2019) ("ethics rules do not allow non-competition clauses in partnership, member, shareholder, or employment agreements" among attorneys).

108. *Id.*

109. *Chesman v. Nainby*, 2 Str. 739, 93 Eng. Rep. 819 (K.B. 1726).

110. Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 47-48 (1995); Restatement (Second) of Contracts § 184 (Am. L. Inst. 1981).

111. *Toledo Police Patrolmen's Ass'n, Local 10 v. City of Toledo*, 641 N.E.2d 799, 803 (Ohio Ct. App.), appeal denied, 639 N.E.2d 795 (Ohio 1994).

112. Movsesian *supra* note 110, at 47-48.

113. *Id.*

indicate bad faith or deliberate overreaching” in negotiating the unenforceable provisions.<sup>114</sup>

With respect to employee covenants not to compete, there are three basic approaches that states use to apply the severability doctrine to deal with unreasonably broad restraints. First, nine states<sup>115</sup> apply the strictest form of the “blue pencil rule” and their courts will enforce the reasonable terms in a noncompete provided the covenant remains grammatically coherent once its unreasonable provisions are excised.<sup>116</sup> The court cannot revise, rearrange, or add language to the agreement; it can use its blue pencil merely to strike words in the contract.<sup>117</sup> Second, thirty-three states and the District of Columbia<sup>118</sup> apply a more liberal version of the blue pencil rule, usually referred to as “equitable reformation,” in which the court is allowed to amend the language in question to generate an enforceable contract consistent with the intent of the parties.<sup>119</sup> Equitable reformation allows both the deletion and addition of words to the contract, and increases the chances that the employee will be subject to an enforceable noncompete.<sup>120</sup> Finally, three states<sup>121</sup> have rejected the blue pencil rule and adopted what is known as the “red pencil rule” in which their courts will strike down the entire noncompete if any of its constraints are unreasonable.<sup>122</sup> No reformation of an unreasonable noncompete is possible in these jurisdictions.

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114. *Ferrofluidics Corp. v. Advanced Vacuum Components, Inc.*, 968 F.2d 1463, 1469 (1st Cir. 1992) (citing *Durapin, Inc. v. Am. Prods. Inc.*, 559 A.2d 1051, 1058 (R.I. 1989)).

115. Arizona, Connecticut, Georgia, Indiana, Louisiana, Maryland, Montana, North Carolina, and South Carolina. *See Beck, supra* note 69.

116. Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Non-Compete Agreements*, 86 NEB. L. REV. 672, 682 (2008).

117. *See for example*, *Valley Medical Specialists v. Farber*, 982 P.2d 1277, 1286 (Ariz. 1999) (courts can modify unreasonable noncompetes only if the unreasonable provisions are grammatically severable); *Hahn v. Dress, Perugini & Co.*, 581 N.E.2d 457, 462 (Ind. Ct. App. 1991) (a court may modify a restrictive covenant by redacting unreasonable terms but not by adding additional terms).

118. Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wyoming. *See Beck, supra* note 69.

119. Some states specify this approach by statute. *See* MICH. COMP. LAWS ANN. § 445.774a (West 1989) (“To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.”); Other states have adopted this approach through case law. *See Data Mgmt., Inc. v. Greene*, 757 P.2d 62, 64–65 (Alaska 1988) (permitting reasonable alterations to an overbroad covenant drafted in good faith).

120. *North Am. Paper Co. v. Unterberger*, 526 N.E.2d 621, 625 (Ill. Ct. App. 1988) (Illinois courts may employ principles of equity in modifying overbroad noncompetes if considerations of fairness weigh in favor of modification); *Phone Connection v. Harbst*, 494 N.W.2d 445, 449–450 (Iowa Ct. App. 1992) (Iowa courts have the power to modify the content of an overly broad noncompete).

121. Nebraska, Virginia, and Wisconsin. In addition, two states, New Mexico and Utah, have not yet decided the question, and three states, California, North Dakota and Oklahoma, do not enforce employment noncompetes. *See Beck, supra* note 69.

122. *See* WIS. STAT. ANN. § 103.465 (West 1988) (“[A]ny covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.”). *Pitchford v. Oakwood Mobile Homes*, 124 F. Supp. 2d 958, 965 (W.D. Va. 2000) (reiterating that Virginia courts refuse to adopt any version of the blue pencil doctrine to avoid rewriting the contract on behalf of the parties).

The debate between the blue pencil and red pencil approaches turns on concerns over the equitable enforcement of noncompetes and the preclusive effects of overbroad noncompetes. Proponents of the blue pencil argue that it is unfair to strike down a noncompete due to overbreadth issues that don't apply to the case in question, particularly if the employer clearly has protectable interests with the covered employee.<sup>123</sup> Proponents of the slashing red pencil argue that without it, employers don't have adequate incentive to narrowly draft noncompetes and employees will feel bound by a spurious agreement and pass on valuable opportunities that would benefit the worker and society at large.<sup>124</sup> As will be discussed later, despite the common law doctrine that severance should not be available in cases of bad-faith or deliberate over-reaching, clearly overbroad and unenforceable noncompetes are proliferating in both blue and red pencil states with a negative impact on workers and the economy.<sup>125</sup>

### III. THE AMERICAN EXPERIENCE WITH COVENANTS NOT TO COMPETE: THE EMPIRICAL EVIDENCE ON THEIR IMPACT ON WORKERS, FIRMS, AND THE VIBRANCY OF THE ECONOMY

As previously mentioned, economic theory provides both positive and negative accounts of the efficiency of employee noncompetes. Under the positive account, noncompetes allow employers to make investments in potentially appreciable technology, customer contacts and employee reputation to the benefit of the employer, employee and society. Under the negative account, noncompetes allow employers to extend monopsony power and raise potential competitor's costs for their own benefit, but to the detriment of employees and society. Fortunately, these competing theories yield different predictions that can be tested empirically to determine whether and under what circumstances each account holds true.

#### *A. The Economics of Noncompetes: Mitigating Holdup or Accentuating Employer Market Power?*

The positive economic theory of noncompetes is that they allow the employer to make investments in intangible assets that otherwise might not be made because the value of the investments could be appropriated if the employee leaves and works for a competitor.<sup>126</sup> In the economic literature this is known as a "holdup problem"

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123. Blake, *supra* note 27 at 682.

124. Blake, *supra* note 27. "If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable." Pivateau, *supra* note 116; Charles Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 77 OHIO ST. L.J. 1127, 1162 (2009).

125. See *infra* note 145 and accompanying text. In 2016, the U.S. Treasury issued a report declaring that the overuse of restrictive covenants was harming the American economy. See Office of Economic Policy U.S. Department of the Treasury, *Non-compete Contracts: Economic Effects and Policy Implications* (March 2016).

126. See McAdams 2019, *supra* note 9, at 6; Rubin & Shedd, *supra* note 5; Starr, Prescott & Bishara (2021), *supra* note 5, at 7 in draft.

in that the threat that the employee will leave and appropriate the value of the investment prevents the employer from making the investment.<sup>127</sup> Common examples of employer investments that might be subject to this holdup problem include investments in trade secrets, customer lists, customer relations and employee reputation.<sup>128</sup> The employer investment, combined with the employee's labor, produces a positive rent over which the employer and employee can bargain.<sup>129</sup> The employee will agree to future constraints on his or her job search if the employer shares a portion of the rent with the employee and raises his or her wage.<sup>130</sup> Thus, this account of noncompetes predicts that such clauses should increase employee wages, decrease worker mobility, increase employer investment and profits, and increase innovation and total wealth and welfare.<sup>131</sup>

The negative economic theory of noncompetes is that employers use advantages in bargaining power to compel the employee to accept restrictions on his or her future employment which extend employer monopsony power in the labor market and raise the costs of competitors in the product market.<sup>132</sup> Under this theory, noncompetes benefit employers, but not employees or society, because they allow the employer to augment existing monopsony power, or take advantage of a short-term advantage to extend their monopsony power and constrain wages.<sup>133</sup> Employer monopsony power is associated with job search costs,<sup>134</sup> and covenants not to compete increase employee job search costs.<sup>135</sup> Noncompetes that are imposed on the employee after he or she has already accepted the job and foregone alternatives can be used by the employer to extend a short-run advantage in bargaining power into a long-term constraint on employee mobility.<sup>136</sup> Noncompetes may also yield the employer advantages in the product market because they raise the recruiting costs of potential competitors, including the bound employee.<sup>137</sup> The concern that noncompetes may augment employer monopsony power has become more acute as

127. See Rubin & Shedd, *supra* note 5; Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986).

128. McAdams 2019, *supra* note 9, at 6.

129. Pierre Cahuc, Fabien Postel-Vinay & Jean-Mark Robin, *Wage Bargaining with On-the-Job Search: Theory and Evidence*, 74 ECONOMETRICA 323 (2006).

130. McAdams 2019, *supra* note 9, at 6. The reduction in turnover attendant to the use of noncompetes might also yield a rent the employer and employee could share, but this theoretical possibility seems of little relevance to the real world of noncompetes.

131. *Id.*

132. See McAdams 2019, *supra* note 9, at 5; Starr, Prescott & Bishara (2021), *supra* note 5, at 6–7 in draft.

133. Starr, Prescott & Bishara (2021), *supra* note 5, at 2, 7 in draft.

134. Kenneth Burdett & Dale T. Mortensen, *Wage Differentials, Employer Size, and Unemployment*, 39 INT'L ECON. REV. 257 (1998); Manning, *supra* note 8.

135. Starr, Prescott & Bishara (2021), *supra* note 5, at 7.

136. Starr, Prescott & Bishara (2021), *supra* note 5, at 2, 7; Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 JOURNAL OF HUMAN RESOURCES (2022); Suresh Naidu, Eric A. Posner, & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV L REV 536, 595 (2018); see also Krueger & Posner, *supra* note 20.

137. Notice that because each employer raises his competitors' recruitment costs, this aspect of noncompetes becomes a positional externality that just raises costs and wastes resources. On positional externalities see Robert H. Frank, *Positional Externalities*, STRATEGY AND CHOICE: ESSAYS IN HONOR OF THOMAS C. SCHELLING 25–47 (Richard Zeckhauser, ed., 1991).

the practice of employer “no-poaching” agreements has become more common<sup>138</sup> and concerns about employer labor market monopsony power have increased.<sup>139</sup> Thus, under the account of noncompetes as extensions of monopsony power, economic theory predicts that noncompetes will lower employee wages, decrease employee turnover, increase employer profits, perhaps increase product prices, and decrease innovation and total wealth and welfare.<sup>140</sup>

Recently a number of scholars have undertaken empirical studies to measure the prevalence of noncompetes among American workers and to examine the impact of these agreements on those workers, their firms and the U.S. economy.<sup>141</sup> To examine these questions, researchers have conducted employee and business surveys<sup>142</sup> and used a variety of empirical strategies.<sup>143</sup> In comparing outcomes across states, researchers sometimes employ an index of relative “enforceability” for each state, based on the state’s legal doctrine and how readily courts enforce noncompetes in that state.<sup>144</sup>

138. Naidu et al., *supra* note 21, at 545; Posner, *supra* note 20; Krueger & Posner, *supra* note 20.

139. Anna Sokolova & Todd Sorensen, *Monopsony in Labor Markets: A Meta-Analysis*, 74 WASHINGTON CENTER FOR EQUITABLE GROWTH 27 (2020); David Card, *Who Set Your Wage?*, 112 AM. ECON. REV. 1075 (2022); Manning, *supra* note 8; Krueger & Posner *supra* note 20. Even if noncompetes yield benefits to both the contracting employers and employees, concern has grown in the literature that noncompetes might decrease societal wealth because they quell innovation, competition, and growth. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U L. REV. 575 (1999); ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH VELOCITY LABOR MARKET* (2003); Kenneth G. Dau-Schmidt, *High Velocity Labor Economics: A Review Essay of Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market*, 6 U. PA. J. LAB. & EMP. L. 847 (2004).

