# BATTLING THE FORM: A FRONT-END APPROACH TO DEFAULT-USE NONCOMPETES

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## Abstract

A growing consensus holds that employer overuse of noncompete agreements adversely affects workers and the economy. But there is little agreement on how best to regulate these instruments. States have experimented with an array of idiosyncratic reforms that capture the most egregious misuses, while the Federal Trade Commission (FTC), has issued an outright ban that would prohibit all employee noncompetes and comparable instruments nationwide.

This Article argues that any effective reform strategy must target what it terms "default-use" noncompetes—boilerplate restraints imposed by employers as a matter of course without close consideration of their underlying justification. Some unlawful noncompetes are clearly predatory, but others are likely due to legal and institutional factors. Vague, uncertain law as to what informational interests support a noncompete can lead employers to overestimate their need for such agreements and misconceive the lawfulness of their use. At the same time, standard corporate onboarding practices make it easy for companies to require workers to sign noncompetes along with other form agreements. The result is that companies impose standardized noncompetes whenever an employee *might* encounter assets they perceive (correctly or not) to be proprietary. These agreements subsequently deter employees from seeking or accepting competitive work irrespective of whether they might ultimately prove unlawful.

Thus far no enacted reform measure short of a ban adequately addresses this problem. But the American Law Institute's recently adopted Uniform Restrictive Employment Agreement Act (UREAA) models how regulators might begin to do so. UREAA incorporates what the Article calls "front-end" reforms: rules that disrupt an employer's rote decision to require a noncompete at the point of hire. Three innovations achieve this result: First, UREAA narrows the permissible bases for the use of a noncompete, eliminating employers' ability to use noncompetes to broadly protect confidential information absent a genuine trade secret. Second, UREAA requires employers to use the least restrictive form of restraint whenever possible, replacing some noncompetes with more

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limited, tailored restrictions. Third, UREAA pushes employers to expressly articulate a legally cognizable justification for their chosen restraint through a novel, multi-tiered notice requirement. Through these drafting choices, UREAA forces employers to confront the critical but often overlooked question of what justifies so formidable a restraint on competition. By making noncompetes a restraint of last resort it provides a second-best alternative to full ban on noncompete use.

INTRODUCTION .....143

I. NONCOMPETES AND THE DEFAULT USE PROBLEM .....149
A. *The Investment Theory: A Stylized Justification for Employee Noncompetes* .....150
B. *Noncompetes in the Wild: Failures of an Uncertain Legal Regime* .....153
1. *In Terrorem* Effects and Back-End Choice.....154
2. Front-End Practices and the Rise of "Standard Form Employment".....156

II. REGULATING DEFAULT USE UNDER UREAA .....160
A. *Capacious Coverage, Tailored Limitations*.....161
B. *Front-End Reform Mechanisms*.....165
1. Justified Noncompetes and the Last Resort Principle.....166
2. Substantive Notice .....170
C. *inIndividualized Compliance Regime* .....174

III. BEST PRACTICES OR SECOND BEST?.....177
A. *Too Much and Not Enough*.....177
B. *Adoption Alternatives: UREAA as "Influencer"* .....179
1. A la Carte Legislation .....180
2. The Continuing Relevance of the Common Law.....181

CONCLUSION.....183

## INTRODUCTION

For nearly a decade, the use of employee noncompetes and other "restrictive employment agreements"[1] has been a hot-button issue.[2] Nearly two dozen states have enacted new legislation limiting employers' ability to impose and enforce these agreements,[3] and dozens more bills are currently pending.[4] Recently, the Federal Trade Commission (FTC) raised the stakes, promulgating a rule that, should it go into effect, would categorically prohibit all employee noncompetes and comparable instruments.[5]

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1. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(11) (UNIF. L. COMM'N 2021) [hereinafter UREAA or the Act]. As UREAA recognizes, noncompetes are but one of a suite of restrictive provisions that employers use to limit post-employment competition, often in tandem. *See* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 895 (2021); Natarajan Balasubramanian et al., *Employment Restrictions on Resource Transferability and Value Appropriation from Employees* at 3–4 (Jan. 16, 2024) (unpublished manuscript), https://ssrn.com/abstract=3814403 [https://perma.cc/3BKX-LZWY]. One unique aspect of the Act that this Article will discuss is its choice to regulate all such restraints. *See* UREAA § 2(11); *infra*, Part II.A. However, the primary focus of the current reform movement, and consequently of this Article, is noncompetes. Thus, I use the term "restrictive employment agreement" when describing all restrictive provisions within the scope of the Act. I use "noncompetes" to refer to agreements that directly and explicitly restrain post-employment competition. This is not to discount the anticompetitive effect of more indirect restraints. *See* Rachel Arnow-Richman et al., *Supporting Market Accountability, Workplace Equity, and Fair Competition by Reining in Non-Disclosure Agreements*, DAY ONE PROJECT (Jan. 2022), https://uploads.dayoneproject.org/2022/04/14172008/Supporting-Market-Accountability-Workplace-Equity-and-Fair-Competition-by-Reining-in-Non-Disclosure-Agreements_final.pdf [https://perma.cc/52D8-V8KF]; Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L.J. 669, 694-98. I will briefly discuss these other restraints *infra* Part II.A. I do not in this Article consider noncompetes used in the business-to-business context, although UREAA regulates those as well. *See* UREAA § 8(1)(A).

2. I consider the relevant period of legislative reform to have begun with Hawaii's 2015 ban on employee noncompetes in the technology sector, HAW. REV. STAT. ANN. § 480-4(d) (2023), culminating in the Federal Trade Commission's rule banning all noncompetes, Non-Compete Clause Rule, 16 C.F.R. § 910 (2024), and continuing through the present.

3. The most aggressive of these is Minnesota, the only state to have enacted an outright ban on noncompetes. MINN. STAT. § 181.988 (2023). Other states whose recent laws are particularly restrictive include Colorado, Massachusetts, Oregon, and Washington. COLO. REV. STAT. § 8-2-113 (2023); MASS. GEN. LAWS ANN. ch. 149, § 24L (2023); OR. REV. STAT. § 653.295 (2023); WASH. REV. CODE. § 49.62.020 (2023). A few states countered the trend with laws that arguably enhance enforceability. *See, e.g.*, ARK. CODE ANN. § 4-75-101 (2023) (declaring a two-year noncompete presumptively reasonable and mandating judicial modification of overbroad restraints); *see generally Changes in Noncompete Laws Since 2011*, FAIR COMPETITION L. (Dec. 27, 2023), https://faircompetitionlaw.com/2023/12/27/noncompete-law-changes-since-2011 [https://perma.cc/YFT7-MHQG] (tracking new legislation).

4. Ninety-eighty bills were introduced in 2023. *Noncompetes 2023: The Sky Still Has Not Fallen… yet*, FAIR COMPETITION L. (Dec. 26, 2023), https://faircompetitionlaw.com/2023/12/26/noncompetes-2023-the-sky-still-has-not-fallen-yet/ [https://perma.cc/J4DL-AZZS].

5. *See* Non-Compete Clause Rule, 16 C.F.R. § 910 (2024).

These developments have given rise to what I previously termed the "new enforcement regime"[6]—an array of novel initiatives shaking up a long-standing law of restrictive covenant doctrine centered on common law principles.[7] This change is a good thing. A growing body of empirical research has revealed the harmful effects of noncompetes on workers,[8]

6. Rachel Arnow-Richman, *The New Enforcement Regime*: *Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223, 1223 (2020).

7. To be sure, a number of enforcing jurisdictions had statutes regulating noncompetes prior to the new regime. *See id.* at 1229–30 (discussing codification in the late twentieth century). But other than a few historical outliers like California and North Dakota, whose statutory bans on noncompetes date to the nineteenth century, *see* CAL. BUS. & PROF. CODE § 16600 (2024); N.D. CENT. CODE ANN. § 9-08-06 (2023), most either restated or embellished the common law rule. *See* Arnow-Richman, *supra* note 6, at 1229–30 (discussing first-wave of statutory reform in the late twentieth century). For an historical treatment of California's unique law, see 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, 614–19 (1999).

8. Empirical research shows that noncompetes stunt wages. *See, e.g.*, Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers,* 57 J. OF HUM. RES. S349, S388 (2022) (finding that technology workers have 4.6% lower cumulative earnings in states that enforce noncompetes compared to non-enforcing states); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 144 (2022) (finding wage gains of as much as fourteen to twenty-one percent following Oregon's adoption of retroactive wage threshold legislation); Donna Rothstein & Evan Starr, *Noncompete Agreements, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997*, MONTHLY LAB. R. (June 2022), https://www.bls.gov/opub/mlr/2022/article/noncompete-agreements-bargaining-and-wages-evidence-from-the-national-longitudinal-survey-of-youth-1997.htm [https://perma.cc/CLP6-MVW9] (finding a noncompete wage differential of six percent in states that enforce noncompetes compared to states that do not). Importantly the adverse effects of noncompetes are felt by unconstrained workers as well as those who have signed noncompetes. *See* Evan Starr et al., *Mobility Constraint Externalties*, 30 ORG. SCI. 961, 972–73 (2019) (finding that in states with higher noncompete enforcement workers within high-incidence industries – including those not bound by a noncompete – received comparatively fewer job offers, had reduced mobility, and experienced lower wages). For a helpful summary of this and other research on the adverse effects of noncompetes on workers, see EVAN STARR, NONCOMPETE CLAUSES: A POLICYMAKER'S GUIDE THROUGH THE KEY QUESTIONS AND EVIDENCE 7–11 (2023), https://eig.org/wp-content/uploads/2023/10/Noncompete-Clauses-A-Policymakers-Guide.pdf [https://perma.cc/6RUT-SEPD] [hereinafter POLICYMAKER'S GUIDE].

consumers,[9] and the economy as a whole.[10] A more restrictive noncompete policy can promote worker mobility, yielding more competitive terms of employment. It can also benefit the economy by facilitating the type of knowledge "spillovers" that fuel innovation and economic growth.[11]

For these reasons, I am increasingly of the view that an outright ban on noncompetes is the best course of action. I am persuaded by the literature suggesting we are all better off when companies operate on a level playing field without the benefit of anticompetitive restraints.[12] More than that, I believe, as a matter of first principles, that in an at-will world, employers should not have the right to prevent workers from

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9. Noncompetes are associated with industry consolidation, which reduces consumer choice and increases prices. *See* Naomi Hausman & Kurt Lavetti, *Physician Practice Organization and Negotiated Prices: Evidence from State Law Changes*, 13 AM. ECON. J.: APPLIED ECON. 258, 293 (2021) (finding that increased noncompete enforcement results in medical practice concentration and increased physician prices); Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29 J. ECON. & MGT. STRATEGY 663, 680–81 (2020) (demonstrating that increased noncompete enforcement limits firm entry resulting in industry concentration); *cf.* Michael Lipsitz & Mark Tremblay, *Noncompete Agreements and the Welfare of Consumers*, AM. ECON. ASS'N (forthcoming) (manuscript at 8-24), https://ssrn.com/abstract=3975864 [https://perma.cc/46PN-536L] (modeling the relationship between noncompete use, worker investment, competition, and consumer prices).