140. Starr, Prescott & Bishara (2021), *supra* note 5 at 2, 7.

141. There are two very useful reviews of the empirical literature in this area to which our work on this project is deeply indebted. McAdams 2019, *supra* note 9; Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Econ. Innovation Group 2 (Feb. 2019), available at <https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf>.

142. See, e.g., Starr, Prescott & Bishara (2021), *supra* note 5; Colvin & Shierholz, *supra* note 13; Mark J. Garmaise, *Ties that Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment*, 27 J.L. ECON. & ORG. 276 (2009); Omesh Kini, Ryan Williams & David Yin, *CEO Non-Compete Agreements, Job Risk, and Compensation*, THE REV. FINANCIAL STUDIES (2020); Matthew S. Johnson, & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. HUMAN RESOURCES (2022); Kurt Lavetti, Carol Simon, & William D White, *The Impacts of Restricting Mobility of Skilled Workers: Evidence from Physicians*, 55 J. HUMAN RESOURCES (2020).

143. There are three general approaches used to assess the effects of noncompete agreements. The first is to examine the impact of changes in state policy on noncompete enforceability, for example if a state changes to prohibit their enforcement. The second evaluates the impact of having a high incidence of noncompete agreements in a state with high enforceability in a difference-in-differences (or triple differences) framework. The third compares labor market outcomes of signers with non-signers after controlling for other worker characteristics through regression analysis. McAdams 2019, *supra* note 9, at 10-11.

144. In determining the relative magnitude of “enforceability” in a state, researchers commonly look at a number of legal doctrines including: whether noncompetes can be enforced for both voluntary and involuntary separations; whether employers must provide additional consideration beyond continuing employment; the state’s standard for sufficient “protectable interest” to motivate a noncompete; and whether the state is a blue pencil, red pencil or equitable reform state. Some researchers use a sophisticated weighted multi-factor analysis to compute a meaningful index from these criteria. Typically, Florida, Connecticut, Kansas, Missouri, South Dakota, and Iowa rank the highest on these enforceability indexes, while Oklahoma, Arkansas, New York, California, and North Dakota rank the lowest. See JJ Prescott, Norman Bishara, & Evan Starr, *Understanding Non-competition Agreements-The 2014 Noncompete*

*B. The Incidence, Distribution, and Circumstances of Noncompetes*

The incidence of employee noncompetes in the United States has grown from relative insignificance to about 20–25% of the American labor force. In a 2014 nationwide survey of 11,505 workers, Starr, Prescott, and Bishara found that 18.1% of labor force participants reported being bound by a noncompete, and that 38% had been covered by one in the past.<sup>145</sup> This percentage climbs to 19.9% when an estimate of the share of workers who don't know whether they are covered by a noncompete, but in fact are, is included.<sup>146</sup> Less comprehensive surveys have produced similar estimates. In a 2017 survey of 795 employees, Krueger and Posner found that 15.5% of employees reported being covered by a noncompete<sup>147</sup> while in another 2017 survey of 2,000 Utah employees, Cicero found that 18% of employees reported being covered by a noncompete.<sup>148</sup>

As useful as they are, surveys of individual workers may produce an underestimate of the prevalence of noncompetes in the workforce because these same surveys show that the workers do not always know whether they are bound by a noncompete.<sup>149</sup> To solve this problem, Colvin and Shierholz conducted a 2017 survey of 634 American business establishments to find out how many used covenants not to compete and then extrapolated from this finding to an estimate of the percent of the American workforce that is covered by such agreements.<sup>150</sup> They found that 49.4%, of responding establishments indicated that at least some of their employees were required to enter into a noncompete agreement and 31.8%, of responding establishments indicated that *all* of their employees were required to enter into a noncompete agreement, regardless of pay or job duties.<sup>151</sup> These findings translated into an estimate that between 27.8% and 46.5% of private-sector workers in the United States are subject to noncompetes, or between 36 million and 60 million workers.<sup>152</sup>

Noncompete clauses are not distributed evenly across the American work force. In their 2014 survey, Starr, Prescott, and Bishara found that, noncompetes are more common among salaried workers (27.5%), workers who make more than \$40,000/year (25.2%), those with a graduate degree (30.0%), and those employed by

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*Survey Project*, 2 MICH. ST. L. REV. 369, 457–59 (2016); Balasubramanian, et al, *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, U.S. Census Bureau, Center for Economic Studies Paper #CES-WP-17-09 (2018); Evan Starr, *Consider This—Firm-Sponsored Training and the Enforceability of Covenants Not to Compete*, 72(4) IND LAB REL REV 783 (2019).

145. Starr, Prescott & Bishara (2021), *supra* note 5.

146. *Id.* at note 16.

147. Krueger & Posner, *supra* note 20, at 7–8.

148. Cicero, *Utah Noncompete Agreement Research (2017)*, [http://issuu.com/saltlakechamber/docs/utah\\_noncompete\\_agreement\\_research](http://issuu.com/saltlakechamber/docs/utah_noncompete_agreement_research). See also, Kenneth G. Dau-Schmidt & Timothy A. Haley, *Governance of the Workplace: The Contemporary Regime of Individual Contract*, 28 COMP. LAB. L. & POL. J. 313, Tables 1 and 2 (2007) (individual employment contracts are much more likely to contain noncompetes than collective bargaining agreements).

149. Starr, Prescott & Bishara (2021), *supra* note 5.

150. Colvin & Shierholz, *supra* note 13.

151. *Id.*

152. *Id.*

firms with more than 5,000 employees (21.5%).<sup>153</sup> They also found that noncompetes were more common in some occupations, notably architecture and engineering (36%), computing and mathematics (35%) and management (30%),<sup>154</sup> and some industries, notably information (32%), mining and extraction (31%), and professional and scientific services (31%).<sup>155</sup> Surveys of engineers employed in technology firms<sup>156</sup> and primary care physicians<sup>157</sup> confirm that these high skill workers are more likely to be subject to a covenant not to compete (32.6% and 45%, respectively). In a 2006 study of 375 contracts for CEOs of major corporations, Schwab and Thomas found that 67.5% of the contracts contained covenants not to compete.<sup>158</sup> In their 2017 survey of business establishments, Colvin and Shierholz found that 52.0% of firms in the business services industry imposed noncompetes on all of their employees.<sup>159</sup> Consistent with legal theory, Starr, Prescott, and Bishara found that covenants not to compete were more common among employees who had access to sensitive information, especially trade secrets (32.6%).<sup>160</sup> Based on their regression analysis of the independent association of various characteristics with the likelihood that an employee will have a noncompete, Starr, Prescott, and Bishara estimate that a salaried employee, in a private for profit firm, earning \$100,000 per year, who has a college degree, and who has access to employer trade secrets, has a 44% likelihood of being bound by a noncompete.<sup>161</sup>

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153. Starr, Prescott & Bishara (2021), *supra* note 5, Table 5 (reproduced in the appendix).

154. Starr, Prescott & Bishara (2021), *supra* note 5, Figure 5.

155. Starr, Prescott & Bishara (2021), *supra* note 5, Table 5 (reproduced in the appendix).

156. Matt Marx *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AMER. SOC. REV. 695 (2011).

157. See Lavetti, Simon & White (2018), *supra* note 142.

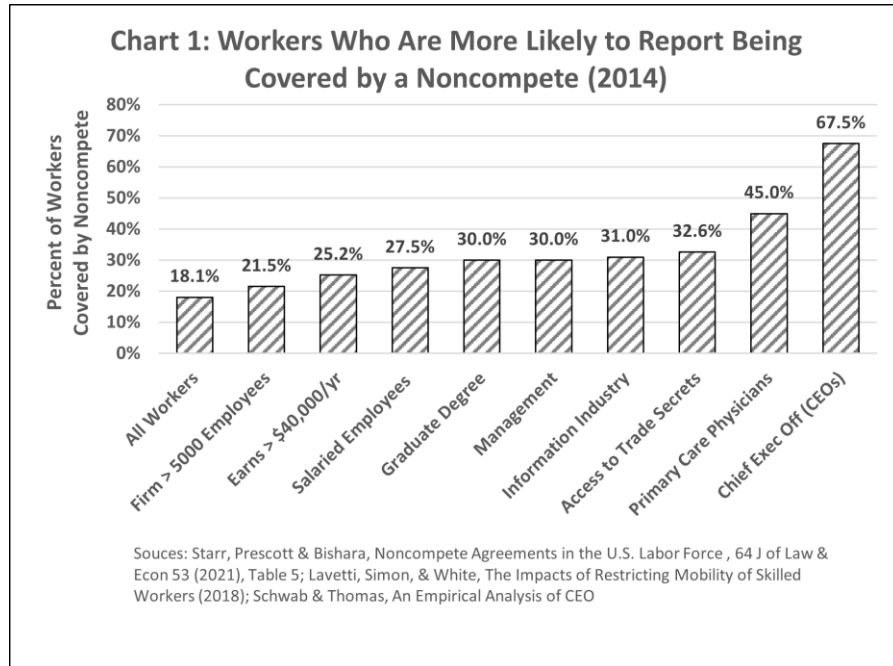
158. See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231 (2006). On noncompetes in CEO employment contracts, see also, Marx, *supra* note 161; Garmaise, *supra* note 142; Kini et al., *supra* note 142.

159. Colvin & Shierholz, *supra* note 13, at Table 3, p. 7.

160. Starr, Prescott & Bishara (2021), *supra* note 5, Table 5 (reproduced in the appendix).

161. *Id.* at p. 8.





However, Starr, Prescott, and Bishara found that noncompetes are also common among low paid employees in less sensitive positions who are unlikely to have access to appreciable information. These workers include hourly employees (14.0%), those who make less than \$40,000 per year (13.3%), those without a college degree (14.3%), those employed by firms with less than twenty-five employees (11.6%) and even those who profess no access to sensitive information (7.8%).<sup>162</sup> They found noncompetes even among grounds maintenance employees (11%) and food preparers and servers (11%).<sup>163</sup> Colvin and Shierholz found that even in the leisure and hospitality industry, 14.3% of business establishments impose noncompetes on all of their employees.<sup>164</sup> Even though noncompetes are found disproportionately among high paid salaried employees, because low-wage hourly employees are so much more numerous, the majority of employees with noncompetes are hourly employees (53%).<sup>165</sup> Colvin and Shierholz found that among business establishments where the average employee wage was less than \$13.00 per hour, 29.0% of responding firms imposed noncompetes on all their workers.<sup>166</sup> Based on their regression analysis, Starr, Prescott, and Bishara estimate that an hourly

162. *Id.*

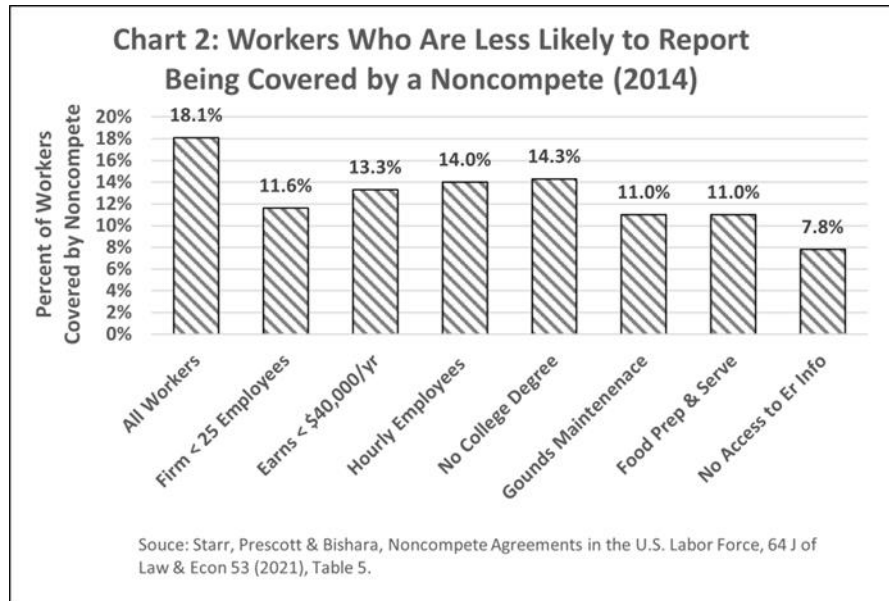
163. Starr, Prescott & Bishara (2021), *supra* note 5, Figure 5.

164. Colvin & Shierholz, *supra* note 13, at Table 3, p. 7.

165. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 1 MANAGEMENT SCIENCE (2020).

166. Colvin & Shierholz, *supra* note 13, at p. 7.

employee, in a private for profit firm, earning \$50,000 per year, who does not have a college degree, and who does not have access to employer trade secrets, has a 13% chance of being covered by a noncompete.<sup>167</sup>



From the perspective of legal scholars, Starr, Prescott, and Bishara also quite usefully explored the circumstances under which covenants not to compete are imposed on workers by their employers. They found that 29.3% of employees with a noncompete clause first learned of the clause only after they had accepted the job, while 63.0% first learned of the clause before acceptance and 7.7% couldn't remember when they first learned of the clause.<sup>168</sup> When presented with a noncompete, only 10% of employees report negotiating over the clause, while 88% report just reading and signing it with 6.7% admitting that they did not even read the provision.<sup>169</sup> The top reasons for forgoing the opportunity to negotiate include that the terms were reasonable (52%), the assumption that noncompetes were not negotiable (41%) and the fear of being fired (20%) or creating tension with their employer (19%).<sup>170</sup> Only 8% responded that they did not negotiate because they assumed the employer would not sue and only 7% responded that they did not negotiate because they did not think a court would enforce the provision.<sup>171</sup>

167. *Id.*, at p. 8.

168. Starr, Prescott & Bishara (2021), *supra* note 5, Table 7. In this result we combine those who say they first learned of the noncompete before they accepted the job (60.8%), with those who say they first learned before accepting a promotion or raise (2.2%).

169. *Id.*

170. *Id.* Table OB2, at 42 in draft.

171. *Id.*

Advance notice of the noncompete appears to matter to employees since those who receive advance notice are almost twice as likely to bargain for benefits in exchange for the noncompete (11.6%) in comparison with those without advance notice (6%).<sup>172</sup> Of those who did not receive advance notice of the noncompete, 26% report that they would have reconsidered accepting the job if they had known about the restriction.<sup>173</sup> Consultation with friends, family, or a lawyer is relatively uncommon among those presented with a noncompete (17%), but those who seek advice are three to five times more likely to negotiate for benefits in return for the restriction.<sup>174</sup>

Finally, quite surprisingly, it seems that noncompete clauses are almost as common in states where the clauses are unenforceable as they are in states where they are readily enforceable. Starr, Prescott, and Bishara found no significant difference in the percent of employees ostensibly covered by noncompetes in California and North Dakota (19%), where they are unenforceable, and the percent covered in the rest of the country, and even in states such as Florida and Connecticut (19%) where the clauses are readily unenforceable.<sup>175</sup> Performing a multivariate analysis to separate out the impact of other variables, for example the fact that California is a high tech state with a lot of employees who have access to employer trade secrets, Starr, Prescott, and Bishara find that the percent of employees subject to noncompetes in states where they are unenforceable is about four to five percentiles less than what would be expected in a state where they are enforceable.<sup>176</sup> In their survey of business establishments, Colvin and Shierholz found that the percent of establishments that required all of their employees to submit to noncompetes was not significantly different in California (29.3%) from the percentages calculated in eleven other states, including Florida (39.3%).<sup>177</sup>

### *C. The Impact of Noncompetes on Workers' Wages*

Empirical studies of the impact of noncompete agreements on the labor market have examined a number of outcomes, in particular the impact of such agreements on worker wages and mobility. The impact of these agreements on worker wages are of particular importance because the positive and negative economic models of the impact of noncompetes yield very different predictions with respect to this variable: if noncompetes are voluntary agreements that facilitate employer investments that make workers more productive, the workers should receive compensating wages for accepting the post-employment constraint; however, if noncompetes facilitate and extend employer monopsony power, the workers should suffer a diminution in wages

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172. *Id.* Table 7, at 34 in draft.

173. *Id.*

174. *Id.* Among those workers who consult with friends and family, 30.8% try to negotiate, and among those workers who consult with a lawyer, 48.6% try to negotiate.

175. *Id.* at 7 in draft.

176. *Id.*

177. Colvin & Shierholz, *supra* note 13, Table 2, at p. 6.

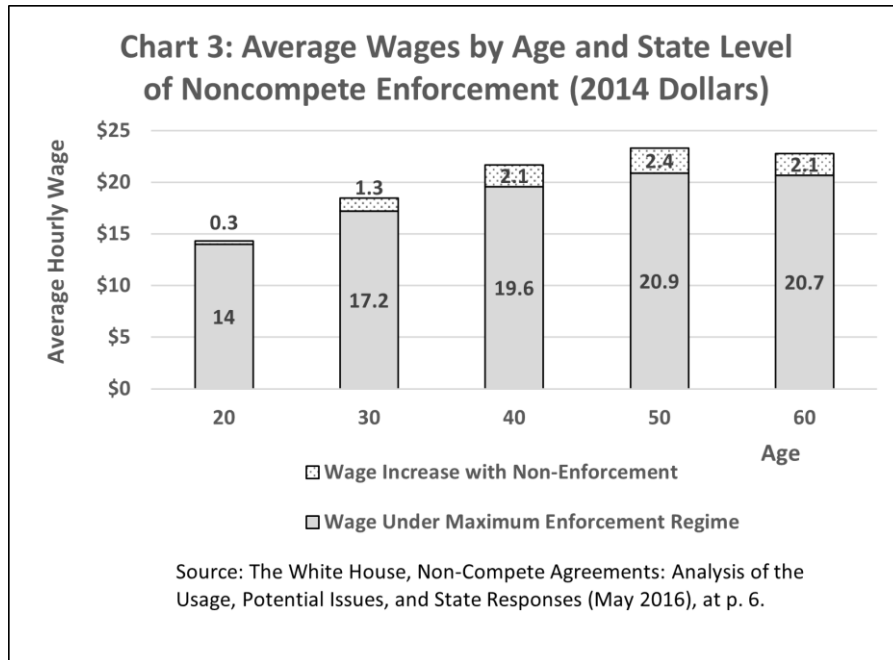
with the imposition of a noncompetitor. Both the positive and negative economic models predict that noncompetitors will result in lower worker mobility, but it is still useful to estimate the magnitude of this impact in order to evaluate whether noncompetitors are beneficial or detrimental to the larger economy.

The empirical studies to date suggest that employees generally suffer a decrease in wages with the imposition of a noncompetitor, although high wage, high skill, employees may enjoy higher wages, particularly if they have advance notice of the noncompetitor and an opportunity to bargain over the terms of its acceptance. Studies that compare wages across states with different levels of enforcement of noncompetitors have found that increased enforcement of noncompetitors results in lower wages for workers. Starr, Prescott, and Bishara find that moving from a non-enforcement regime to an average enforcement regime lowers wages in a state by 4%.<sup>178</sup> The Treasury Department has combined the Starr, Prescott, and Bishara findings with demographic data from the Current Population Survey to produce estimates of the impact of noncompetitor enforcement on average hourly wages over the life cycle, reproduced in Chart 3. These estimates suggest that, as workers age, the average wage benefit of being free from noncompetitors increases from a mere 2.14% when the worker is twenty years old, to 11.5% when the worker is fifty years old. Using a method of analysis similar to that used by Starr, Prescott, and Bishara, Balasubramanian et al. found that tech workers receive wages that are 2.0–2.8% lower on average in states with an average level of enforcement of noncompetitors as compared with workers in non-enforcing states.<sup>179</sup>

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178. Starr, Prescott & Bishara (2021), *supra* note 5, at 14 and Table 9 in draft; *see also*, Evan Starr, *Consider This . . .*, *supra* note 144, at 785 (2019).

179. Balasubramanian et al., *supra* note 136.



The results of studies that examine changes in the enforcement of noncompetes within a given state concur. Lipsitz and Starr estimate that Oregon's partial ban on noncompetes in 2008 led to a 2.2 to 3.1% increase in average wages for low wage hourly workers relative to several control groups.<sup>180</sup> Johnson, Lavetti and Lipsitz estimate that the wages of U.S. workers would increase 7% on average if noncompetes were made unenforceable nationwide.<sup>181</sup> However, the results of studies comparing workers with and without covenants give more mixed, but still reasonable, results. Lavetti, Simon and White find that wage growth among primary care physicians is higher among those who signed a noncompete compared with those who have not.<sup>182</sup> Starr et al. (2019) find that workers bound by noncompetes earn 7% higher wages compared with comparable unbound workers, however the circumstances of adoption of the noncompete seem to matter since those workers receiving advance notice of the noncompete receive 10% higher wages, while those receiving notice after accepting the job receive no wage premium.<sup>183</sup>

180. Lipsitz & Starr, *supra* note 168.

181. Mathew S. Johnson, Kurt Lavetti & Michael Lipsitz, *The Labor Market Effects of Legal Restrictions on Worker Mobility*, at 12 (Sept. 22, 2019) (unpublished manuscript) (herein after "Johnson et al. (2019)").

182. See Lavetti, Simon & White (2018), *supra* note 142.

183. Starr, Prescott & Bishara (2021), *supra* note 5 at 12 in draft.

*C. The Impact of Noncompetes on Firms' Investment*

Under the positive economic theory of noncompetes, the clauses allow firms to make investments in non-tangible assets which they otherwise would not make because the value of these assets is appropriable if the employee leaves. Accordingly, if noncompetes perform this function, we should see increased employer investment in these non-tangible assets in jurisdictions that allow their enforcement.<sup>184</sup> The most common investments examined in the empirical literature are “shared information,” customer lists, and employee training.

Although there is some variation in the findings, depending on the type of noncompete and occupation, the scholars who have looked at this question have largely found that workers who are covered by a noncompete receive greater access to information, customer lists, and training, than other similarly situated workers who are not covered by a noncompete.<sup>185</sup> Starr, Prescott, and Bishara found that workers covered by noncompetes were 7.8% more likely to received shared information and 11% more likely to have received training in the last year than workers without a noncompete, but only if the noncompete was raised with the employee in advance of acceptance of the offer of employment.<sup>186</sup> Accordingly, one might view the employer’s decision whether to raise the issue in advance of employment as a marker for whether the employer has a legitimate protectable interest. Lavetti, Simon and White found that physicians receive more intra-practice patient referrals, or “customer contacts,” when they have a signed noncompete agreement.<sup>187</sup> Starr estimates that moving a state from a non-enforcement regime to an average enforcement regime would increase the incidence of worker training by 18%.<sup>188</sup> Johnson and Lipsitz find that, among coiffures, coverage by a noncompete is associated with a 14% greater likelihood of the firm providing on-the-job training.<sup>189</sup> As the contrarian, Garmaise suggests that noncompetes may increase firm-sponsored training, but decrease employee investments in training, and thus the predicted impact of noncompetes on training is indeterminant.<sup>190</sup> Examining the impact of changes in state law in Florida, Louisiana, and Texas on top executives of public companies, he finds that the decline in self-sponsored general training associated with a noncompete is greater than the increase in employer sponsored general training, leading to lower levels of overall human capital investment among these employees.<sup>191</sup>

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184. *But see*, Garmaise, *supra* note 142, arguing that noncompetes have potentially offsetting effects on investments in training: they increase the incentive for firm-sponsored training but decrease that of self-sponsored training.