10. There is a growing body of economic research demonstrating that noncompetes reduce economic dynamism and innovation. This effect was theorized by Professor Ronald Gilson in a groundbreaking article positing that California's nonenforcement policy contributed to the robust growth of Silicon Valley's tech industry in contrast to the Route 121 sector in Massachusetts, an enforcing jurisdiction. *See* Gilson, *supra* note 7, at 577–80. Since then, numerous economic studies have born out Gilson's claim, finding that nonenforcement enhances economic dynamism. *See, e.g.*, Salomé Baslandze, *Entrepreneurship through Employee Mobility, Innovation, and Growth* at 15-28 (Sept. 2022) (unpublished manuscript), https://ssrn.com/abstract=4277191 [https://perma.cc/PY76-BJGH] (modeling the benefits of non-enforcement on economic growth and welfare); Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 3, 425, 435-36 (2011) (finding increases in venture capital positively affecting patenting and firm formation in nonenforcing jurisdictions); *cf.* Fenglong Xiao, *Non-competes and Innovation: Evidence from Medical Devices*, 51 RSCH. POL'Y 1, 8 (2022), https://doi.org/10.1016/j.respol.2022.104527 [https://perma.cc/9EG4-L3XQ] (finding that increased enforceability promotes exploitative innovations but hinders novel exploratory innovation in the medical device industry). For a helpful summary of this and other research on the adverse effects of noncompetes on innovation, *See* STARR, POLICYMAKER'S GUIDE, *supra* note 8.

11. *See* ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET 25-40 (2003); ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING 39-41 (2013); Gilson, *supra* note 7, at 584-85.

12. Notably, economists researching the effects of noncompetes have openly indicated their support for this result. *See* STARR, POLICYMAKER'S GUIDE, *supra* note 8, at 1 ("In the wake of growing [evidence, the] debate over how to regulate noncompete clauses has hastened towards a contentious resolution: ban them.").

competing after employment.[13] But like others, I recognize that the FTC's current rule is legally and politically vulnerable,[14] and that widespread state-level adoption of a noncompete ban is slim at best.[15] This reality requires consideration of second-best alternatives.

In this Article, I advocate for the Uniform Law Commission's (ULC) recently adopted Uniform Restrictive Employment Agreement Act (UREAA or the Act).[16] The product of four years of study and drafting by a committee of legal experts and stakeholders, UREAA offers a deeply considered statutory proposal that espouses a strong anti-enforcement approach, not just to noncompetes, but to what I refer to as "lesser restraints"—restrictive covenants that impede but do not directly preclude employee competition.[17] UREAA's comprehensive approach integrates and builds on some of the best features of existing state reforms. And as a uniform law, it can ensure greater consistency and predictability should it achieve widespread adoption.

But what is especially unique about UREAA—and what I focus on in this Article—is its incorporation of what I call "front-end" regulation: rules that pressure an employer's initial decision to require a noncompete at the point of hire. Empirical and anecdotal evidence suggests that

13. *See* Rachel Arnow-Richman et al., *Comment on Proposed Rule on Non-Compete Clauses (Docket FTC-2023-0007)* 2–3 (Apr. 19, 2023) (unpublished manuscript), https://ssrn.com/abstract=4620282 [https://perma.cc/8PHR-699W].

14. I see the matter as falling squarely within the FTC's jurisdiction to regulate fair competition. *Id.* at 10–11. Yet political conservatives and business interest groups vehemently contend that the proposed ban constitutes an unlawful exercise of executive power and a violation of the nondelegation doctrine. *See, e.g.*, Coalition Letter to Congress on the FTC's Proposed Rule on Noncompete Agreements (Feb. 28, 2023), https://www.uschamber.com/assets/documents/230228_Coalition_NoncompeteAgreements_Congress_2023-02-28-153518_vfkz.pdf [https://perma.cc/KEA6-X7RC]; Karl Evers-Hillstrom, *US Chamber Vows Fight Against FTC Ban on Noncompete Clauses*, THE HILL (Jan. 23, 2023), https://thehill.com/lobbying/3826463-us-chamber-vows-fight-against-ftc-ban-on-noncompete-clauses/ [https://perma.cc/MHX8-KFQE]; Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3540 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (Wilson, dissenting). Litigation seeking to enjoin the rule as exceeding the scope of agency authority has already been filed. *See* Ryan v. FTC, No. 3:24-cv-986m (N.D. Tex.); ATS Tree Serv. v. FTC, No. 2:24-cv-1743; (E.D. Pa); Properties of the Villages, Inc. v. FTC, No. 5:24-cv-00316 (M.D. Fla.). As of the time this Article went to press, one court had granted a preliminary injuction preventing the rule from going into effect vis-à-vis the plaintiffs. *See* Memorandum Opinion & Order, Ryan v. FTC, No. 3:24-cv-986m (N.D. Tex.) (July 3, 2024).

15. Only one state, Minnesota, has thus far enacted a full statutory ban on noncompetes. *See* MINN. STAT. § 181.988 (2023). Two jurisdictions, New York and the District of Columbia, passed bans that were ultimately vetoed or revised. D.C. CODE § 32-581.02 (2024); Jimmy Vielkind*, New York Gov. Kathy Hochul Rejects Ban on Noncompete Agreements*, WALL ST. J. (Dec. 23, 2023), https://www.wsj.com/us-news/law/new-york-gov-kathy-hochul-to-reject-ban-on-noncompete-agreements-3f0eb7d4 [https://perma.cc/WX4A-H4YA].

16. UNIF. RESTRICTIVE EMP. AGREEMENT ACT (UNIF. L. COMM'N 2021).

17. *See generally* Stewart Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 IND. L.J. 275 (2022) (providing a history of UREAA and an overview of its provisions).

companies overuse noncompetes, requiring them in situations where they are not legally justified.[18] Some of this overuse is clearly predatory, such as the widely cited example of Jimmy John's use of noncompetes to restrain low-wage sandwich makers.[19] But some unlawful overuse, I suggest, is less flagrant and might even be characterized as unintentional.

My core contention is that a combination of legal and institutional factors leads employers to overestimate their need for, and entitlement to, a noncompete.[20] At the same time, standard corporate onboarding practices make it easy for companies to require workers to sign form documents, such as noncompetes, as a matter of course.[21] These employers at best misunderstand the law; at worst, they play close to the edge in interpreting its requirements. Either way, the result is a compliance gap: companies impose standardized noncompetes whenever an employee *might* encounter assets they perceive (correctly or not) to be proprietary. While, in theory, an employer could not successfully enforce many of these "default-use" agreements, as I call them, their mere existence deters employees from seeking or accepting competitive work.[22]

Thus, a critical yet difficult-to-achieve goal for the new enforcement regime must be to disrupt the rote imposition of default-use noncompetes, bringing employer contracting practices into closer compliance with governing law. In this Article, I argue that UREAA, more than any other approach short of a ban, has the potential to do just that. Its front-end rules narrow the permissible bases for the use of a noncompete, compel

18. The sheer incidence of noncompetes suggest overuse. Nearly one in five workers reported being bound by a noncompete in 2014 and nearly forty percent reported having signed one in the past. *See* Evan Starr et al., *Noncompetes in the US Labor Force*, 64 J. L. & ECON. 53, 60–61 (2021) (finding that 18.1 percent of labor force participants were bound by noncompetes and 38.1 percent had previously been bound). Moreover, evidence shows that, although they are more common with high-skill, high-earning workers, they are widely used with low-skill, low-wage workers who are unlikely to have access to proprietary assets. *Id.* at 61-65.

19. *See, e.g.*, Neil Irwin, *When the Guy Making Your Sandwich Has a Noncompete Clause*, N.Y. TIMES (Oct. 14, 2014), https://www.nytimes.com/2014/10/15/upshot/when-the-guy-making-your-sandwich-has-a-noncompete-clause.html [https://perma.cc/67WC-S6L9]. Another egregious example is the wide use of noncompetes in California, a state well known for its anti-enforcement policy. *See* Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. STATE. L. REV. 369, 460–61 (reporting that noncompetes are as or more prevalent in nonenforcing jurisdictions compared to enforcing jurisdictions).

20. *See infra* Part I.B.2.

21. *See infra* Part I.B.2. In prior work, I refer to this strategic use of contract documents as the "contractualization" of employment. *See, e.g.*, Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV 637 (2007).

22. *See* J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability* at 21-22 (July 19, 2022) (unpublished manuscript), https://ssrn.com/abstract=3873638 [https://perma.cc/BD33-566P]; Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. L. ECON. & ORG. 633, 660–65 (2020).

the use of lesser restraints whenever possible, and push employers to expressly articulate a legally cognizable justification for their chosen restriction.[23] Through these drafting choices, I argue, UREAA forces employers to confront the critical but often overlooked question of what justifies so formidable a restraint on competition, making noncompetes a restraint of last resort.

A few disclaimers are in order. First, this Article focuses exclusively on compliance-minded employers. I recognize that the front-end reform measures I describe here are unlikely to deter brazen violators. Accounts of especially egregious misuse of noncompetes have given momentum to the reform movement, but they are also limiting. Such depictions suggest that unlawful noncompetes are the work of isolated bad actors and can be easily redressed by modest, targeted reforms such as wage thresholds. Indeed, business interests opposed to ambitious reform have argued that regulators should exclusively target low-wage use while touting the continued need for noncompetes with high-level workers.[24] In this Article, I expand the lens beyond predatory noncompetes to those that are merely unjustified. My principal contention is that even compliance-minded employers dealing with high earners may misuse noncompetes, imposing them on workers who obtain valuable, though not necessarily proprietary, assets.[25] Such subtle violations can only be addressed by far-reaching, nuanced reform measures that go beyond blunt interventions like wage thresholds.

Second, by focusing on noncompetes that do not comply with existing law, I do not mean to discount the economic harms of *lawful* noncompetes. It seems increasingly likely that even the careful use of narrowly tailored noncompetes for what the law presently considers justifiable purposes can have aggregate negative effects on third parties.[26] In a hypothetical world where UREAA was uniformly adopted and all employers complied fully with its provisions, there would be fewer noncompetes, but these might still have undesirable economic

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23. *See infra* Part II.B.

24. *See* Russell Beck & Sarah Tishler, *The Uniform Restrictive Employment Agreement Act: How UREAA Offered an Alternative to Recent State and Federal Regulation of Restrictive Covenants, and Where to Go from Here*, 34 U. FLA. J.L. & PUB. POL'Y 223, 239 (2024).

25. *See infra* Part I.B.2.

26. Legal scholars have long argued this point. *See, e.g.*, LOBEL, *supra* note 11; Arnow-Richman, *supra* note 6, at 1256; Charles A. Sullivan, *Revisiting the "Neglected Stepchild": Antitrust Treatment of Postemployment Restraints of Trade*, 1977 ILL. L.F. 621, 625–32. Empirical literature on the sheer incidence of noncompetes would seem to support this view, *see* Starr et al., *supra* note 22, as does research focused on high-earning, high-skill workers. *See, e.g.*, Liyan Shi, *Optimal Regulation of Noncompete Contracts*, 91 ECONMETRICA 425, 454-55 (2023) (finding a duration cap of less than two months for CEO noncompetes to be socially optimal). However, none of the empirical literature on the economic effects of noncompetes compares or controls for the effects of lawful versus unlawful agreements.

implications. If so, it would strongly support more aggressive reform, such as the FTC's total ban. My project here, however, is to evaluate the Act from the perspective of what can be done to bring noncompete use into compliance with existing law. I defer the broader question for further elaboration in the economic literature and political discourse.

Finally, I wish to disclose that I contributed to the drafting of UREAA as an invited observer on the ULC committee. Even so, I do not consider the Act an unequivocal success, nor do I speak on behalf of the committee. I have framed the problem of default-use noncompetes and UREAA's potential for front-end reform using my own terminology and drawing from my prior research. In other words, I offer my own reading of the Act, and a prediction as to how it may play out, rather than a representation of committee intent or a description of the drafting process.