185. McAdams 2019, *supra* note 9, at 13–14.

186. Starr, Prescott & Bishara (2021), *supra* note 5, at 75.

187. Lavetti, Simon & White (2018), *supra* note 142.

188. Starr, *Consider This . . .*, *supra* note 144, at Table 3.

189. Johnson & Lipsitz, *supra* note 142.

190. Garmaise, *supra* note 142.

191. *Id.*

*D. The Impact of Noncompetes on the Vibrancy of the Economy:  
Employee Mobility, In Terrorem Effects, and Firm Entry*

Finally, there is the question of the impact of noncompetes on the vibrancy of the economy. By restricting past employees from becoming competitors or working for competitors, covenants not to compete raise competitors' costs, reducing competition in the economy and perhaps growth and innovation.<sup>192</sup> Raising rivals' costs is a well-recognized strategy for attaining or maintaining market power which causes dead-weight losses to society.<sup>193</sup> Younge and Marx have found that the enforcement of noncompetes increases incumbent firm value,<sup>194</sup> while Younge, Tong, and Fleming show that firms in states that enforce noncompetes are more likely to be acquisition targets.<sup>195</sup> Of course the wide-spread use of noncompetes will also raise the employee search costs of incumbent firms.<sup>196</sup> As a result, the imposition of these costs on rival employers may become merely a positional externality which imposes a dead-weight loss on the economy without the employer even attaining a competitive advantage.<sup>197</sup> Even if noncompetes do benefit covered employees and encourage employer investment, they may not be wealth maximizing if they pose too big of a drag on employee mobility, the formation of firms and growth of the economy. In his seminal work on the subject, Gilson makes a convincing argument that triumph of the "Silicon Valley" in success and growth over possible rivals such as "Route 128" in Massachusetts was in no small part due to the absence of enforceable noncompetes in California.<sup>198</sup> Even though Silicon Valley employers may have lost some returns on appropriable investments due to employee mobility, overall the industry and the economy of California benefited. More recently, Lobel has made a convincing argument concerning the overall negative effect of noncompetes on the economy.<sup>199</sup> Noncompetes may hurt the vibrancy of the economy through the reduction of employee mobility, the *in terrorem* effects on employees who are covered by unenforceable constraints, and by thwarting the formation and growth of competitors.

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192. McAdams 2019, *supra* note 9; Lobel, *supra* note 12.

193. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986); Timothy J. Brennan, *Understanding "Raising Rivals' Costs"*, 33 ANTITRUST BULL. 95 (1988).

194. Kenneth A. Younge & Matt Marx, *The Value of Employee Retention: Evidence from a Natural Experiment*, 25 J. ECON. & MGMT. STRATEGY 652 (2016). However, Garmaise, *supra* note 142, finds no effect on firm value.

195. Kenneth A. Younge, Tony W. Tong & Lee Fleming, *How Anticipated Employee Mobility Affects Acquisition Likelihood: Evidence from a Natural Experiment*, 36 STRATEGIC MGMT. J. 686 (2015).

196. Noncompetes can impose significant hiring costs on incumbent firms, as demonstrated by the recent dispute between HP and Cisco over hiring former HP employees. Mark Chandler, *HP Sues Employees for Leaving—We Challenge HP to Support Employee Freedom*, CISCO BLOGS (Nov. 23, 2011), <https://blogs.cisco.com/news/hp-sues-employees-for-leaving>.

197. On positional externalities, see Frank, *supra* note 137, at 25–47.

198. Gilson, *supra* note 139. See also, ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* (2003); Dau-Schmidt, *supra* note 139.

199. Lobel, *supra* note 9; Mark A. Lemley & Orly Lobel, *Supporting Talent Mobility and Enhancing Human Capital: Banning Noncompete Agreements to Create Competitive Job Markets*, at p. 2–3, Day One Project (Jan. 2021)

As previously mentioned, both the positive and negative economic models of noncompetes predict lower worker mobility and longer job tenure. Not surprisingly, all of the empirical studies consistently support this prediction. Johnson, Lavetti and Lipsitz find that moving from a noncompete unenforceability regime to the highest level of enforceability observed in the United States would reduce the month-to-month probability of workers changing employers by 26.1%.<sup>200</sup> Similarly, Lipsitz and Starr show that Oregon’s ban on noncompetes for low wage workers resulted in an increase in transitions across employers of 12.2–18.3% for those same workers.<sup>201</sup> Marx, Strumsky and Fleming found that Michigan’s fortification of the enforcement of noncompete agreements in the 1980s resulted in an 8.1% decrease in inventors switching jobs.<sup>202</sup> Garmaise found that the shift to stricter enforcement regimes in Texas, Louisiana and Florida resulted in a 48.5% decrease in the likelihood that top executives would change jobs within industries, and an increase in their job tenure of 16%.<sup>203</sup> Balasubramanian, et al found that Hawaii’s 2015 ban on noncompetes among technology workers led to an 11% increase in mobility for those workers, relative to comparable workers in other states.<sup>204</sup> Balasubramanian et al. also found that, nationwide, workers in states with average enforcement regimes had 8% fewer jobs than similar workers in non-enforcing states.<sup>205</sup> In a forthcoming article, Starr, Frake and Agarwal find that, in comparing average employee job tenure across states with different incidences of noncompetes, a 10% increase in the incidence of noncompetes results in a 0.8 year increase in average job tenure.<sup>206</sup> Starr, Frake and Agarwal also find that, at least in high enforcement states, a high incidence of noncompetes lowers job offers to both employees covered by noncompetes and those not covered, suggesting that a high incidence of noncompetes increases friction in labor mobility generally.<sup>207</sup>

The widespread existence of clearly unenforceable covenants not to compete raises the prospect that employers use these clauses to decrease employee mobility through an *in terrorem* effect on employee behavior, as a means of decreasing wages or increasing rivals costs.<sup>208</sup> Employees’ behavior may be affected by a noncompete, even though the clause is clearly not enforceable, either because employees don’t

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200. Johnson et al. (2019), *supra* note 181.

201. Lipsitz & Starr, *supra* note 15.

202. Matt Marx, Deborah Strumsky & Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment*, 55 MGMT. SCI. 875 (2009).

203. Garmaise, *supra* note 142.

204. Balasubramanian et al., *supra* note 136.

205. *Id.*

206. Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 30 ORG. SCI. 961 (2019).

207. *Id.* The fact that noncompetes can have “spillover effects” on non-signers complicates empirical tests of their impact resulting in underestimates when comparing workers who are covered by a noncompete with those who are not. McAdams 2019, *supra* note 9, at 11.

208. Blake wrote about the in terrorem effect of covenants not to compete in his 1960 article on the subject. Blake 1960 at 682-83. *See also*, Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L. J. 1127 (2009). For a more recent treatment of the problem see, Evan Starr, JJ Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36(3) J OF LAW ECON. & ORGAN. 633 (2020), herein after Starr et al. (2020).



understand that some clauses aren't enforceable,<sup>209</sup> or because the employees or potential employers fear frivolous lawsuits.<sup>210</sup> Starr, Prescott, and Bishara examine the *in terrorem* effect of unenforceable noncompetes by comparing the impact of noncompetes on employee mobility in states where they are enforceable with the impact they have in states where they are clearly unenforceable.<sup>211</sup> They find that workers in states where noncompetes are unenforceable suffer a decrease in mobility that is not significantly different from that suffered by workers in states with an average level of enforceability.<sup>212</sup> Examining the causes of this decrease in mobility, Starr, Prescott, and Bishara find that workers covered by noncompetes are as likely to receive job offers from competitors, but they are more likely to turn them down and focus job search on noncompetitors.<sup>213</sup>

Finally, there is the question of the impact of noncompetes on the formation and growth of competitors. The empirical evidence on the impact of noncompetes on firm startup and entry is mixed, but generally supports the notion that noncompetes hinder the formation and growth of competitors. Samila and Sorenson study venture capital availability in response to positive and negative investment shocks in states with high and low enforcement regimes.<sup>214</sup> They find that states with lower enforceability of noncompetes respond to such shocks with higher levels of firm startups and employment.<sup>215</sup> These findings are consistent with the hypothesis that even though noncompetes encourage investments in non-tangible assets, they inhibit new firm creation more and on net decrease economic growth. Stuart and Sorenson study initial public offerings and acquisitions in the biotech industry, which they show increase the rate of new firm formation, often with the assistance of senior employees from existing firms.<sup>216</sup> They show that noncompete enforceability decreases the incidence of these important "liquidity events" in the founding of new firms.<sup>217</sup> Starr, Balasubramanian, and Sakakibara (2017) found that higher enforceability of noncompetes is associated with fewer "spin-off firms" within the same industry as their predecessor, but the spin-off firms that do appear are larger,

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209. Catharine L. Fisk, *Reflections on the New Psychological Contract and Ownership of Human Capital*, 34 CONN. L. REV. 765 (2006); Rachel Arnov-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006).

210. Sullivan, *supra* note 124.

211. Starr, et al. (2020), *supra* note 208. In states where noncompetes are enforceable, employees who are covered by such clauses have, on average, 11% longer job tenures, a 17% higher competitor-specific reservation wage, and a 54% greater likelihood of reporting that they will leave for a noncompetitor relative to a competitor. *Id.*

212. *Id.*

213. *Id.* (draft p. 30) Once again, the fact that noncompetes can have "spillover effects" on non-signers complicates empirical tests of their impact resulting in underestimates when comparing workers who are covered by a noncompete with those who are not. McAdams 2019, *supra* note 9, at 11.

214. Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCIENCE 3, 425 (2011).

215. *Id.*

216. Toby E. Stuart & Olav Sorenson, *Liquidity Events and the Geographic Distribution of Entrepreneurial Activity*, 48 ADMIN. SCI. Q. 175 (2003).

217. *Id.*

faster growing, and have a higher likelihood of surviving.<sup>218</sup> They argue that this occurs because noncompetes raise the expected litigation costs for spin-offs, and these costs dissuade smaller, less profitable, firms from forming.<sup>219</sup> Kang and Fleming have found that the increased enforceability of noncompetes allows large firms to add more establishments and grow, at the expense of new entrants.<sup>220</sup>

#### IV. THE AMERICAN MOVEMENT FOR STATUTORY REFORM

As outlined in the previous section, there is a growing body of evidence that more employers are abusing covenants not to compete, and that this abuse is having a detrimental effect on workers' wages, workers' mobility, firm formation, and the general health of the economy. This employer abuse can take the form of imposing the noncompete: without advance notice or additional consideration; when less intrusive alternative common law or contractual means could protect the employer's legitimate interest; when the employer has no legitimate interest to protect; or when the noncompete is otherwise clearly unenforceable and prohibited by law. Even when they are clearly unenforceable, the empirical evidence suggests that noncompetes have a deleterious effect on the functioning of the labor market due to the *in terrorem* effect they have on workers and competing employers and the fact that they raise transaction costs in the labor market.

The deleterious impact of noncompetes on workers and the economy has not gone unnoticed. In the last decade numerous scholars and policymakers have called for legislative reform ranging from greater transparency in contracting to an outright ban on noncompetes.<sup>221</sup> The Uniform Law Commission has undertaken the drafting of a proposed uniform state law on noncompetes in hopes of facilitating useful reform and promoting uniformity in state law on the subject.<sup>222</sup> In 2016, the Treasury Department released an economic analysis of noncompetes in the United States outlining many of the problems and suggesting possible reforms.<sup>223</sup> Later that same year, the Obama White House produced a position paper<sup>224</sup> and then a "call to

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218. Evan Starr, Natarajan Balasubramanian & Marik Sakakibara, *Screening Spinouts?: How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552 (2018).

219. *Id.*

220. Hyo Kang & Lee Fleming, *Non-competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29(3) J. ECON. & MGMT. STRATEGY 663 (2020).

221. Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts*, Issue Brief of the Economic Innovation Group (2019); Colvin & Shierholz, *supra* note 13; Lemley & Lobel, *supra* note 199.

222. Uniform Law Commission, *Uniform Restrictive Employment Agreement Act, National Conference of Commissioners on Uniform State Laws* (Jul. 12, 2021)..

223. Treasury Report, *supra* note 125.

224. The White House, *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* (May 2016) (hereafter White House Report), [https://obamawhitehouse.archives.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf)

action”<sup>225</sup> detailing the current abuse of noncompetes and urging state legislators to address this abuse through legislative reform. Although interest in noncompetes waned under the Trump administration, President Biden campaigned on a platform of prohibiting such agreements.<sup>226</sup> Indeed President Biden, campaigned to work with Congress to produce federal legislation to “[e]liminate noncompete clauses and no-poaching agreements that hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers.”<sup>227</sup> In 2022, the Treasury Department produced a comprehensive report on the negative effects of noncompetes and no-poach agreements on the U.S. economy.<sup>228</sup>

These calls for reform have resulted in action at both the federal and state level. In 2015, Senators Murphy (D-Conn) and Franken (D-Minn) introduced the Mobility and Opportunity for Vulnerable Employees Act (MOVE Act), which prohibited noncompetes for low wage workers.<sup>229</sup> Although the Obama administration supported the MOVE Act, the legislation never made it out of Committee.<sup>230</sup> In 2019, Senators Chris Murphy (D-Conn.) and Todd Young (R-Ind.) introduced the Workforce Mobility Act (WMA) which would prohibit noncompetes nationwide, except in conjunction with the sale of a business or the dissolution of a partnership, and give the Department of Labor the power to fine employers attempting to enforce such restrictive covenants.<sup>231</sup> Also in 2019, Senator Marco Rubio (R-Fla) introduced the Freedom to Compete Act (FCA) which would amend the Fair Labor Standards Act (FLSA) to prohibit noncompetes unless the employee is a bona fide executive, administrative, professional, or salesperson who is exempt from the FLSA’s minimum wage requirements.<sup>232</sup> Reform may also come at the federal level in the form of executive rulemaking under existing antitrust laws. In 2021, President Biden issued an executive order encouraging the FTC to exercise its rulemaking authority “to curtail the unfair use of noncompete clauses and other . . . agreements that may

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225. The White House, *State Call to Action on Non-Compete Agreements* (Oct. 2016) (hereafter *Call to Action*), <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.

226. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, <https://joebiden.com/empowerworkers/> (last visited Jun. 12, 2021).

227. *Id.*

228. U.S. Dept. of the Treasury, *The State of Labor Market Competition* (Mar. 7, 2022).

229. *See* Mobility and Opportunity for Vulnerable Employees Act, S. 1504, 114th Cong. (2015–2016) (hereinafter MOVE Act). In the MOVE Act, the protected low wage workers were those earning less than \$15 an hour, \$31,200 per year, or the state or local minimum wage.

230. Anne Dunne & Erik Weibust, *Democratic U.S. Senators Seek to Abolish Non-Compete Agreements*, SEYFARTH SHAW (May 2, 2018), <https://www.tradesecretslaw.com/2018/05/articles/legislation-2/democratic-u-s-senators-seek-to-abolish-non-compete-agreements/>.

231. *See* Workforce Mobility Act of 2019, S. 2614, 116th Cong. (2019–2020); *see also*, Press Release, Sen. Young, Young and Murphy Introduce Bill to Limit Non-Compete Agreements, Protect Workers (Oct. 17, 2019), <https://www.young.senate.gov/newsroom/press-releases/young-and-murphy-introduce-bill-to-limit-non-compete-agreements-protect-workers>.

232. *See* Freedom to Compete Act, S. 124, 116th Cong. (2019–2020); *see also*, Press Release, Sen. Rubio, Rubio Introduces Bill to Protect Low-Wage Workers from Non-Compete Agreements (Jan. 15, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/1/rubio-introduces-bill-to-protect-low-wage-workers-from-non-compete-agreements>.

unfairly limit worker mobility.”<sup>233</sup> Pursuant to this presidential order, the FTC has hosted a joint public workshop with the DOJ to discuss efforts to promote competitive labor markets and worker mobility.<sup>234</sup>

Successful enactments of reform have been much more common at the state level. Since 2015, twenty-two states and the District of Columbia have enacted or amended noncompete statutes.<sup>235</sup> These enactments ranged from modest amendments tinkering with statutory definitions to a flat prospective ban on the enforcement of noncompetes in the District of Columbia.<sup>236</sup> At the time of this writing, important state legislation concerning the enforcement of noncompetes is being considered in over a dozen other states.<sup>237</sup> These proposals for reform have been put forth to remedy problems with the enforcement of noncompetes that are apparent in the empirical literature. The reforms can be characterized as having four basic objectives: to ensure notice, clarity and bargaining over noncompetes; to help ensure employer legitimate interest in the noncompete; to discourage overly broad noncompetes; and to completely ban noncompetes.

#### *A. Proposals to Ensure Notice, Transparency, and Bargaining Over Noncompetes*

The empirical literature shows that lack of transparency and bargained for exchange is a problem in the enforcement of noncompetes. Starr, Prescott, and Bishara found that the workers who do not receive notice of the restrictive covenant before accepting employment do not receive compensating wages and these workers constitute 29.3% of those covered by noncompetes.<sup>238</sup> Starr, Bishara, and Prescott (2021) also find that only 10% of workers with noncompetes report bargaining over their noncompete, with 38% of the non-bargainers not realizing that they could negotiate.<sup>239</sup> Moreover, Starr’s later work suggests that employers with a legitimate interest to protect are more likely to give their employees advance notice of the

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233. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

234. See Fed. Trade Commission, Making Competition Work: Promoting Competition in Labor Markets, <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-doj-hold-virtual-public-workshop-exploring-competition-labor>; See also Dept. of Justice, Public Workshop on Promoting Competition in Labor Markets, <https://www.justice.gov/atr/events/public-workshop-promoting-competition-labor-markets>.

235. Those states are: Alabama (2016), Arkansas (2015), Colorado (2018, 2021), District of Columbia (2021), Florida (2020), Hawaii (2015), Idaho (2018), Illinois (2018, 2021), Louisiana (2020), Maine (2019), Massachusetts (2018), Maryland (2019), Nevada (2017, 2021), New Mexico (2015), New Hampshire (2019), North Dakota (2019), Oregon (2015, 2019, 2021), Rhode Island (2019), Texas (2019), Utah (2018), Washington (2019), Virginia (2020), West Virginia (2017). Stewart Schwab, *Report to the Study Committee on Covenants Not to Compete Draft of September 4, 2019*, Uniform Law Commission, Table A-5 (Sep. 2019); Beck Reed & Riden, Fair Competition Law, New Map of Recent Changes to State Noncompete Laws (Jun. 8, 2021), <https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/>.

236. *Id.*, Schwab.

237. *Id.*, Schwab, at Table A-6; *Id.*, Reed & Riden.

238. Starr, Prescott & Bishara (2021), *supra* note 5, Table 7.

239. *Id.*

noncompete.<sup>240</sup> Thus advance notice is not only an indication of bargained for exchange and mutual benefit, but also a marker of whether the employer has a legitimate interest to protect. Finally, arguments of equity and economic efficiency require that agreements be based on transparency, understanding and mutual assent. Absent these criteria there is no “meeting of the minds” and no reasonable presumption that the agreement is mutually beneficial.

Accordingly, it is not surprising that the academics and policymakers have over-whelmingly endorsed reforms to promote transparency and bargained for exchange in noncompetes. In his policy analysis, Starr recommends that states adopt laws promoting transparency including notice in advance of accepting a job or promotion.<sup>241</sup> The Obama White House “Call to Action” on noncompetes also recommends that states “promot[e] transparency in noncompetes” by enacting laws that require advance notice and additional consideration for a noncompete to be enforceable, and that require notice to employees on their rights under the law.<sup>242</sup> Finally, the Uniform Restrictive Employment Agreement Act drafted by the Uniform Law Commission, requires that employees receive a written copy of any restrictive employment agreement at least fourteen days before accepting or beginning work, that they receive a separate notice in the preferred language of the worker, that they receive a notice of penalties against an employer entering into a prohibited agreement, and that the State Department of Labor shall prescribe the notice.<sup>243</sup>

A variety of states have taken these recommendations to heart and passed or considered laws to promote transparency and bargaining with respect to noncompetes. In 2014, New Hampshire adopted a law that requires that noncompete agreements be provided to potential employees prior to the acceptance of an offer of employment; otherwise the noncompete is not enforceable.<sup>244</sup> Beginning in 2015, Oregon adopted a more comprehensive set of notice requirements.<sup>245</sup> Oregon requires that firms make clear whether employees will be expected to sign a noncompete in advance of offer letters, the noncompete must be provided at least two weeks before employment or with bona fide advancement, and the employer must give post-termination notification of a written signed noncompete.<sup>246</sup> Massachusetts (2018), Maine (2019), and Washington (2019) soon followed suit and all now require written notice in advance of hiring for noncompetes to be effective.<sup>247</sup>

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240. *Id.*

241. Starr, Use and Abuse . . ., *supra* note 221, at p. 13.

242. White House Call to Action, *supra* note 225.

243. Uniform Law Commission, *Uniform Restrictive Employment Agreement Act*, *National Conference of Commissioners on Uniform State Laws*, Section 4. Notice Requirements (Jul. 12, 2021).

244. N.H. REV. STAT. ANN. § 275:70-a (2019).

245. OR. REV. STAT. ANN. § 653.295.

246. *Id.*

247. See ME. REV. STAT. ANN. tit. 26 § 599-A(4) (requiring employers disclose a noncompete before making an offer of employment and providing them at least three days to consider); MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(i) (requiring employers provide notice of a noncompete ten business days before the commencement of employment or before formal offer of employment); WASH. REV. CODE ANN. § 49.62.020(1)(a)(i) (requiring employers to provide written notice of the terms of a noncompete no later than time of the employee’s acceptance).

In 2021, Illinois amended its Freedom to Work Act to stipulate that noncompete and nonsolicitation covenants are void unless the employer complies with specific notice requirements before the commencement of employment or before signing a covenant.<sup>248</sup> The District of Columbia requires employers to provide all covered employees written notice that noncompetes are banned in the District of Columbia.<sup>249</sup> In addition some states, such as Massachusetts and Nevada, require that independent consideration be given for any noncompete agreed to after employment starts.<sup>250</sup> These requirements help ensure that employees have notice and an opportunity to look for other work before accepting the restriction, and thus be more likely to share in the benefits of a noncompete. They also help insure legal equity and the contractual requirement of a “meeting of the minds.”

*B. Proposals to Help Ensure that the Employer has a Legitimate Interest: Prohibiting Noncompetes for Low Wage Workers, Prohibiting Noncompetes for Certain Occupations, and Requiring Garden Leaves*

The empirical evidence suggests that employers often impose noncompetes on employees even when the employer has no legitimate interest, and the restraint is unenforceable. Starr, Prescott, and Bishara found that, even in California and North Dakota where noncompetes are unenforceable, 19% of the workforce is covered by a noncompete.<sup>251</sup> Similarly, Colvin and Shierholz found that in California 29.3% of business establishments required *all* of their employees to submit to noncompetes even though they were unenforceable.<sup>252</sup> Nationwide, Starr, Prescott, and Bishara estimate that an hourly employee, in a private for-profit firm, earning \$50,000 per year, who does not have a college degree, and who does *not* have access to the employer trade secrets, has a 13% chance of being covered by a noncompete.<sup>253</sup> Even though they are unenforceable, these noncompetes have an *in terrorem* effect on employee mobility and wages either because the employees do not understand that noncompetes can be unenforceable or because they fear frivolous law suits. These *in terrorem* effects on wages and mobility are not significantly different from the wage and mobility declines suffered by workers with noncompetes in states where enforcement is possible.<sup>254</sup> The common existence of unenforceable covenants not to compete is a problem that cannot be ignored in the law. Academics and policymakers have suggested several reforms to help ensure that employers have a legitimate interest to protect before they impose a noncompete on an employee.

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248. Employers must: 1) advise the employee in writing to consult with an attorney before entering into the covenant; and 2) provide the employee with a copy of the covenant at least fourteen calendar days before the commencement of employment or provide the employee with at least fourteen calendar days to review the covenant before signing. See Illinois Freedom to Work Act of 2021, 820 ILCS § 90, Section 20 (2021).