This Article proceeds as follows: Part I explains the default use problem and the need for front-end reform. It argues that the traditional legal regime creates incentives for employers to use standard form noncompete agreements across wide swaths of their workforce. Due to legal uncertainty and employee risk aversion, these agreements deter employee competition to the extent of their terms rather than as limited by law. Part II turns to UREAA and how it can address this problem. It identifies and develops three unique choices by the Act's drafters—the elimination of confidential information as a protectable interest, the adoption of what I term a "least restrictive alternative" approach to lawful restraints, and the incorporation of what I call a "substantive notice" requirement that inspires greater forethought as to the suitability of any chosen restraint. These key provisions go well beyond other pro-employee statutes in requiring the employer to consider the need for and the legality of a noncompete with respect to each employee. Part III turns to criticism of UREAA and its potential for enactment. It concludes that UREAA offers a powerful, if second-best, alternative to a ban and a useful model for state legislators in the event that permanent federal-level reform proves elusive.

## I. NONCOMPETES AND THE DEFAULT USE PROBLEM

Assessing any noncompete reform proposal requires understanding the stakes and limits of what I refer to as the "traditional legal regime." This Part reviews the historical rationale for allowing so-called "reasonable" noncompetes in limited circumstances and the reasons why that account fails in the face of employer contracting practices and enforcement realities. Common knowledge and empirical evidence suggest that employees do not knowingly agree to noncompetes or

bargain over their terms.[27] I suggest that, in many cases, employers do not either. Instead, they adopt noncompetes as a rote practice without meaningful consideration of their legal justification. Due to the combination of uncertain law and employee risk aversion, these "default-use" noncompetes deter lawful competition. The result is a compliance gap between the permissible uses of noncompetes and their actual effects.

### A. *The Investment Theory: A Stylized Justification for Employee Noncompetes*

It is important to locate any discussion of lawful noncompetes in first principles: noncompetes are restraints of trade that threaten the public interest. They obviously impede the mobility of the restrained worker, but they also limit competitor firms' access to necessary labor and deprive the public of the benefit of the restrained workers' services.[28] This trifecta of concerns explains why noncompetes have never been treated as ordinary contracts. In fact, for much of history, they were void outright.[29] The notion that so-called reasonable noncompetes should be enforced evolved in the eighteenth century.[30] Notably, it arose initially in the sale-of-business context, where it is widely agreed that noncompetes are more likely to reflect a reasoned bargain and raise fewer policy concerns than employment-based noncompetes.[31]

Yet it was only a short leap to the idea that under certain circumstances, noncompetes could be enforced in the employment context as well.[32] Under the familiar "rule of reason," the centerpiece of the traditional enforcement regime, noncompetes are permissible where necessary to protect a so-called "legitimate" employer interest, but only if they are reasonable in scope and not unduly harmful.[33] Thus, an enforceable noncompete must satisfy a two-part test: what may be

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27. *See* Starr et al., *supra* note 18, at 53 (finding in a nationally representative survey that only ten percent of workers negotiate over their noncompetes).

28. For an early and widely cited presentation of these classic concerns, see Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960).

29. *Id.* at 629–37 (discussing early English law).

30. The seminal case is Mitchel v. Reynolds, 24 Eng. Rep. 347 (QB 1711). *See generally* Blake, *supra* note 28 (discussing these developments).

31. UREAA and most recent legislative enactments either apply exclusively to employee noncompetes or subject sale-of-business noncompetes to different enforceability standards. *See* UREAA § 8(3) (permitting sale-of-business noncompetes up to five years and employee noncompetes up to one year). Notably, even California, known for its harsh anti-noncompete stance, permits sale of business noncompetes. *See* CAL. BUS. & PROF. CODE § 16600.

32. Blake, *supra* note 28, at 638.

33. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188(1) (AM. L. INST. 1981) ("A promise to refrain from competition …is unreasonably in restraint of trade if (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.").

thought of as a preliminary "justification" inquiry based on the employer's proprietary interests, followed by a "reasonableness" inquiry based on the scope and effect of the restraint.[34] Within these limits, workers and companies have ostensibly enjoyed the freedom to buy and sell their labor, or what we would today call human capital.[35]

By the mid-twentieth century, law and economics scholars arrived at a new justification for noncompetes, what can be described as the "investment theory."[36] According to this influential view, noncompetes are necessary to facilitate employer investments in their workforce against a backdrop of employment at will.[37] A company may wish to invest in employee training, entrust a worker with confidential information, or provide a worker with access to valuable business relationships over the course of the job. Such behavior is mutually advantageous: the investments enhance the worker's human capital and improve productivity and development. But companies are loathe to make them if workers are free to depart at will. Should the employee defect to a competitor, that company would usurp the benefit the prior employer had hoped to realize. From this perspective, noncompetes are valuable tools for controlling that risk, enabling beneficial investments.

There are many problems with the investment theory as a basis for permitting noncompetes, and I will touch on a few. First, it does not align with the historical law of noncompetes. Noncompetes have never been permitted simply to protect employer "investment," but only proprietary assets.[38] Indeed, it has long been a black-letter principle of the traditional enforcement regime that ordinary training, however valuable, does not justify a noncompete.[39] Second, there is evidence that employers provide employee training despite employment at will, suggesting that noncompetes are not essential to facilitating these investments.[40] Finally,

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34. *Id.*

35. *See* Viva R. Moffat, *Human Capital as Intellectual Property? Non-Competes and the Limits of IP Protection*, 50 AKRON L. REV. 903, 907 (2017) ("[T]he goal of [noncompete] agreements is to control . . . human capital.").

36. *See* Eric Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 177 (2020). Orly Lobel refers to this as the "orthodox view" of noncompetes. LOBEL, *supra* note 11, at 12.

37. *See, e.g.*, Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete* 10 J. LEGAL STUD. 93, 93 (1981); Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 VA. L. REV. 383, 389–95 (1993). Numerous commentators have summarized this view. *See, e.g.*, LOBEL, *supra* note 11, at 27-29; Posner, *supra* note 36, at 177–84; Christopher B. Seaman, *Noncompetes and Other Post-Employment Restraints on Competition: Empirical Evidence from Trade Secret Litigation*, 72 HASTINGS L.J. 1183, 1194 (2021).

38. *See* Seaman, *supra* note 37, at 1195.

39. Indeed, the theory is most often set forth in the context of general training, which by definition is nonproprietary. *See* Posner, *supra* note 36, at 169.

40. *See id.* at 183 (providing evidence that firms invest in general human capital in contradiction to the assumptions of the investment theory).

the investment theory ignores the availability of other legal or market-based tools that employers might use to achieve some of the same results as noncompetes, potentially with fewer anticompetitive consequences.[41]

Still, the investment theory has proved quite resilient, and a version of it resonates strongly in the contemporary debate over noncompete reforms. Business interests vehemently contend that they need noncompetes to protect proprietary investments in workers when opposing new regulation.[42] So for purposes of this Article, we will assume that the theory is at least partially correct: noncompetes, in at least some instances, protect and encourage beneficial employer investments in workers. And let us suppose that this is most likely to be true where the company provides the worker with the type of proprietary assets that the rule of reason generally treats as a legitimate justification for a lawful noncompete. Given the countervailing risks of these agreements, how do we ensure that employers use noncompetes solely for these purposes and in a form appropriately tailored to achieve those ends?

It is worth noting at the outset that this is not the type of question that contract law typically asks. And as we will see, it does a poor job of answering. The decision to enter any contract, including employment, is deemed a private matter. Courts police the terms of agreement only at the margins, where they violate fundamental principles or statutory law.[43] In the case of employment contracts, obvious unlawful terms are those that violate state or federal employment protection legislation, schemes that generally have their own enforcement mechanisms.[44] Thus, a worker whose contractual pay rate falls below the minimum wage would pursue relief through an affirmative claim for backpay and statutory penalties. The matter would never be litigated through the lens of breach of contract.

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41. These might include any of the lesser restraints regulated by UREAA, *see* UREAA § 2(11) (UNIF. L. COMM'N 2021); *infra* Part II.A, or simply better terms of employment. *See* Arnow-Richman et al., *supra* note 13, at 10 (asserting that in the absence of noncompetes, employers can "fairly compete for and retain talent by offering attractive wages and benefits, opportunities for training and advancement, and other positive terms and conditions of work").

42. *See, e.g.*, Letter from Sean Heather, Senior Vice President, International Regulatory Affairs and Antitrust U.S. Chamber of Commerce to April Tabor, Secretary of the Commission, Federal Trade Commission (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf [https://perma.cc/2VDV-RAJN] (asserting that noncompetes are necessary to prevent beneficial investments against "holdup" by at-will employees and "free-riding" by competitors).

43. Substantive common law constraints of general applicability on private contracts consist principally of the unconscionability and public policy doctrines. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 178 , 208 (AM. L. INST. 1981). Beyond that, contract terms are the province of the parties subject to legislative action or other public law. *Id.* § 178(1).

44. *See* 29 U.S.C. § 216 (creating private right of action for recovery of damages, penalties, and attorneys fees to redress employer violations of the federal Fair Labor Standards Act).

But that is precisely how questions about the lawfulness of a noncompete term arise. Under the traditional legal regime, there is no way for courts to address the legality of a particular agreement unless the restrained employee violates its terms or threatens to do so.[45] As the next section will explore, a combination of legal uncertainty and institutional hiring practices leads employers to use noncompetes by default, including in situations where they are neither strictly necessary nor legally supported.[46] In the absence of any breach by the employee, these agreements go unchecked, deterring lawful and socially beneficial competition.

### B. *Noncompetes in the Wild: Failures of an Uncertain Legal Regime*

Understanding the failures of the traditional legal regime requires appreciating the incentives of employers and employees at two points in time: what I have previously described as the "front end" and "back end" dynamics of noncompetes.[47] I use the term "front end" to refer to choices the *employer* makes, usually at the outset of the employment relationship, in electing to use a noncompete.[48] By "back end," I refer to the choices

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45. An employee could in theory seek a declaratory judgment as to the enforceability of the noncompete, and there may be a strategic advantage to doing so where choice of law or forum is at issue. *See* Gillian Lester & Elizabeth Ryan, *Choice af Law and Employee Restrictive Covenants:An American Perspective,* 31 COMP. LABOR L. & POL'Y J. 389, 405 (2010)(describing incentives of employees who have signed a noncompete in high-enforcement state but are relocating to a non- or low-enforcement state). However, this course of action is no less fraught for the employee than simply departing: it requires suing one's employer while revealing the intention to compete. Under such circumstances it seems unlikely that the bound employee would be able to preserve the existing employment relationship should the court find the agreement enforceable. *Cf.* Jerry Cohen, etal., *Employee Noncompetition Laws and Practices: A Massachusetts Paradigm Shift Goes National,* 103 MASS. L. REV. 37, 45-46 (2022) (noting that an employee who seeks clarity from an employer about the enforceability of a noncompete is likely to face a chilly response if not an immediate termination). And of course, the declaratory judgment process, like all litigation. is slow and costy. *Id.* at 46,

46. *See infra* Part II.B.

47. Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 969–76.

48. There are, of course, other points in the employment relationship that a noncompete might be introduced beyond the point of hire. An incumbent employee may be promoted to a position that requires a noncompete, or the employer may decide to require noncompetes as a new policy. Such unilaterally imposed changes in employment terms pose unique contract formation issues that I have explored in prior writing. *See* Rachel Arnow-Richman, *Modifying At-Will Employment Contracts*, 57 B.C. L. REV. 427, 438–43 (2016). My focus here, however, is how the law of noncompete enforceability (as opposed to employment contract law) shapes employers' incentives. From that perspective, there is little difference between an employer's decision to use a noncompete at the point of hire versus at a later point in the relationship, though in many cases

of the *employee* who is bound by a noncompete and considering departing for a competitor. As this section explains, employees are understandably unwilling to risk violating unlawful noncompetes at the back end. Consequently, the law must do more to ensure employers are not misusing noncompetes on the front end.

### 1. *In Terrorem* Effects and Back-End Choice

A useful starting place for exploring this contention is the back-end reality that only a subset of noncompetes are enforced or challenged through litigation.[49] Most do their work covertly, deterring employees from leaving their jobs for new employment and deterring future employers from extending offers to bound employees.[50] These *in terrorem* effects mean that noncompetes are likely to prevent competition according to their terms rather than in accordance with the governing law.

To appreciate this, consider the position of an employee bound by a noncompete who must decide whether to seek or accept employment with a competitor. Most workers, like consumers and other one-off transactors, know little about the law compared to the more sophisticated entities that demand and draft the parties' contracts.[51] Research on the impact of noncompetes on employee perception shows that employees are misinformed about the law of enforceability.[52] Even in states like California, one of the few where employee noncompetes are unequivocally banned, a large number of workers assume their agreements are binding.[53] Alternatively, employees may feel a moral obligation to abide by the agreement regardless of the law.[54] Either way, such beliefs influence behavior, leading employees to decline offers or refrain from seeking new employment.[55] In such cases, noncompetes that

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an incumbent employee will have less ability to negotiate or refuse a noncompete than a new hire. *See id.* at 486.

49. *See* Sullivan, *supra* note 26, at 622–23 (describing reported noncompete caselaw as the "proverbial iceberg's tip").

50. *Id.* at 623.

51. For instance, past research shows that employees assume they have greater job security than they actually do. *See* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 133-34 (1997) (finding that an overwhelming majority of surveyed at-will workers believed incorrectly that they were protected against unjust, arbitrary, or personally motivated discharges).

52. Prescott & Starr, *supra* note 22, at 12–14.

53. *See, e.g.*, *id.* at 11, 29 (finding that sixty-nine percent of workers who had signed noncompetes in nonenforcing jurisdictions incorrectly believed their noncompetes were enforceable).

54. *Id.* at 22–25.

55. *Id*. at 18–21.

may be unjustified, overbroad, or even statutorily void operate to chill legitimate competition.[56]

Of course, sophisticated workers might consult a lawyer about their agreement rather than simply abide by its terms. But even setting aside the cost barrier to accessing legal services, the advice obtained is likely to be of limited value. Application of the historical rule of reason requires nuanced, fact-dependent determinations.[57] The initial justification inquiry turns on the employee's degree of access to the employer's customers and clients or its trade secrets and confidential information.[58] The reasonableness assessment, entails a multi-factored analysis—examination of the scope of prohibited behavior, the geographic range in which it applies, and its duration—in relation to the underlying interest and the overall impact on the employee.[59] The outcome of either of these inquiries alone defies prediction.[60] Considering them together offers a

56. *See* Starr et al., *supra* note 22, at 668.

57. *See supra* Part I.A.

58. *See, e.g.*, Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp., 511 F.3d 535, 547 (6th Cir. 2007); Ormco Corp. v. Johns, 869 So. 2d 1109, 1115 (Ala. 2003); Ticor Title Ins. Co. v. Cohen, 173 F.3d 63, 70 (2d Cir. 1999); Nationwide Mut. Ins. Co. v. Cornutt, 907 F.2d 1085, 1087–88 (8th Cir. 1990); *see* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d. (AM. L. INST. 1981) ("An employer's interest in [a noncompete] is usually explained on the ground that the employee has acquired either confidential trade information relating to some process or method or the means to attract customers away from the employer.").

59. *See, e.g.*, Home Paramount Pest Control Cos., Inc. v. Shaffer, 718 S.E.2d 762, 764 (Va. 2011); Cent. Ind. Podiatry, P.C. v. Krueger, 882 N.E.2d 723, 729 (Ind. 2008); Coleman v. Retina Consultants, P.C., 687 S.E.2d 457, 461 (Ga. 2009); Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396–97 (Ill. 2011); *see* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. d. (AM. L. INST. 1981) ("The extent of [a noncompete] may be limited in three ways: by type of activity, by geographical area, and by time.").

60. With respect to the justification inquiry, part of the difficulty lies in defining what is confidential, an issue we will return to shortly. *See* RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. b. (AM. L. INST. 1981) ("[I]t is often difficult to distinguish between [protectible] information and normal skills of the trade, and preventing use of one may well prevent or inhibit use of the other."); *infra* Part I.B.2; II.B.1. As to the reasonableness inquiry, courts not only examine the three dimensions described above—activity, geography and duration—they may balance them in relation to each other. *See, e.g.*, Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc., 3 F.3d 730, 739–40 (4th Cir. 1993), *vacated pursuant to settlement* (Sept. 30, 1993) (finding a noncompete's national reach reasonable owing in part to its narrow definition of the employer's business); H&R Block E. Enters., Inc. v. Morris, 606 F.3d 1285, 1291–92 (11th Cir 2010) (noting the need to "examine the interplay between the scope of the prohibited behavior and the territorial restriction" in assessing noncompete reasonableness) (quoting Beacon Sec. Tech. Inc. v. Beasley, 648 S.E.2d 440, 442 (Ga. Ct. App. 2007)); Sterling Title Co. v. Martin, 831 S.E.2d 627, 631–33 (N.C. Ct. App. 2019) ("A longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*.") (quoting Farr Assocs., Inc. v. Baskin, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000)); Pinnacle Performance, Inc. v. Hessing, 17 P.3d 308, 312 (Idaho Ct. App. 2001) ("An otherwise overly broad geographical limitation may be considered reasonable if the class of persons with whom contact is prohibited is sufficiently limited.").

worker little assurance about the lawfulness of any particular form of competition.

This uncertainty leaves employees only one real option: to take the job and risk being sued. It is hard to overstate the perilousness of that course of action. Since an employer may obtain an immediate injunction, the worker faces the possibility of unemployment pending determination of the dispute on the merits. In the meantime, the worker will have to manage without a source of income while shouldering the cost of the litigation. Even if the worker succeeds, the matter will take time to adjudicate. Only in exceptional situations is an employer likely to put its hiring needs on hold for the sake of one particular job candidate. The new employment opportunity will likely have passed by the time the litigation is resolved. Under the traditional legal regime, an enforcing employer bears no liability to the bound employee for that outcome, or for the employee's attorneys' fees or other losses.[61] Facing this lose-lose situation, an employee might rationally decide to stay put.

For these reasons, back-end adjudication is not a reliable means of ensuring noncompetes comply with existing law. In the absence of that failsafe, what happens on the front end—the choices employers make in drafting and imposing noncompetes—will largely determine the reach and effect of these agreements.

### 2. Front-End Practices and the Rise of "Standard Form Employment"[62]

Unfortunately, the back-end dynamics just described give employers no reason to self-police: companies can obtain the benefits of a noncompete's deterrent effect irrespective of whether it is lawful. But that is not all. The compliance challenges of an uncertain legal regime combined with corporate onboarding practices make the default use of noncompetes a path of least resistance for employers. This section examines institutional factors encouraging employers to use noncompetes on the front end.

One such factor is simply the practical challenge of front-end compliance. As hard as it is to predict the outcome of noncompete litigation, it can be even more difficult to determine what amounts to a lawful restraint at the drafting stage. The historical rule of reason

61. Moreover, even if the employee convinces a court that the noncompete is overbroad, most jurisdictions permit a court to modify a noncompete to make its terms reasonable. I have argued against this so-called "blue penciling" in prior work on grounds that it incents overly broad restraints. *See* Arnow-Richman, *supra* note 6, at 1230–31; Arnow-Richman, *supra* note 47, at 967. I do not reiterate those arguments here, focusing instead on the problem of unjustified (as opposed to unreasonable) noncompetes.

62. Arnow-Richman, *supra* note 21.

evaluates a noncompete's lawfulness at the point of breach.[63] To comply at the front end, the employer must anticipate the factual situation at the time of the employee's defection. This means predicting what assets the employee will have, what competitive value the assets will retain, and the marketability and flexibility of the bound employee, to name just a few. Unless the employer is remarkably clairvoyant, it must undertake a highly nuanced, and thus costly, assessment of the particular situation of each employee or class of employees and draft multiple, tailored versions of its preferred restraint.

But that is not how companies usually operate when hiring employees or drafting most employment contracts. A second factor driving the default use of noncompetes is the corporate onboarding process through which companies distribute and collect form documents from new hires. That process contrasts sharply with the investment theory's stylized presentation of an employer and employee undertaking a reasoned calculation about the suitability of a noncompete in the context of a planned information exchange. It certainly fails to capture the real-life experience of most employees, many of whom do not have the opportunity or ability to bargain over the employer's terms of employment.[64] But it also fails to describe the way most *employers* establish terms of employment, including the terms of post-employment competition. Companies rarely design formal individualized contracts for employees other than c-suite executives and high-ranking employees.[65] For the rank-and-file workforce, companies generally rely on a strategic combination of default rules, written policies, and form contracts to set the terms of the relationship. Thus employers who use noncompetes widely are likely to rely on generic documents rather than carefully drafted instruments.[66] If so, at least some portion of these agreements are likely to lack a threshold justification or be overbroad in.

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63. This makes the rule different from other contract defenses that focus on the time of formation, such as unconscionability. *See id.* at 643–44 (discussing this anomaly). For a discussion of the use of contract defenses to avoid noncompetes and other standard from agreements, see generally Lobel, *supra* note 1, at 892–900.

64. Most sign the agreement as a matter of ourse, often after they have begun work. *See* Starr et al., *supra* note 27, at 69 (finding in a nationally representative survey of workers that only ten percent of employees negotiate over their noncompete, and about one-third of employees are presented with their noncompete only after having already accepted their job offer); Matt Marx, *The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals*, 76 AM. SOC. REV. 695, 706 (2011) (finding that nearly half of surveyed engineers signed their noncompete upon or after beginning new employment).

65. *See* TIMOTHY GLYNN ETAL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 105 (5th ed. 2023).

66. Research on the use of noncompetes at the firm level shows that nearly fifty percent of companies use noncompetes and that nearly a third use them with *all* of their employees. *See*

A third and related driver of the default use problem is the possibility that employers misconceive the law, specifically the threshold requirement of a protectable interest in situations where access to information is at stake. The traditional common law regime has long considered noncompetes justifiable when used to protect an employer's trade secret *or confidential information*.[67] Adoption of the Uniform Trade Secret Act (UTSA) in the late twentieth century supplied a statutory definition for the former term: information must be unknown, kept secret, and have independent economic value in order to be classified as trade secret, a designation that has become a term of art.[68] Confidential information, on the other hand, has long lacked a meaningful definition either in the traditional case law or, until recently, state statutes.[69] Consequently, it has emerged as a catch-all classification, ostensibly capturing a wide array of work-related information, such as marketing techniques, product plans, customer data, and firm financials, to name a few.[70] Such case law opens the floodgates to employers' use of

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Alexander J.S. Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/LFQ8-JG9D]; *see also* Balasubramanian et al., *supra* note 1, at 5. Professor Evan Starr suggests that these results in fact underestimate noncompete use. *See* STARR, POLICYMAKER'S GUIDE, *supra* note 8, at 11.

67. RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. g (AM. L. INST. 1981) ("The employer's interest . . . is usually explained on the ground that the employee has acquired either *confidential trade information* relating to some process or method or the means to attract customers away from the employer.") (emphasis added); *see generally* Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes,* 80 OR. L. REV. 1163, 1176 (2001) (discussing judicial interpretation of the legitimate interest requirement).

68. UNIF. TRADE SECRET ACT § 1(4) (UNIF. L. COMM'N 1985).

69. For a discussion of various attempts to define "confidential information," *see* Erin Brendel Mathews, *Forbidden Friending: A Framework for Assessing the Reasonableness of Nonsolicitation Agreements & Determining What Constitutes a Breach on Social Media*, 87 FORDHAM L. REV. 1217, 1233 (2018).

70. *See, e.g.*, AK Steel Corp. v. ArcelorMittal USA, L.L.C., 55 N.E.3d 1152, 1157 (Ohio Ct. App. 2016) (finding corporate strategic initiatives and pricing initiatives constituted protected confidential information justifying a noncompete); Quirch Foods LLC v. Broce, 314 So. 3d 327, 339 (Fla. Dist. Ct. App. 2020) (finding "customer lists with emails, sales, prices, profit margins, and business strategies" constituted protected confidential information justifying the noncompete); Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 646 (Tenn. Ct. App. 1999) (finding that knowledge of surgeon preferences, customers, and pricing structures were confidential information amounting to a legitimate business interest in a noncompete); Comprehensive Techs. Int'l, Inc. v. Software Artisans, Inc., 3 F.3d 730, 739 (4th Cir. 1993) (finding that an employee deeply familiar with the employer's operation "necessarily acquired" confidential information justifying a noncompete).

noncompetes to protect alleged informational interests far beyond what trade secret law would sanction.[71]

Organizational perceptions of confidentiality likely compound this effect. Sociologist and workplace law scholar Lauren Edelman and colleagues coined the term "managerialization" to refer to how companies respond to legal rules within their organization.[72] Their research asserts that where law is ambiguous, companies interpret it consistent with their managerial values, adopting compliance protocols that reflect and transmit their beliefs about what the law should be.[73]

The managerialization theory, developed principally in the area of workplace equality and diversity, can similarly provide insight into companies' expansive use of noncompetes.[74] There is no empirical research assessing why companies adopt noncompetes, but the content of litigated restraints reveals how broadly companies conceive of their informational interests. A study of employer nondisclosure agreements (NDAs) found that many such agreements aim far beyond the protection of trade secrets, ostensibly covering publicly available information and information that would fairly be described as part of an employee's general skillset and experience.[75] Of course, a court would never find such information confidential, at least not under a correct reading of the traditional rule. But as the managerialization theory suggests, companies may perceive such information as legally protectable.[76] And as we have seen, it matters little whether a court would ultimately deny enforcement or narrow a particular restraint. What matters is the employer's front-end choice to demand one.

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71. *See* Hrdy & Seaman, *supra* note 1, at 738 (observing that while "trade secrets are the gold standard for what counts as a legitimate business interest [for noncompete enforcement], courts also recognize other interests, such as protecting the employer's 'confidential information' or 'goodwill'").

72. Lauren B. Edelman et al., *Diversity Rhetoric and the Managerialization of Law*, 106 AMER. J. OF SOC. 1589, 1589 (2011).

73. *See id.* ("[M]anagerialization of law [is] a process by which legal ideas are refigured by managerial ways of thinking as they flow across the boundaries of legal fields and into managerial and organizational fields.").

74. *See* Arnow-Richman, *supra* note 47, at 983 (suggesting that companies' use of noncompetes contributes to an "internal culture of property ownership" based on management's views of its property rights).

75. *See, e.g.,* Alliantgroup, L.P. v. Feingold, 803 F. Supp. 2d 610, 622 (S.D. Tex. 2011) (NDA prohibiting employees from disclosing know-how or training); Simplified Telesys, Inc. v. Live Oak Telecom, L.L.C., 68 S.W.3d 688, 692 (Tex. Ct. App. 2000) (NDA protecting know-how and "other business information"); Deep South Commc'ns, LLC v. Fellegy, 652 F. Supp. 3d (M.D. La. 2023) (NDA protecting general training); *see generally* Hrdy & Seaman, *supra* note 1, at 677 (reviewing cases)

76. Arnow-Richman, *supra* note 47, at 982–83 .

In sum, companies likely deploy default-use noncompetes for a variety of institutional reasons. Such agreements are easy to prepare and administer uniformly, do not require costly individualized assessment, and reinforce managerial expectations about their rights. Whether as a matter of ignorance or aspiration, companies can designate almost any form of information conveyed in the course of employment as confidential. If indeed they perceive their interest this broadly, it is no wonder they use noncompetes by default across large swaths of their workforce.

## II. REGULATING DEFAULT USE UNDER UREAA

Part I described the front- and back-end dynamics that contribute to the default use problem. This Part turns to how adopting UREAA can potentially disrupt employer contracting practices. To date, no single consensus approach has emerged within the new enforcement regime. Enacted measures range from wage threshold laws that ban the use of noncompetes with workers earning below a statutorily defined amount[77] to all-out bans that prohibit any form of employee noncompete.[78] Between these extremes, states have experimented with an array of idiosyncratic statutes that restrict noncompetes using a variety of levers: presumptions or caps on permissible duration, penalties for overreaching agreements, and advance disclosure requirements, just to name a few.[79]

UREAA incorporates these features as well.[80] However, what makes UREAA unique, and potentially more effective than other laws short of a ban, is that it targets front-end hiring dynamics. UREAA contains three novel features that I contend will put pressure on the employer's initial decision to require a noncompete, leading to the adoption of fewer restraints. First, UREAA allows noncompetes only where no other restraint can effectively protect the employer's proprietary interests.[81] Second, UREAA limits the permissible uses of noncompetes to protecting customer interests and trade secret information, forcing employers to rely on NDAs to protect so-called confidential

77. *See, e.g.,* 820 ILL. COMP. STAT. 90/10 (2018); ME. REV. STAT. ANN. tit. 26 § 599-A (2020); MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2020); MASS. GEN. LAWS ANN. ch. 149, § 24L (West 2020); N.H. REV. STAT. ANN. § 275:70-a (2020); 28 R.I. GEN. LAWS § 28-59-3 (2020);WASH. REV. CODE. ANN. § 49.62.020 (West 2020); *see generally* Arnow-Richman, *supra* note 6, at 1231–33 (discussing this approach).

78. *See* MINN. STAT. § 181.988 (2023); Non-Compete Clause Rule, 16 C.F.R. § 910 (2024).

79. *See* Arnow-Richman, *supra* note 6, at 1238–41 (describing features of "middle way" legislation that goes beyond wage thresholds but falls short of a full ban).

80. *See* UREAA §§ 8(3), 16(e), 4(a) (UNIF. L. COMM'N 2021).

81. *Id.* § 8(2).

information.[82] Third, UREAA requires an especially robust form of advance disclosure that forces the employer to tailor and justify its demand for a restraint in providing relevant information to the employee.[83]

This Part looks first at UREAA's unique structure, which reaches beyond noncompetes to regulate all forms of restrictive employment agreements.[84] This structure sets the stage for considering the three front-end components of UREAA's regulatory scheme noted above. Together, these features permit the use of noncompetes only as a restraint of last resort and force employers to consider whether their perceived interests, in fact, meet the Act's new legal standard.

### A. *Capacious Coverage, Tailored Limitations*

Unpacking UREAA's front-end features requires some initial consideration of the Act's scope and an appreciation for its unique focus on the underlying justification for using any restraint. Unlike any state measure to date, it covers all forms of "restrictive employment agreements" and sets distinct enforceability criteria for each instrument.[85] This capacious approach provides guidance to employers, fills a gap in existing law, and ensures that employers do not subvert the purpose of noncompete reform. Most importantly, it lays the groundwork for UREAA's front-end scheme, which permits noncompetes only for identifiable, narrowly delineated purposes and only when no other restraint will do.

UREAA embraces any form of "restrictive employment agreement," defined as:

> an agreement . . . between an employer and worker *that prohibits, limits, or sets a condition on working other than for the employer after the work relationship ends* . . . . The term includes a confidentiality agreement, no-business agreement, noncompete agreement, nonsolicitation

82. *Id.* § 8(1).

83. *See id.* § 4 (requiring that the employer clearly specify the information, type of work activity, or extent of competition that the agreement prohibits post-employment).

84. *Id.* § 2(11) (defining "restrictive employment agreement" to include a "confidentiality agreement, no-business agreement, noncompete agreement, nonsoclicitation agreement, no-recruit agreement, payment-for-competition agreement, and training-repayment agreement").

85. *See id.* §§ 8–14 (defining the enforceability criteria for noncompete agreements, confidentiality agreements, no-business agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training-repayment agreements, respectively).

> agreement, no-recruit agreement, payment-for-competition agreement, and training-repayment agreement.[86]

No other enacted reform measure reaches as broadly.[87] Indeed, state legislation thus far has focused almost exclusively on regulating noncompetes, and almost all new laws that reflect legislative consideration of other types of restraints carve them out.[88]

UREAA's comprehensive approach to restrictive employment agreements is essential to reducing employer overreach and harnessing the benefits of anti-enforcement legislation. First, noncompetes are part of employers' more extensive toolkit for containing employee competition. The number of workers who report being bound by non-disclosure, non-solicitation, and no-recruitment agreements exceeds those who report being bound by noncompetes.[89] Moreover, where noncompetes are present, they do not operate alone; most workers bound by a noncompete have also signed the other three.[90] The fact that all four restraints are most often signed together means some anticompetitive effects attributed to noncompetes may be partly due to the others. In addition, noncompetes coupled with other restraints may have aggregate effects. Scholar Orly Lobel suggests that even if such provisions might be individually challenged, together they comprise an "ironclad" contract that deters beyond the reach of each component.[91] Regulating only noncompetes fails to capture this fuller picture.

Second, it is likely that any new legislation restricting only noncompetes will prompt employers to adopt alternative types of restraints. In California, whose ban on noncompetes long predates the

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86. UREAA § 2(11) (emphasis added).

87. The FTC's Final Rule bans noncompetes and other instruments that "function" as a noncompete. Non-Compete Clause Rule, 16 C.F.R. § 910.1 (2024). However, the Final Rule provides no regulatory limits on restrictive employment agreements that do not constitute a noncompete equivalent and consequently do not fall within its scope.

88. *See, e.g.*, D.C. CODE § 32-581.01(15)(B) (2023) (exempting NDAs and no moonlighting policies from the definition of noncompetes); OR. REV. STAT. § 653.295(4) (2023) (exempting covenants not to recruit former employer's employees or solicit or service its clients); MASS. GEN. LAWS ANN. ch. 149, § 24L(a) (West 2023) (exempting multiple alternate restraints, including non-disclosure and non-solicitation clauses). One exception is Colorado whose statute limits the use of non-solictiation and training repayment agreements. *See* COLO. REV. STAT. § 8-2-113. I will return to Colorado's approach *infra* Part III.B.1.