249. Ban on Non-Compete Agreements Amendment Act of 2020, D.C. Code § 32–581.05 (2020).

250. MASS. GEN. LAWS ANN. c. 149, § 24L(b); NEV. REV. STAT. § 613.195.

251. Starr, Prescott & Bishara (2021), *supra* note 5, at 7 in draft.

252. Colvin & Shierholz, *supra* note 13, Table 2, at p. 6.

253. Starr, Prescott & Bishara (2021), *supra* note 5, at 8 in draft.

254. Starr et al. (2020), *supra* note 208, at 25 in draft.

The most popular proposal to help ensure that the employer has a legitimate interest is to prohibit noncompetes for low-wage workers.<sup>255</sup> The thinking is that low-wage workers are unlikely to have access to valuable employer information that might be appropriated and that they have little bargaining power to resist the imposition of an uncompensated noncompete.<sup>256</sup> Moreover, clear legislative prohibitions based on certain levels of income or wages have the advantage that they are easy to communicate to the public and cheap to enforce. The proposed Uniform Restrictive Employment Agreement Act of the Uniform Laws Commission prohibits application of a noncompete against workers whose earnings are less than the annual mean wage of employees in the state.<sup>257</sup> The proposed Act also prohibits application of noncompetes to independent contractors, externs, interns, volunteers, apprentices, sole proprietors, and certain service providers.<sup>258</sup> The 2015 federal MOVE Act proposed to prohibit noncompetes for workers earning less than \$15 an hour, \$31,200 per year, or the state or local minimum wage.<sup>259</sup> In the current Freedom to Compete Act, Senator Rubio proposes to prohibit noncompetes for employees who are not exempt from the wage and hours provisions of the FLSA.<sup>260</sup> Currently, an employee needs to be paid a salary of at least \$35,568 a year to possibly qualify as an exempt employee.<sup>261</sup>

Following this analysis, eleven states have enacted statutes that prohibit or constrain the application of noncompetes to low wage workers, although they disagree considerably on how to define who is a “low wage worker.”<sup>262</sup> Most states, like Oregon, Illinois, Maryland, New Hampshire, and Virginia tie the threshold for protected low-wage workers to the minimum wage or some specified hourly, weekly or annual amount.<sup>263</sup> For example, New Hampshire prohibits noncompetes where an employee earns an hourly rate less than 200% of the federal minimum wage<sup>264</sup> while Illinois voids them for employees making less than \$75,000 per year.<sup>265</sup> Washington protects both low wage employees and low wage independent contractors from the imposition of a noncompete, exempting employees who earn less than \$107,301.04

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255. Starr, *Use and Abuse . . .*, *supra* note 221, at p. 14; Lemley & Lobel, *supra* note 199, at 8–9; Uniform Law Commission, *Uniform Restrictive Employment Agreement Act, National Conference of Commissioners on Uniform State Laws*, Section 5. Low Wage Worker (Jul. 12, 2021).

256. Starr, *Use and Abuse . . .*, *supra* note 221, at p. 14.

257. Uniform Law Commission, *Uniform Restrictive Employment Agreement Act, National Conference of Commissioners on Uniform State Laws*, Section 5. Low Wage Worker (Jul. 12, 2021).

258. *Id.*, Uniform Law Commission, *Uniform Restrictive Employment Agreement Act*, Section 2. Definitions, and Section 5. Low Wage Worker.

259. *See supra* note 229 and accompanying text.

260. *See supra* note 232 and accompanying text.

261. 84 Fed. Reg. 51230 et. seq. (Sept. 27, 2019).

262. The ten states are Illinois, Maine, Maryland, Massachusetts, New Hampshire, Nevada, Oregon, Rhode Island, Virginia, and Washington.

263. OR. REV. STAT. §653.295; 820 ILL. COMP. STAT. ANN. 90/5; MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2019); N.H. REV. STAT. ANN. § 275:70-a (2019); VA. CODE ANN. § 40.1-28.7:8.

264. N.H. REV. STAT. ANN. § 275:70-a(1)(b).

265. 820 ILL. COMP. STAT. ANN. 90/5.

per year and independent contractors who earning less than \$268,252.59 per year.<sup>266</sup> Idaho defines low wage workers in the negative by limiting the application of noncompetes to high paid “key employees.”<sup>267</sup> Other states, including Massachusetts and Rhode Island, prohibit noncompetes for employees who are not exempt from the wage and hour provisions of the Fair Labor Standards Act.<sup>268</sup> Massachusetts and Rhode Island also prohibit noncompetes for students, interns, short-term employees and minors.<sup>269</sup> Nevada exempts “hourly employees.”<sup>270</sup> Finally, Rhode Island and Maine base their threshold for low-wage exemption on the federal poverty level.<sup>271</sup> Specifying that noncompetes are prohibited for certain easily identifiable categories of workers, and in particular low-wage workers, seems a promising avenue for addressing many employer abuses of noncompetes.

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266. WASH. REV. CODE ANN. § 49.62.030(1).

267. “Key employees” are defined as those “who, by reason of the employer’s investment . . . have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer.” IDAHO CODE §§44-2702 (1). An employee is presumed a “key employee” if he or she is among the highest paid 5% of employees in the company. IDAHO CODE §§44-2702 (2)

268. See MASS. GEN. LAWS ANN. ch. 149, § 24L(c).

269. R.I. GEN. LAWS § 28-59-3(a)(3); MASS. GEN. LAWS ANN. c. 149, § 24L(c).

270. NEV. REV. STAT. § 613.195.

271. R.I. GEN. L. § 28-59-2 (2019) (“low-wage employee” means an employee whose average annual earnings, as defined in subsection (2), are not more than two hundred fifty percent (250%) of the federal poverty level for individuals as established by the United States Department of Health and Human Services federal poverty guidelines); ME. REV. STAT. ANN. tit. 26 § 599-A (3) (Maine classifies low wage employees as those earning less than or equal to 400 percent of the federal poverty level annually).



Definition Low-Wage Worker	Hourly Wage	Annual Income	FLSA Non-Exempt	Specific Categories of Workers
States with Existing Statutes	MD (<\$15/hr) NH (< 2 x FMW) NV (Paid Hrly Basis)	IL (< \$75K*) ME (< 4 x Pov Lev) MD (< \$31K) OR (< \$100K*) RI (< 2.5 x Pov Lev) VA (< \$58K) WA (< \$107K*)	MA OR RI	ID (Non-Key) MA, RI, VA (Students, Interns, Short-term and Minor Employees)
States with Pending or Past Proposals	CO, KY, NJ, NY, OK (< SAWW) CT (< 3 x SMW) HA, IN, TX (< \$15/hr) IA (< \$14.5/hr) MO (Paid Hrly Basis) PA (< \$30/hr) VA (<1.5 SAWW)	MN (< SAAW) MO (< \$75K) VT (< SAAW) WV (<SAAW)	NJ	KY, NJ (Students, Interns, Short-term and Minor Employees)
Key: SAWW = Statewide Average Weekly Wage; SAAW = Statewide Average Annual Wage; FMW = Federal Min Wage; SMW = State Min (or Fair) Wage; * = adjusts with inflation Sources: Stewart J. Schwab, Report to the Study Committee on Covenants Not to Compete Uniform Law Commission, Draft of December 13, 2019, Table a-4; Beck Reed Riden, 50 State Noncompetes Chart (6/27/21)				

Generally presented as a balancing of employer and societal interests, some reformers also seek to prohibit noncompetes for certain occupations. Starr argues for exemption of healthcare providers and tech workers; the first on the basis of patient choice and the second on the basis of economic vitality and growth.<sup>272</sup> Similarly, the 2016 White House report argues for the exemption of healthcare workers, broadly defined, as a matter of “consumer choice.”<sup>273</sup> The prohibition on noncompetes enjoyed by lawyers under the ABA’s Rules of Professional Conduct is generally justified on the basis of client freedom of choice.<sup>274</sup> As of 2019, eleven states and the District of Columbia had enacted bans or substantial limitations on noncompetes for physicians, and eight more were actively considering such legislation.<sup>275</sup> In 2015, Hawaii banned noncompetes and non-solicitation agreements for employees of a “technology business,” which the Act defines as one that “derives the majority of its gross income from . . . products or services resulting from . . . software development

272. Starr, Use and Abuse . . . , *supra* note 221, at p. 14.

273. White House Report, *supra* note 224, at p. 14.

274. *Id.*

275. Schwab, *supra* note 25 at Appendix Table A-2.

or information technology development, or both.”<sup>276</sup> The stated purpose of the Act was “to stimulate Hawaii’s economy by prohibiting . . . restrictive covenants that forbid post-employment competition for employees of technology businesses.”<sup>277</sup> Another sixteen states and the District of Columbia have restrictions on covenants not to compete for other professions, including broadcasters, healthcare workers, secretaries, clerks, beauticians, and cosmologists.<sup>278</sup>

Another way to ensure that the employer has a legitimate interest in the noncompete is to require that a “garden leave” be paid by the employer to the employee during the period of noncompetition. Initially, “garden leaves” were contractual provisions applied to top executives in Europe and the United States that provided for periods after they had left their job during which they were paid full wages and benefits not to work, and in particular not to work for a competitor.<sup>279</sup> Drawing on this idea, some have argued that by requiring employers to pay some significant “garden leave” to the employee during the duration of the noncompete would help ensure that the employer had a legitimate interest in the constraint and ensure compensation to the employee for the constraint.<sup>280</sup> In 2016, Oregon adopted a statute that made voidable noncompetes for certain low-wage employees, unless the employer paid a garden leave equal to the greater of: (1) 50% of the employee’s annual gross base salary and commissions at the time of the employee’s termination, or (2) 50% of the median family income for a four-person family.<sup>281</sup> In 2021, Oregon amended its garden leave provision to require that the employer agree in a writing to pay compensation to make noncompetes enforceable for certain low-wage workers.<sup>282</sup> In 2018, Massachusetts followed suit adopting a statute that requires employers to provide pay equal to 50% of the employee’s base pay, or other “mutually agreed upon consideration,” during the period of the noncompete.<sup>283</sup> The statute makes clear, however, that the garden leave pay requirement only runs (i) if the employer chooses to enforce the restrictions; (ii) so long as the employee is in compliance with the agreement; and (iii) up to a maximum of one (1) year.<sup>284</sup> Finally, in 2019 Washington state adopted a statute specifying that employers who lay off an

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276. Haw. Rev. Stat. Ann. § 480-4 (West).

277. Robert B. Milligan, *Hawaii Bans Non-Compete and Non-Solicit Agreements with Technology Workers*, SEYFARTH SHAW (July 6, 2015) <https://www.tradesecretslaw.com/2015/07/articles/trade-secrets/hawaii-bans-non-compete-and-non-solicit-agreements-with-technology-workers/>.

278. The states limiting or voiding noncompetes on broadcasters include: Arizona, Connecticut, Illinois, Maine, Massachusetts, New York, Oregon, Utah and Washington. See Schwab, *supra* note 25 at Appendix Table A-3. Other exempted professions include: “professionals” (Alabama), medical, veterinary and social workers (Arkansas), government contractors (Illinois), accountants (Louisiana), nurses, social workers and psychologists (Massachusetts), secretaries and clerks (Missouri), in-house counsel and psychologists (New Jersey), a variety of health professionals (New Mexico), home healthcare workers (Oregon), beauticians and cosmetologists (Vermont). See Beck, *supra* note 69.

279. Howard J. Rubin & Gregg A. Gilma, *Will Garden Leaves Blossom in the States?*, 33 EMP. REL. L.J. 1 (2007).

280. Starr, Use and Abuse . . ., *supra* note 221, at p. 13.

281. OR. REV. STAT. ANN. § 653.295(6).

282. S. 169, 81<sup>st</sup> Leg. Assemb., Reg. Sess. (Or. 2021).

283. MASS. GEN. LAWS ANN. ch. 149, § 24L(b)(vii).

284. *Id.*

employee must provide compensation equivalent to the laid-off employee's base salary for the duration of the restraint in order to enforce a noncompete.<sup>285</sup> This "garden pay" requirement is net compensation earned by the employee through other employment during the period of enforcement.<sup>286</sup>

### C. Proposals to Discourage Overly-Broad Noncompetes

Even if the employer has a legitimate interest to support a noncompete, it is important that the noncompete be narrowly drafted to protect just that legitimate interest. American law draws some very fine lines in the enforcement of noncompetes, and it is easy to see how employees, potential employers, and even advising attorneys might not always be sure the exact limits of an employer's interest that a court will protect. Moreover, as Starr, Prescott, and Bishara have shown, even clearly overbroad and unenforceable noncompetes have a negative effect on employee wages, mobility and the vibrancy of our economy.<sup>287</sup>

There are a variety of proposed and adopted reforms to address the problem of overly broad and unenforceable noncompetes. The traditional solution, adopted to date by three states,<sup>288</sup> and recommended in the White House in its "Call to Action,"<sup>289</sup> is for states to adopt the "red pencil" doctrine and refuse to reform and enforce overbroad noncompetes.<sup>290</sup> The Uniform Covenants Not to Compete Act of the Uniform Law Commission reins in noncompete reformation providing two options: (1) a complete prohibition on reformation, or (2) allowing limited reformation only when the employer "reasonably and in good faith believed the agreement was enforceable".<sup>291</sup> Theoretically this would have given employers incentive to draft noncompetes narrowly so that they would be enforced. Unfortunately, this remedy is opaque and hard to communicate to the public and does nothing about the large number of noncompetes that are clearly unenforceable but used by employers for their *in terrorem* effect. Perhaps for this reason this remedy was omitted from the final uniform law proposal.