89. Balasubramanian et al., *supra* note 1, at 9–10 (finding from a 2017 study of 33,637 private sector employees that 57% were bound by a non-disclosure agreement, 28.4% were bound by a non-solicitation agreement, 24% were bound by a non-recruit agreement, and 22.1% were bound by a noncompete agreement).

90. *Id.* at 14.

91. Lobel, *supra* note 1, at 895–96 ("[T]aken together, each clause thickens the appearance of a lock-in . . . create[ing] a contract that, in its entirety, purports to achieve an ironclad that surpasses the effects of any single clause.").

new enforcement regime, companies have developed a wide range of legal instruments and extra-contractual techniques for deterring employee departure despite the state ban.[92] Reform that targets only noncompetes may simply shift employer practices, undermining the advantages of restrictive legislation. Indeed, some recent state legislation arguably invites that result. For instance, the 2018 Massachusetts Noncompetition Agreement Act (MNAA) explicitly carves out at least six different types of employment restraints from its definition of noncompete.[93] These offer employers a veritable playbook for achieving the same anticompetitive results.

The likelihood of a surge in the use of lesser restraints points to a third advantage of UREAA's capacious approach: it fills a jurisprudential gap as to the enforceability of those instruments. In enforcing jurisdictions, noncompetes are the centerpiece of any fair competition litigation. Where the employer is able to secure an injunction preventing a former employee from competing under the noncompete, any other restrictive agreements the employee may have signed will be superfluous. These generally prohibit a narrower swath of conduct (such as contacting prior clients or disclosing information), which is likely to be subsumed or made irrelevant by the broader injunction. Consequently, despite their prevalence, courts have had less opportunity to articulate legal standards for the enforceability of lesser restraints.[94] And when they do, it is uncertain whether decisions regarding a particular type of restraint apply

92. *See* Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663 667–68 (2020) (cataloguing the variety of techniques California employers have devised to circumvent the state's prohibition on noncompetes).

93. These include NDAs, no-recruitment agreements, no-solicitation, and no business agreements, as well as more subtle instruments like garden leave clauses, forfeiture provisions, and exit agreements. *See* MASS. GEN. LAWS ANN. ch. 149 § 24L(a) (West 2023).

94. Most courts appear to subject lesser restraints to the same framework applicable to noncompetes. *See, e.g.*, Century Bus. Servs. Inc. v. Urban, 900 N.E.2d 1048, 1053 (Ohio Ct. App. 2008) ("In Ohio, noncompetition and nonsolicitation agreements that are reasonable are enforced[.]"); Orca Commc'n Unlimited, LLC v. Noder, 314 P.3d 89, 94 (Ariz. App. 1st Div. 2013) ("Non-compete and non-solicitation restrictions are enforceable if they are "no broader than necessary to protect the employer's legitimate business interest."); 1st Am. Sys. Inc. v. Rezatto, 311 N.W.2d 51, 57 (S.D. 1981) (stating that NDAs are "enforced only to the extent reasonably necessary to protect the employer's interest in confidential information"); TLS Mgmt. and Mktg. Servs., LLC v. Rodriguez-Toledo, 966 F.3d 46, 57 (1st Cir. 2020) (applying common law reasonableness tests to an NDA). But a few appear to treat them as ordinary contracts not subject to the rule of reason. *See, e.g.*, Chemimetals Processing, Inc. v. McEneny, 476 S.E.2d 374, 376–77 (N.C. Ct. App. 1996) ("An agreement is not in restraint of trade . . . if it does not seek to prevent a party from [competing] but instead seeks to prevent the disclosing or use of confidential information."); City of Oakland v. Hassey, 78 Cal. Rptr. 3d 621, 634 (Cal. Ct. App. 2008) (holding in training repayment dispute that "nothing in the agreements [plaintiff] signed 'restrained [him] from engaging in [his] lawful trade, business, or profession'")(citation omitted)

to others. UREAA's approach is expansive but tailored, supplying clear rules for each restraint.

Fourth, and most importantly for present purposes, UREAA's structure surfaces and prioritizes the threshold justification inquiry in assessing enforceability. Section 7 of the Act establishes an umbrella requirement that all restrictive employment agreements must be reasonable.[95] Over the subsequent six sections, the Act articulates tailored limits on each type of restraint, which incorporate the purposes for which they may legitimately be used.[96]

Figure 1 below catalogs these operative sections. A non-solicitation agreement, for instance, can last up to a year, but it may apply only to clients that the employee personally served.[97] By contrast, a non-disclosure agreement can last indefinitely, but only if the underlying information remains secret and difficult to discover.[98] Thus, each rule embeds the necessary justification for each form of restraint.

Figure 1: UREAA's taxonomy of restrictive agreements with applicable limitations.

| | **Restraint** | **Duration** | **Other Limitations (Justification)** |
|---|---|---|---|
| § 8 | Noncompetes | 1 year | Protects (1) sale/creation of a business; (2) trade secrets; or (3) "ongoing" clients/customers |
| § 9 | NDA | Coextensive with confidentiality | Underlying information is unknown and not easily ascertained |
| § 10 | No-business | 6 months | Applies only to clients whom the employee personally served. |

95. *Id.* § 7.

96. *Id.* §§ 8–13.

97. *Id.* § 11.

98. *Id.* § 9. The Act takes an especially nuanced view of training repayment obligations, often described as "TRAPs." Such restraints may only be used to recoup specialized training and must be pro-rated over a period no longer than two years. UREAA § 14. The latter requirement recognizes that even where the employer's investment is sufficiently specialized to justify a restraint, that interest is generally recouped over time through the improved marginal product of the trained employee. Once that return is realized, the employer lacks a basis for seeking repayment, and the restraint is no longer justified. *See generally* Jonathan Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 751–52 (2021) (discussing the harms of training repayment agreements and analogizing them to noncompetes).

| | | | |
|---|---|---|---|
| § 11 | Nonsolicitation | 1 year | Applies only to clients whom the employee personally serviced. |
| § 12 | No-recruit | 6 months | Applies only to co-workers with whom the employee worked personally |
| § 13 | Training-repayment | 2 years | Training is specialized and payback schedule is pro-rated |

Finally, this unique taxonomy grounds the umbrella assessment of reasonableness. The reasonableness of a particular restraint cannot be determined in a vacuum; it can only be determined in connection with a protectable interest. Of course, reasonableness can (and should) be assessed in relation to the hardship imposed on the employee. But that is only one consideration. Some bound employees might be flexible enough to change fields or relocate so as to be able to maintain full employment. However, these career "detours"[99] are still costly to the affected employees and harmful to the public, who lose the employees' services and the benefits of greater competition. By its structure, UREAA makes clear that the touchstone for the enforceability inquiry is the presence of an underlying employer interest. Absent that, employers have no right to restrain employee competition even "reasonably."

In sum, UREAA's capacious but tailored approach serves multiple purposes. It ensures that the goals of noncompete reform are not undermined by employer adoption of other restrictive employment agreements that lack clear legal boundaries. More importantly, UREA's general architecture—its prioritization of the employer's threshold justification in relation to both the particular form of restraint and the Act's overall reasonableness requirement—sets the stage for front-end reform, the subject of the next section.

### B. *Front-End Reform Mechanisms*

The mere existence of the taxonomy described above is a step toward reducing default-use noncompetes. Compliance-oriented employers, examining UREAA's list of restraints along with their appropriate uses, might determine that a lesser restraint will adequately serve their purpose. But UREAA does not leave the matter to chance or good intention. Instead, it makes three critical, interrelated changes to the traditional

99. Matt Marx, *The Firm Strikes Back: Non-compete Agreements and the Mobility of Technical Professionals*, 76 AMER. SOC. REV. 695, 696 (2011).

common law regime that, operating in tandem with the Act's broader taxonomy, make noncompete agreements lawful only as a restraint of last resort. The first two changes, contained in § 8 of the Act, augment and refine the historical rule of reason. First, UREAA permits noncompetes only if no other restraint can adequately protect the employer's interest. Second, it eliminates confidential information as a legitimate basis for a noncompete.[100] The third change, part of UREAA's broader disclosure obligations, requires the employer to expressly articulate the impact of its proposed restraint on the employee.[101] This exercise forces employers to meaningfully assess their legal justification for restricting post-employment competition.

1. Justified Noncompetes and the Last Resort Principle

UREAA treats noncompetes as a special case within the universe of restrictive agreements. Section 8 provides as follows:

> A noncompete is prohibited and unenforceable unless:
>
> (1) the agreement protects any of the following legitimate business interests:
>
> (A) the sale of a business . . .;
>
> (B) the creation of a business . . .;
>
> (C) *a trade secret*; or
>
> (D) an ongoing client or customer relationship of the employer;
>
> (2) . . . the agreement is narrowly tailored . . . to protect an interest under paragraph (1), *and the interest cannot be protected adequately by another restrictive employment agreement*; and
>
> (3) the prohibition on competition lasts not longer than:
>
> . . .
>
> (B) one year after the work relationship ends when protecting an interest [in a trade secret or ongoing client/customer relationship].[102]

Like UREAA's other restraint-specific sections, this section imposes a durational cap (one year for employee noncompetes) and delineates the narrow and exclusive purposes for which the restraint may be used.

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100. *See id*. § 8 cmt.
101. *See id*. § 4(3).
102. *Id*. § 8 (emphasis added).

Section 8 also reflects two innovations that go directly to employers' use of noncompetes as a default practice. First, UREAA introduces a new limitation, with no common law analog, on what constitutes a reasonable noncompete. Under § 8(2), a noncompete is only enforceable where a lesser restraint cannot "adequately protect" the employer's underlying interest.[103] Second, UREAA tightens the categories of "legitimate business interests" that the traditional common law regime has historically recognized as justifying a noncompete. Under § 8(1), noncompetes protecting information must be supported by a trade secret.[104]

The first change borrows from and strengthens the approach pioneered by Massachusetts in its 2018 reform bill. Section (b)(iii) of the MNAA provides that a noncompete must be "no broader than necessary" to protect an employer's legitimate interest.[105] It then states: "A noncompetition agreement may be presumed necessary where the legitimate business interest cannot be adequately protected through an alternative restrictive covenant, including but not limited to a non-solicitation agreement or a non-disclosure or confidentiality agreement."[106] As of yet, there is no case law directly applying this provision.[107] It appears to codify a strict interpretation of what constitutes a reasonable noncompete: one that is no broader than necessary. And it create a presumption as to when that requirement is met: when a lesser restraint would suffice to protect the employer's interests.

UREAA elevates this "last resort" principle, as I refer to it, from a presumption to what might fairly be described as a third element for enforceability. Under § 8, in addition to demonstrating that its noncompete is "narrowly tailored" to protect its "legitimate interest," the employer must *affirmatively* show that the interest could not be "protected adequately" by a less onerous restrictive covenant.[108] This requirement means that employers can no longer default to using what is effectively the nuclear option—prohibiting the former employee from competing altogether. They must opt for a lesser restraint wherever possible.

The second innovation ties in directly with the first. In addition to its "last resort" requirement, UREAA eliminates the ability to use a noncompete to protect certain employer interests that other agreements

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103. *Id.*

104. UREAA § 8.

105. MASS. GEN. LAWS ANN. ch. 149 § 24L(b)(iii) (West 2023).

106. *Id.*; *see also* ME. REV. STAT. ANN. 26 § 599-A (West 2023) (incorporating identical language).

107. The statute applies to agreements entered into on or after October 1, 2018. H.R. 4732, 2018 Mass. Legis. Serv. (Mass. 2018).