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285. WASH. REV. CODE. ANN. § 49.62.005.

286. *Id.*

287. Starr et al. (2020), *supra* note 208.

288. Nebraska, Virginia, and Wisconsin. In addition, two states, New Mexico and Utah, have not yet decided the question, and three states, California, North Dakota and Oklahoma, do not enforce employment noncompetes. *See Beck, supra* note 69. *See also, Vlasin v. Len Johnson & Co., Inc.*, 455 N.W.2d 772 (NE S. Ct. 1990)(It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.); *Pitchford v. Oakwood Mobile Homes*, 124 F. Supp. 2d 958, 965 (W.D. Va. 2000) (reiterating that Virginia courts refuse to adopt any version of the blue pencil doctrine to avoid rewriting the contract on behalf of the parties); WIS. STAT. ANN. § 103.465 (West 1988) ("[A]ny covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.").

289. White House Call to Action, *supra* note 225.

290. *See supra* note 142 and accompanying text.

291. Uniform Law Commission, *Uniform Restrictive Employment Agreement Act, National Conference of Commissioners on Uniform State Laws*, Section 16. Enforcement and Remedy (Jul. 12, 2021).

Another solution to address the overbreadth of noncompetes, is to adopt a statutory presumptions or maximums for the scope of noncompetes. Several states, either by court opinion or statute, have established a presumptively reasonable duration or a maximum duration for such covenants, most often two years.<sup>292</sup> Idaho has gone further, establishing presumptions of reasonableness with respect to duration (eighteen months), geographic area (where employee services or had significant presence or influence), and activity (the line of business in which employee worked).<sup>293</sup> In 2021, Oregon’s noncompete statute reduced the maximum duration of a noncompete to twelve months, down from eighteen months.<sup>294</sup> Other states could adopt useful statutory presumptions of reasonableness or maximums with respect to the duration, geographic scope, and activities covered by noncompetes. However, this solution still leaves open the problem of the *in terrorem* effect of unenforceable noncompetes.

A more comprehensive solution, suggested by the White House Call to Action, is to assess administrative fines or create a private cause of action, with damages, class actions and attorney’s fees, for overbroad noncompetes.<sup>295</sup> This solution appears in the Uniform Restrictive Employment Agreement Act currently approved by the Uniform Law Commission<sup>296</sup> which makes the imposition of a noncompete the employer “knows or reasonably should know” is unenforceable a civil violation subject to statutory damages of not more than \$5,000 per worker per agreement for each violation.<sup>297</sup> The Act also allows declaratory judgements that a covenant is unenforceable and gives the challenging party attorney’s fees and damages.<sup>298</sup> Some state Attorney Generals have exercised the state’s *parens patriae* power to sue major employers to rescind unreasonable covenants not to compete that those employers had imposed on their employees.<sup>299</sup> In California, where noncompetes are unenforceable, a court has held that the only reason for inclusion of a clearly non-

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292. See *supra* note 76 and accompanying text.

293. *Id.*

294. Senate Bill 169, 81st Oregon Legislative Assembly--2021 Regular Session. .

295. White House Call to Action, *supra* note 225.

296. Uniform Law Commission, *Uniform Restrictive Employment Agreement Act*, *National Conference of Commissioners on Uniform State Laws*, Section 16. Enforcement and Remedy (Jul. 12, 2021).

297. *Id.*

298. *Id.*

299. In 2016, Illinois State Attorney General Lisa Madigan sued Jimmy John’s to rescind the unreasonable covenants not to compete those companies had imposed on their employees. Office of the Attorney General of Illinois (OAG Illinois). 2016b. “Madigan Sues Jimmy John’s for Imposing Unlawful Non-compete Agreements on Sandwich Makers and Delivery Drivers” (press release). June 8, 2016. Office of the Attorney General of Illinois (OAG Illinois). 2016a. “Madigan Announces Settlement with Jimmy John’s for Imposing Unlawful Non-compete Agreements” (press release). December 7, 2016. New York Attorney General Eric Schneiderman has also reached several settlements in relation to employers’ use of noncompete agreements. Office of the Attorney General of New York (OAG New York). 2016e. “A.G. Schneiderman Announces Settlement with Jimmy John’s to Stop Including Non-compete Agreements in Hiring Packets” (press release). June 22, 2016; Office of the Attorney General of New York (OAG New York). 2016f. “A.G. Schneiderman Announces Settlement with Major Legal News Website Law360 to Stop Using Non-compete Agreements for Its Reporters” (press release). June 15, 2016.

enforceable noncompete is to “mislead people,”<sup>300</sup> and awarded penalties and attorneys’ fees to the plaintiff under California’s Private Attorneys General Act.<sup>301</sup> The 2020 Washington statute discourages overbroad noncompetes by imposing a \$5,000 minimum in damages, plus attorney fees and costs, if a court or arbitrator reforms, rewrites, modifies, or only partially enforces a noncompete.<sup>302</sup> In 2021, Illinois amended its Freedom to Work Act to discourage overbroad noncompete clauses by requiring employers to pay monetary damages, statutory penalties, attorney’s fees, equitable relief and other appropriate relief for entering into or attempting to enforce unlawful noncompete agreements.<sup>303</sup> In enforcing its prospective ban on noncompetes, the District of Columbia makes employers liable to employees for \$500–\$1,000 for an initial violation of the act and at least \$3,000 for each subsequent violation and allows the Mayor to assess administrative penalties of \$350–\$1,000 for violations of the act.<sup>304</sup> Similarly, the Workforce Mobility Act proposes an amount not to exceed \$5,000 as a civil penalty, payable to the employee, for employers who violate its limitations on noncompetes or notice requirements.<sup>305</sup> Fines and private causes of action would seem one way to discourage employers from imposing clearly overbroad and unenforceable noncompetes on employees.

#### *D. Proposals for a Complete Ban on Noncompetes*

The empirical evidence suggests that noncompetes are an important drag on the U.S. labor market. Empirical estimates of the percent of the American workforce they cover vary from 18.1% to 27.8%, much more than can be justified by the economic arguments in favor of noncompetes.<sup>306</sup> Starr, Prescott, and Bishara have estimated that noncompetes decrease wages by an average 4%, nationwide, including those not covered by a noncompete.<sup>307</sup> Johnson, Lavetti and Lipsitz estimate that moving from a legal regime of noncompete unenforceability to a regime with the highest level of enforceability observed in the United States would reduce the month-to-month probability of workers changing jobs by 26.1%.<sup>308</sup> Moreover, under our elaborate common law and statutory scheme for regulating noncompetes, we do not seem to do a very good job of separating those employees for whom a noncompete might be useful and beneficial from those for whom it is an extension of employer market power. As Starr, Prescott, and Bishara have shown, even employees who are

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300. *Robinson v. U-Haul Co. of California*, 4 Cal. App. 5th 304, 312(2016).

301. California Legislative Information, *Part 13. The Labor Code Private Attorneys General Act of 2004* (2698–2699.5), available at [https://leginfo.ca.gov/faces/codes\\_displayText.xhtml?lawCode=LAB&division=2.&title=&part=13.&chapter=&article](https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=LAB&division=2.&title=&part=13.&chapter=&article) (last accessed Dec. 2018).

302. WASH. REV. CODE § 49.62.080 (2019).

303. Illinois Freedom to Work Act of 2021, *supra* note 248.

304. Ban on Non-compete Agreements Amendment Act of 2020, *supra* note 249.

305. Workforce Mobility Act of 2021, S. 483, 117<sup>th</sup> Cong. Section 6 (b) (2) (2021-2022).

306. Starr, Prescott & Bishara (2021), *supra* note 5, (18.1%); Colvin & Shierholz, *supra* note 13, (27.8%).

307. Starr, Prescott & Bishara (2021), *supra* note 5, at 14 and Table 9 in draft; *see also*, Starr, Consider this . . . , *supra* note 144.

308. Johnson et al. (2019), *supra* note 181.

covered by clearly unenforceable noncompetes suffer *in terrorem* diminution in wages and mobility that is not significantly different from employees covered by a noncompete that might be enforced.<sup>309</sup>

As a result, some commentators and policy makers have suggested that we should adopt a complete ban on employee noncompetes and leave employers to protect investments in trade secrets and customer connections through trade secret law, do not disclose provisions, do not solicit provisions, or perhaps not at all. Starr has advocated for a complete ban on noncompetes arguing that it will help spur the spread of technology and economic growth.<sup>310</sup> Lobel has perhaps been the strongest advocate for a complete ban, extolling the virtues of setting talent free for the economy and society.<sup>311</sup> Colvin and Shierholz advocate for federal legislation prohibiting the application of employment noncompetes as a means of simplifying enforcement issues and improving the economy.<sup>312</sup> Finally, we have Gilson's famous case study arguing that the dominance of the Silicon Valley over other possible high tech corridors like Route 128 in Massachusetts is in large part due to the fact that noncompetes are not enforceable in the state of California.<sup>313</sup>

As previously mentioned, three states and the District of Columbia have adopted blanket prohibitions on the enforcement of covenants not to compete. In 1865, the Dakota Territory adopted the "Field Code," a statutory simplification of the common law, which prohibited covenants not to compete.<sup>314</sup> This enactment survives today in the North Dakota Century Code § 9-08-06 which specifies that "[a] contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void, except [ancillary to the sale of a business or the dissolution of a partnership]."<sup>315</sup> California adopted the Field Code in 1872, followed by Oklahoma in 1890, including language regarding employee noncompetes very similar to that in the North Dakota statute.<sup>316</sup> California courts have consistently affirmed that Section 16600 of the California Business and Professions Code embodies a settled legislative policy favoring "open competition

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309. See Starr et al., (2020), *supra* note 208, at 635.

310. Starr, Use and Abuse . . . , *supra* note 221, at 14.

311. Lobel, *supra* note 12; Lemley & Lobel, *supra* note 199, at p. 2–3.

312. Colvin & Shierholz, *supra* note 13, at p. 12.

313. Gilson, *supra* note 139.

314. Andrew P. Morriss, Scott J. Burnham, & James C. Nelson, *Debating the Field Civil Code 105 Years Late*, 61 MONT. L. REV. 371, at 373 (2000). See also, JacksonLewis, *North Dakota Non-compete Law Shares History with California*, (Jan. 17, 2013) <https://www.restrictivecovenantreport.com/2013/01/north-dakota-non-compete-law-shares-history-with-california/>.