108. UREAA § 8(2).

can adequately protect. Outside of the sale of business context, the recognized employer interests that justify a noncompete include only *ongoing* customer/client interests or information that *qualifies as a trade secret*.[109] By limiting the customer/client interest to "ongoing" relationships, UREAA precludes the use of a noncompete to protect more expansive forms of business goodwill, such as interests in past customer relationships or targets. By requiring information to be a trade secret, UREAA precludes using noncompetes to protect lesser forms of confidential information.

The latter innovation is particularly important in reigning in the use of noncompetes as a matter of both law and practice. As previously discussed, companies may harbor broad ideas about what aspects of their business are proprietary and can internally designate all manner of transmitted information as "confidential."[110] Of course, declaring such information confidential does not make it so. But it helps. Under the UTSA, the existence of a trade secret turns in part on whether the information is subject to efforts to preserve its secrecy,[111] and courts take a similar approach in determining whether information is confidential, often compressing the two categories into a single inquiry.[112]

Such judicial shortcuts are consistent with the managerialization theory previously discussed.[113] Managerialization posits not only that companies imbue legal rules with organizational values, but also that their value-laden implementation of those rules ultimately shapes the law itself. This is because the way companies internalize legal rules can develop into a set of best practices that courts may turn to as a proxy in assessing compliance. In the case of noncompetes, this may manifest as a form of judicial deference to companies about the scope of their protectable interests. Such deference seems especially likely given the procedural posture in which noncompete enforcement questions arise. Employers generally seek a temporary restraining order as a first step to pursuing unfair competition litigation.[114] In that emergent context, it may be difficult for courts to distinguish between true protectable information

109. *Id.* §§ 8(1)(c)–(d).

110. *See supra* Part I.B.2.

111. UNIF. TRADE SECRET ACT § 5 (UNIF. L. COMM'N 1985).

112. *See, e.g.*, Vantage Tech., LLC v. Cross, 17 S.W.3d 637, 645–46 (Tenn. Ct. App. 1999) (analogizing confidential information to trade secrets and finding the totality of confidential information, employee training, and the parties' special relationship gave rise to a protectable business interest).

113. *See supra* Part I.B.2.

114. *See* David P. Twomey, *Developing Law of Employee Non-Competition Agreements: Trends Correcting Abuses and Making Adjustments to Enhance Economic Growth*, 50 BUS. L. REV. 87, 88–89 (2017); *cf.* Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 TUL. J. TECH. & INTELL. PROP. 167, 201 (2005) (discussing comparable efforts to enjoin workers based on risk of trade secret disclosure).

and the employer's perception of its value. Further complicating the analysis will be the employer's understandable (but not protectable) desire to avoid lawful competition, particularly by a highly valued former employee.[115] While such hearings are, of course, preliminary, as a practical matter, they are often determinative.[116]

Unfortunately, the new enforcement regime has done nothing to contain this problem, and several new laws seem destined to exacerbate it. First, some new state statutes appear to expand the categories of protectable interest that the law has historically recognized. Georgia, for instance, has joined Florida in promulgating that costly, non-proprietary training can be a basis for a noncompete.[117] Second, several states have adopted expansive definitions of confidential information.[118] Georgia's new statute contains a five-part definition of confidential information that includes "methods of operation, names of customers, price lists, financial information and projections, route books, personnel data, and similar information" that is not generally known.[119]

Similarly, in Alabama, the law now defines a protectable interest justifying a noncompete as:

> [I]ncluding, but not limited to, pricing information and methodology; compensation; customer lists; customer data and information; mailing lists; prospective customer information; financial and investment information; management and marketing plans; business strategy, technique, and methodology; business models and data; processes and procedures; and company provided files, software, code, reports, documents, manuals, and forms used in the business that may not otherwise qualify as a trade secret *but which are treated as confidential to the business entity*, in whatever medium provided or preserved, such as in writing or stored electronically.[120]

This definition is not only astonishingly broad, it also explicitly makes the company's decision to "treat" material as "confidential to the business" a touchstone for legitimacy. It is hard to envision any

115. *See* UREAA § 8 cmt. (UNIF. L. COMM'N 2021) (making clear that valuableness of the employee is not a legitimate basis for protection).

116. Twomey, *supra* note 114, at 89 ( "Decisions at the preliminary injunction stage [of a noncompete dispute] become, in effect, a determination on the merits"); *cf* Rowe, *supra* note 114, at 202 ("[T]he preliminary injunction hearing serves as a filter that affects . . . the manner in which the [inevitable disclosure] case is evaluated by the court, and thus ultimately has a tremendous impact on the outcome.").

117. GA. CODE ANN. § 13-8-51(3) (West 2023).

118. *See id.*; ALA. CODE § 8-1-191(a)(2) (2023).

119. GA. CODE ANN. § 13-8-51(3)(E) (West 2023).

120. ALA. CODE § 8-1-191(a)(2) (2023) (emphasis added).

administrative or management-level employee who would *not* have access to confidential information under its terms. Thus, rather than rein in confidential information, some states have doubled down on the classification. In doing so, they have largely gutted the threshold requirement that a noncompete be justified by more than a mere desire to thwart competition.[121]

In sum, UREAA's noncompete rule scales back the recognized justifications for a noncompete while placing an additional threshold requirement on noncompete use. Employers may not rely on mere confidential information as a justification for a noncompete, and regardless of what proprietary assets may be at stake, they must use the narrowest form of restraint that will protect their interests. These two changes prohibit employers from relying on noncompetes to protect negligible informational interests and demand a more nuanced assessment of their needs and interests before opting to use one.

### 2. Substantive Notice

The third front-end mechanism in UREAA's regulatory framework comprises part of its multi-tiered notice provision. Like several recent state statutes, UREAA requires employers to provide workers with a noncompete in advance of signing.[122] In addition, they must provide comprehensible information about the governing law and the effects of the noncompete.[123] This three-part requirement—which I call "substantive notice"—goes beyond any new law in ensuring that employees accepting a job not only are aware that a noncompete is required but understand its content and significance. More importantly, by requiring employers to develop and disclose specific information about the reach of their desired restraints, UREAA necessarily forces employers to be more discerning about how and when they use them.

The first and most straightforward aspect of substantive notice is disclosure of the noncompete itself. Prior to the current reform movement, not a single jurisdiction required companies to provide workers with noncompetes in advance of hire. From a pure contract law perspective, this is odd. Basic principles of assent demand that a party

121. The one exception is Colorado, the only state to have adopted portions of UREAA. COLO. REV. STAT. ANN. § 8-2-113 (West 2024). The Colorado statute recognizes only two interests justifying the use of a noncompete: the sale of business assets and the protection of trade secrets. *Id.* § 8-2-113(2), (3). It does not permit use of a noncompete to protect confidential information or customer interests, although it permits reasonable nondisclosure agreements that reach beyond trade secrets. *Id*. Assuming Colorado courts apply the current statute as written, it greatly curtails the contexts in which noncompetes may lawfully be used, much like UREAA. *See* Arnow-Richman, *supra* note 6, at 1229–30, n.27 (suggeting that prior to recent amendments some Colorado courts broadly interpreted the statute's trade secret exception).

122. UREAA § 4(a)(1) (UNIF. L. COMM'N 2021).

123. *Id*. § 4(a)(5)(d).

have the ability to access and review the terms of an agreement in order to accept them. But in the peculiar world of employment at will, modification of terms can happen at any time without any new consideration or procedural safeguards.[124] Under the traditional legal regime, courts treat noncompetes signed by employees after starting work either as lawful modifications or coextensive with the original job offer.[125] In this legal environment, employers—whether for practical or pernicious reasons—will likely defer presenting a required noncompete to a new hire until the on-the-job onboarding process, during which other standard paperwork is reviewed and signed.[126]

UREAA addresses this problem, as has recent state legislation, by requiring advance disclosure to the employee of any noncompete that will be required. Under UREAA, workers must receive the noncompete at least fourteen days in advance.[127] Absent an exception, the agreement is void if the employer does not comply.[128] This advance disclosure component of UREAA's substantive notice rule allows some workers to object to the noncompete or pressure the employer to narrow its scope.[129] Workers who lack the bargaining power to challenge the agreement can at least reject the offer of employment,[130] an option that is effectively foreclosed once the worker has started the job.[131] Such risks may lead employers to reconsider their default use of noncompetes. Rather than imposing them as a matter of course, employers must consider whether

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124. *See* Arnow-Richman, *supra* note 48, at 439–40 (explaining the notion of continued employment as consideration).

125. *See generally id.* (reviewing majority approach to "mid-term" noncompetes signed by incumbent employees).

126. In prior work, I refer to employment agreements signed in this fashion as "cubewrap" contracts. *See* Arnow-Richman, *supra* note 21, at 639; Rachel S. Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963 (2006). This terminology locates such agreements within the literature of deferred-term consumer contracts commonly described as "wrap" contracts. *See* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 2 (2013).

127. UREAA § 4 (UNIF. L. COMM'N 2021). Among the new state laws, only Washington has mandated as much advance notice. *See* WASH. REV. CODE § 49.62.020 (2023).

128. Prior to the current reform movement, I argued for a like outcome reasoning from traditional common law principles. *See* Arnow-Richman, *supra* note 47, at 984–89.

129. UREAA § 4 cmt. (describing advance disclosure as "a key component of a well-functioning labor market. A worker cannot evaluate the relative merits of a restrictive agreement that the worker does not know about.").

130. A recent field experiment found that workers were fifteen percent less likely to accept a job when a required noncompete was clearly identified than in cases where no noncompete was required. *See* Bo Cowgill et al., *Clause and Effect: A Field Experiment on Noncompete Clauses, Knowledge Flows, Job Mobility, and Wages* at 18–19 (June 18, 2024) (unpublished manuscrip on file with author).

131. UREAA § 4 cmt (noting that "[q]uitting a job is far more costly than turning down a job offer").

the need for a particular restraint outweighs the possible loss of promising candidates.

But for advance disclosure to affect employee (and consequently employer) behavior in this way, the worker receiving the noncompete must understand the legal and practical significance of the agreement in relation to their own background rights. The second component of UREAA's substantive notice rule requires that the employer provide with the noncompete an informational notice, prepared by the state Department of Labor, that explains the legal requirements of the Act.[132] Such information can potentially correct mistaken beliefs about noncompete enforceability that might over-deter employees from seeking or accepting new work once they are on the job.[133] At the point of hire, the informational notice can increase the salience of the agreement and spur workers to more carefully consider its terms. The sample notice provided in the Act gives workers options for responding, cautioning employees to sign "if [they] want to."[134]

Realistically, not all—or even many—workers will have the flexibility or bargaining power to implement such recommendations. But the content of the informational notice, provided with the agreement in advance of starting the job, goes a long way to ensure that workers more fully understand the nature of the restraint and the commitment they are undertaking. At a minimum, it precludes the rote process of signing a noncompete during onboarding. At best, it can lead the employee to question the agreement and exert a modicum of bargaining power, which may in some cases disrupt the employer's choice to require noncompetes by default.

In the end, however, the amount of change that can come from employee bargaining is inherently limited. It is actually the third

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132. *Id.* § 4(a)(2).