315. N.D. CENT. CODE § 9-08-06.

316. SEE CAL. BUS. & PROF. CODE §16600; 15 O.S. §217; Brandon Kemp, *Non-competes in Oklahoma Mergers and Acquisitions*, 88 OKLAHOMA BAR J. 128 (2017). Montana also adopted this language from the Field Code, MONT. CODE ANN. § 28-2-703, and is sometimes thought to prohibit noncompetes, but Montana courts have interpreted the language only to prohibit complete restraint on an employee's work. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont. 496, 503–07 (Mont. 2011). See also, Russel Beck, *Montana allows non-competes! (Only California, Oklahoma, and North Dakota don't.)*, FAIR COMPETITION LAW (Jan. 30, 2021) <https://faircompetitionlaw.com/2021/01/30/montana-allows-non-competes-only-california-oklahoma-and-north-dakota-dont/>.

and employee mobility” and protecting the right of all Californians to “engage in businesses and occupations of their choosing.”<sup>317</sup> The Oklahoma language has evolved over time but still expressly allows employees to work in the same business as that conducted by their former employer, regardless of a noncompete, “as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer.”<sup>318</sup>

Although still not the most discussed reform, the idea of a flat prohibition on the enforcement of noncompetes has gained momentum at both the state and national level. The District of Columbia recently passed a statute to join North Dakota, California and Oklahoma in prohibiting the enforcement of noncompetes.<sup>319</sup> The D.C. statute invalidates noncompetes entered into after the applicability date of the Act (postponed to October 1, 2022), except incident to the sale of a business.<sup>320</sup> The Act requires employers to provide notice of the Act to existing D.C. employees within ninety days of the Act’s applicability date and to new D.C. employees within seven days of hire.<sup>321</sup> Employers who violate the Act face administrative penalties and potential civil liability to affected employees.<sup>322</sup> As previously mentioned, at the federal level Senators Murphy and Young have introduced the Workforce Mobility Act (WMA), which would prohibit noncompetes nationwide except incident to the sale of a business or the dissolution of a partnership.<sup>323</sup> The Department of Labor and FTC would share enforcement power through fines, and an employee forced to sign a noncompete would have a private cause of action against their employer.<sup>324</sup> The bill explicitly permits employers to protect investments in information by requiring workers to sign agreements not to disclose trade secrets.<sup>325</sup> The fact that this proposal is bipartisan gives some hope that it may become law during the Biden administration although some legislators see a total prohibition as too harsh and would prefer to focus on legislation protecting low-wage workers.<sup>326</sup>

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317. *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008).

318. Title 15 O.S. 2001 § 219A. Contracts in contradiction of this law are declared “void and unenforceable.” Title 15 O.S. 2001 § 219B.

319. See Guy Brenner & Caroline Guensberg, *DC Mayor Signs Act Creating Near Total Ban on Non-Compete Agreements for DC Employees*, PROSKAUER (Jan. 13, 2021), <https://www.lawandthe workplace.com/2021/01/dc-mayor-signs-act-creating-near-total-ban-on-non-compete-agreements-for-dc-employees/>.

320. Ban on Non-compete Agreements Amendment Act of 2020, *supra* note 249, Section 102 (b). The Act will become effective after enforcement monies are included in an approved DC budget, probably in October of 2021. *Id.* The Act became law in March 2021 and the Act’s applicability date was postponed to April 1, 2022.

321. *Id.*, Section 102 (e)(1).

322. *Id.*, Section 6 (a)(2)(B).

323. Workforce Mobility Act of 2021, *supra* note 305. The bill would allow the purchaser of a business to enforce a noncompete agreement to protect the business’s goodwill by preventing the seller from establishing a similar business within a certain geographic area; a similar exception is created for the dissolution of a partnership. *Id.*

324. *Id.*, Section 6 (d).

325. *Id.*, Section 4.

326. S. HRG. 116-233, Noncompete Agreements and American Workers (2019).

## V. CONCLUSIONS

The abuse of covenants not to compete by employers is an important problem in the American labor market that requires reform. Although noncompetes are sometimes used to the mutual benefit of employers and high paid employees with access to valuable appropriable information, all too often they are imposed, *en masse*, on low wage workers, after employment has been accepted, without a legitimate employer interest, and to the detriment of employee wages, employee mobility, and the vibrancy and economy. This is because the common law doctrine yields few simple rules on the enforceability of noncompetes that are easily communicated to employers and employees, and even fewer penalties for employers who seek to impose unenforceable constraints. At a minimum, states or the federal government should take efforts to confine the application of noncompetes to high paid employees with access to valuable appropriable information where the employee has notice of the noncompete in advance of accepting employment and a real opportunity to bargain for compensating wages. This can be done with laws voiding noncompetes for workers below a certain income or in certain occupations, requiring advance notice of the noncompete, and providing fines, declaratory judgments, civil penalties and attorney's fees to enforce these rules.

Even though there are some noncompetes that benefit both the employer and employee, the common occurrence of noncompetes that are overbroad and/or clearly unenforceable has an important deleterious impact on the American labor market and our economy. The "blue pencil" doctrine that prevails in most states and allows courts to reform overbroad noncompetes encourages employers to draft broadly and let the courts later sort out what can be enforced. Even in states where noncompetes are unenforceable, the clauses are almost as common as they are in states where they can be enforced. Either because employees and employers don't understand that noncompetes can be unenforceable, or because they fear frivolous lawsuits, these unenforceable noncompetes have an *in terrorem* negative impact on workers' wages and mobility that is not significantly different from the impact in states where the clauses can be enforced. At a minimum, states or the federal government should take steps to discourage the drafting of overbroad and clearly unenforceable noncompetes. These steps could include adopting the "red pencil" doctrine of striking down overbroad noncompetes and providing declaratory judgments, civil penalties, attorney's fees and fines to enforce these rules. Although the red pencil doctrine gives employers incentive to draft noncompetes narrowly, without civil and administrative remedies and penalties employers still might draft clearly unenforceable noncompetes just for the *in terrorem* effect.

Finally, even though there are some noncompetes that benefit both the employer and employee, it is not clear that the benefits of the increased employer investment they foster outweigh the costs of policing these agreements and the declines they cause in labor mobility, technology transfer and economic growth. Although elegant, the common law doctrine on this subject is difficult to master.

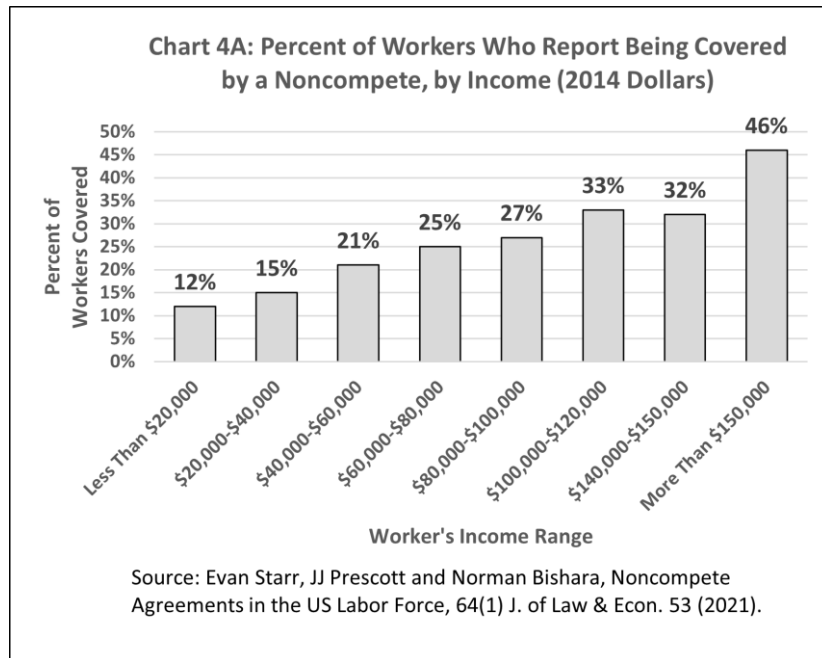


Without talented legal advice, most employees and many employers do not understand their rights and responsibilities under the law. They commonly make decisions assuming that unreasonable noncompetes are enforceable and preclude valuable economic actions. California, and in particular the Silicon Valley, seems to have thrived under a regime in which noncompetes are unenforceable, while other parts of the country wish they could jump start their high-tech industry. Accordingly, it is also appropriate for states and the federal government to consider a complete prohibition on employee noncompetes. Employers could protect their legitimate investments in appropriable information through the narrower remedies of trade secret law, nondisclosure clauses, and nonsolicitation clauses. The case for allowing employers to go further to prohibit competition by enforcing noncompetes is difficult to make.

## APPENDIX

Characteristic	% Currently Bound by Noncompete	% Ever Bound by Noncompete	Characteristic	% Currently Bound by Noncompete	% Ever Bound by Noncompete
Employer Class			Annual Earnings		
Privt For-Profit	19.0%	38.8%	< \$40,000	13.3%	33.0%
Privt Nonprofit	9.8%	28.6%	>= \$40,000	25.2%	45.6%
Pub Healthcare	12.4%	37.8%	Confidential Information		
Gender			Works with Clients	14.9%	35.6%
Female	17.3%	36.3%	Access to Client Info	16.0%	36.2%
Male	18.8%	39.7%	Access to Trade Secrets	32.6%	54.9%
Age in Years			None	7.8%	26.9%
Under 40	20.6%	38.7%	Employer Size (# Employees in Firm)		
40 or Older	15.6%	37.5%	< 25	11.6%	33.6%
Highest Level of Education			25 to 100	17.7%	36.5%
< Bach Degree	14.3%	34.7%	101 to 250	19.1%	40.6%
Bach Degree	25.0%	43.8%	251 to 500	22.3%	40.9%
> Bach Degree	30.0%	49.0%	501 to 1,000	16.8%	39.1%
Compensation Type			1,001 - 2,500	21.2%	42.3%
Hourly	14.0%	33.7%	2,501 - 5,000	21.0%	44.2%
Salary	27.5%	47.7%	> 5,000	21.5%	38.3%
Other	23.6%	45.9%	Overall	18.1%	38.1%
Source: Evan Starr, JJ Prescott and Norman Bishara, Noncompete Agreements in the U.S. Labor Force, 64(1) J. of Law & Econ. 53–84 (2021). Table 5					

Table 2A: Percent of Workers Who Report Being Covered by a Noncompete by Occupation and Industry (2014)			
Occupation	% of Workers Covered	Industry	% of Workers Covered
Farm, Fish, Forestry	6%	Agriculture	9%
Legal	10%	Accommodation, Food	10%
Grounds Maintenance	11%	Arts, Entertainment	10%
Food Prep, Serving	11%	Construction	11%
Construction	12%	Real Estate	12%
Transport., Mat. Moving	12%	Transport., Warehousing	12%
Office	14%	Retail	14%
Community, Social Serv.	15%	Other Services	16%
Sales	16%	Mgmt. of Companies	17%
Production	16%	Healthcare	18%
Physician, Technical	18%	Education	18%
Education, Training	19%	Mining	19%
Management	19%	Utilities	20%
Architecture, Engineering	19%	Manufacturing	22%
Installation, Repair	21%	Admin Supp., Waste Mgt.	23%
Life, Physical, Social Sci.	22%	Finance and Insurance	25%
Protective Services	23%	Wholesale	31%
Arts, Entertainment	25%	Prof. Scientific, Technical	31%
Personal Care	26%	Information	32%
Business, Finance	30%	Source: Evan Starr, JJ Prescott and Norman Bishara, Noncompete Agreements in the U.S. Labor Force, 64(1) J. of Law & Econ. 53–84 (2021).	
Healthcare Support	35%		
Computer, Mathematical	36%		



**Table 3A: Noncompete Agreements in U.S. Workplaces, by State**

State (in order of population size)	Sample Size	Share of Workplaces Where all Employees are Subject to Noncompete Agreements	Share of Workplaces Where any Employees are Subject to Noncompete Agreements
California	82	29.3%	45.1%
Texas	28	50.0%**	60.7%
Florida	28	39.3%	46.4%
New York	43	23.3%	44.2%
Illinois	28	14.3%**	50.0%
Pennsylvania	45	31.1%	42.2%
Ohio	27	44.3%	66.7%*
Georgia	35	34.3%	51.4%
North Carolina	31	29.0%	51.6%
Michigan	29	37.9%	55.2%
New Jersey	43	25.6%	48.8%
Virginia	28	46.4%*	64.3%

Source: Alexander J.S. Colvin and Heidi Shierholz, Noncompete agreements Ubiquitous, harmful to wages and to competition December 10, 2019

\* Denotes result is significantly different from mean at 0.10 level.

\*\* Denotes result is significantly different from mean at 0.05 level.