133. Of course, most employees are not thinking about leaving a job they are just starting. There is a disconnect between providing informational notice at the front end of the relationship and the goal of ensuring the employee has necessary information at the back end. A notice requirement like that adopted in Virginia, which requires a permanent physical posting at the employment site, may be more effective for the latter purpose, while doing little for the former. *See* Va. Code § 40.1-28.7:8(G). As this section describes, UREAA's substantive notice requirement has other important functions at the point of hire. But to ensure that the goal of educating the employee about the limited enforceability of noncompetes is fulfilled, the Act should be interpreted to require employers to provide this information any time the noncompete is presented to the employee, not only at the point of initial execution. This would include instances where the employee requests a copy of the agreement. *See id.* § 4(a)(5) (requiring employers to provide a copy of any restrictive employment agreement upon request). It would also include situations where the employer references the noncompete in an exit interview or other interaction in anticipation of the employee's departure. *See* Prescott & Starr, *supra* note 22, at 15-17 (finding that employers' strategic "reminders" to workers about their noncompetes influences workers views of their legal enforceability and the risk of defection).

134. UREAA § 4(a)(5) (providing a sample notice template).

component of UREAA's substantive notice rule—what the comment refers to as "bespoke specificity"—that I suggest is likely to have the most impact on default-use noncompetes. According to the Act, a restrictive employment agreement must "specify the information, type of work activity, or extent of competition that the agreement prohibits, limits, or sets conditions on after the work relationship ends."[135] As the comment explains, it is not enough to merely recite that the worker will be prohibited from working for a competitor.[136] The employer must actually identify the precise type of work that will be precluded.[137]

According to the drafters, the purpose of this third component of the substantive notice requirement is the same as the second: it gives the employee more comprehensive information to assess the noncompete.[138] Whereas step two requires the employer to explain the agreement's legal enforceability, step three, in a sense, requires an explanation of its practical effect. This required explanation is perhaps the more relevant information at the moment the noncompete is presented. Knowledge of the law is perhaps most useful to workers at the back end of the relationship when they are considering exit. On the front end, information about the law may prompt workers to question the agreement's legality. But the type of employer that takes care to comply with UREAA's informational notice requirements is unlikely to simultaneously demand a noncompete that obviously violates the Act's terms.[139] Rather, the worker will likely assume the agreement is lawful and evaluate it primarily on the extent to which it might impact future employment. Providing the worker with a detailed description of the work precluded by the agreement makes this more than an abstract exercise.

But I suspect the real impact of "bespoke specificity" will have less to do with how workers respond to the information provided and more with how employers prepare it. The mandate clearly contemplates a targeted, tailored assessment. An employer must ask what risk of unfair competition a particular worker (or perhaps those within a narrow job classification) poses to its business. As discussed earlier, this forces the employer to venture a prediction as to what company information and corporate relationships the worker is likely to access, which of those assets will qualify as trade secret information or protectable relationships,

135. *Id.* § 4(a)(3).

136. *See id.* § 4 cmt. ("The 'clearly specify' requirement [in § 4(a)(3)] means that an employer cannot merely state that 'business information' is covered by a confidentiality agreement or that the worker 'cannot compete' in a noncompete agreement.").

137. *Id.*

138. UREAA § 4 cmt. ("This specificity enables the worker to fully evaluate how the restrictive employment agreement will affect future work and make a fully informed decision of [sic] whether to sign the agreement.").

139. More likely this employer would simply not provide the notice, counting on the employee's continued ignorance and the *in terrorem* effects of the non-compliant restraint.

and whether those assets that qualify are likely to retain proprietary status in the future.

In other words, the task of delineating bespoke limits on competition is inherently bound up with the question of what the company is trying to protect and whether it is, in fact, protectable. As previously argued, employers' outsized beliefs about what business assets are proprietary may be honestly held, justified by a combination of legal uncertainty and managerial interest. The process prescribed here forces the employer to engage in a realistic front-end legal assessment that disrupts the type of rote behavior that relies on self-serving assumptions. In considering its legal justification for the restraint, an employer may discover that it has none, or at least not one, that justifies a noncompete as opposed to a lesser restraint.

### C. *Toward an Individualized Compliance Regime*

The upshot of these front-end reform mechanisms is that employers operating under UREAA must adopt a new compliance protocol for using restrictive employment agreements, particularly noncompetes. Rather than treat noncompetes as a standard part of onboarding, employers must closely evaluate the necessity and legitimacy of the agreement for each position, perhaps even for each worker.

The task of developing a UREAA compliance protocol is beyond the scope of this Article. What is clear is that an effective approach must affirmatively consider context-specific facts at the point of hire. In the case of informational interests, this will require at least four inquiries. First, companies must identify the specific information they expect to disclose to a particular employee, creating a written description sufficient for § 4's substantive notice requirement. Second, management-side counsel must determine if that information meets the statutory definition of a trade secret. This inquiry should weed out day-to-day information that the company considers sensitive but lacks the "independent economic value"[140] necessary for trade secret protection. Third, the employer and counsel must jointly determine whether the trade secret could be "protected adequately" by other means.[141] This determination means considering the viability of an NDA that would prevent the use or dissemination of the trade secret without foreclosing competition.[142]

The text of § 8 does not elaborate on what would render an NDA inadequate. Certainly an NDA is not inadequate simply because a

140. UNIF. TRADE SECRETS ACT § 1(4) (UNIF. L. COMM'N 1985); Defend Trade Secrets Act of 2016, 18 U.S.C. § 1839(3)(B); UREAA § 4.

141. UREAA § 8(2).

142. *See id.* § 8 cmt. (noting that a trade secret is a legitimate justification for a tailored noncompete "assuming . . . that the trade secret cannot adequately be protected by a confidentiality agreement").

noncompete would be *more* effective. A noncompete will always be more effective than an NDA because it is prophylactic: it allows the employer to avoid the risk that the employee will rely on protected information by foreclosing employment altogether. But this is precisely what makes noncompetes problematic. The point of the last resort provision is to shift from a default practice of demanding the greatest possible protection with respect to every employee in favor of a compliance culture that aims to identify the least restrictive option for each particular circumstance. In other words, employers must err on the side of less, not more.[143]

One possible interpretation of the last resort concept is that a noncompete is permissible only in situations that would give rise to an inevitable disclosure claim under trade secret law. The inevitable disclosure doctrine permits employers to prophylactically enforce trade secret rights against workers through injunctions against competition in narrow circumstances where, due to the nature of the trade secret and intended competition, the employee would invariably rely on the former employer's trade secret.[144] Many courts and commentators have disavowed this controversial doctrine as exceeding the bounds of trade secret law and granting an employer the benefits of a noncompete despite not having secured one.[145] But where the employer *has* obtained a noncompete the likelihood of inevitable disclosure absent its enforcement

143. *See* Lobel, *supra* note 1, at 14 (noting that "[a]ttorneys drafting boilerplate contracts frequently operate under a 'more is more' mindset. The more clauses that are included to restrict [employee rights] the more protections a corporation has").

144. The seminal case is *Pepsico, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995). *See also* Bimbo Bakeries USA, Inc. v. Botticella, 613 F.3d 102, 110–14 (3d Cir. 2010); Cardinal Freight Carriers, Inc. v. J.B. Hunt Transp. Servs., Inc., 987 S.W.2d 642, 647 (Ark. 1999); *see generally* Rowe, *supra* note 114, at 171–82 (reviewing caselaw).

145. *See, e.g.*, Holton v. Physician Oncology Servs., 742 S.E.2d 702, 706 (Ga. 2013) (holding that inevitable disclosure "is not an independent claim" justifying an injunction against competition); LeJeune v. Coin Acceptors, Inc., 849 A.2d 451, 471 (Md. 2004) (rejecting the inevitable disclosure doctrine because it would give the employer the benefits of a noncompete despite not having one); Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277, 292 (Cal. Ct. App. 2002) ("The decisions rejecting the inevitable disclosure doctrine correctly balance competing public policies of employee mobility and protection of trade secrets."); Del Monte Fresh Produce Co. v. Dole Food. Co., Inc., 148 F. Supp. 2d 1326, 1337 (S.D. Fla. 2001) (holding that an employer should not be able to use the inevitable disclosure doctrine as an "after-the-fact noncompete"); *see generally* HYDE, *supra* note 11, at 34–35; Rowe, *supra* note 114, at 182–85 (discussing the tension between inevitable disclosure, employment at will, and other principles of free competition). The federal Defend Trade Secrets Act rejects the doctrine and the Restatement of Employment Law sharply limits it. *See* 18 U.S.C. § 1836 (b)(3)(a) (providing that injunctions "prevent[ing] a person from entering into an employment relationship . . . shall be based on evidence of threatened misappropriation and not merely on the information the person knows"); RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 8.05 cmt. (AM. L. INST. 2010) (permitting an injunction absent actual or threatened misuse of a trade secret only where the employee "demonstrates a pattern of deceit or misappropriation" suggesting that an injunction barring use/disclosure "would, standing alone, be inadequate").

would seem to provide the type of compelling justification for relying on that instrument rather than a lesser restraint. Hence, it may be a valuable benchmark for determining when a noncompete is necessary and enforceable under § 8.[146]

Fourth and finally, whatever compliance protocol a company devises for point-of-hire must be periodically revisited throughout the employment relationship. This Article's focus is the front-end determination of whether a noncompete is justified, recognizing that once a noncompete is in place, however it may be drafted, it is likely to have *in terrorem* effects on the employee.[147] But it should be noted that UREAA implicitly imposes an ongoing monitoring obligation on employers. Section 8 provides that the terms of an enforceable noncompete must be "narrowly tailored when the worker signs the agreement *and through time of enforcement*."[148] In other words, a noncompete must continue to satisfy the reasonableness inquiry throughout the employment relationship. As previously discussed, a noncompete's reasonableness can only be determined in relation to what it protects.[149] A key contribution of UREAA is to explicitly connect the two components of the traditional regime—the justification and reasonableness inquiries.[150] Thus, in terms of compliance, it seems likely that a careful assessment of the employer's underlying interests would not only displace default use at the point of hire, it would have to become part of a regular audit cycle.

Of course, compliance-minded employers should already be doing at least some of the work envisioned here, even without UREAA. But as we have seen, the incentives for doing so with care on the front end of the relationship are minimal, while the likelihood that employers will overestimate their proprietary interests is high.[151] More likely, companies perform only a superficial assessment at the point of hire, reserving close (and costly) legal analysis for the back end and only in the event of employee breach. UREAA's front-end provisions demand more serious consideration of these concerns before a noncompete is implemented.[152] Absent such steps, any possibility of enforcement is foreclosed.

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146. Notably, the only example provided by UREAA's drafters of a situation in which a nondisclosure agreement could not adequately protect a trade secret involves "a top officer [with] access to strategic business plans." *See* UREAA § 8, cmt. (UNIF. L. COMM'N 2021). To whatever extent the inevitable disclosure doctrine retains legitimacy, it is on strongest ground in cases against corporate leaders and other especially high-ranking employees. *See, e.g.*, *Bimbo Bakeries*, 613 F.3d at 111–14.

147. *See supra* Part I.B.1.

148. UREAA § 8 cmt. (emphasis added).

149. *See supra* Part II.A.

150. *See* UREAA § 8 cmt.

151. *See supra* Part I.B.2.

152. *See* UREAA §§ 4, 8.

## III. BEST PRACTICES OR SECOND BEST?

Part II argued that UREAA's front-end reform mechanisms make it the only measure short of a ban that can potentially disrupt the default use of noncompetes. But whether the Act has those effects depends on state adoption and, ultimately, how employers respond to the new law. In this Part, I address two potential critiques of UREAA: that it expects too much of employers and that it is unlikely to be adopted. In responding to these anticipated challenges, I touch on how UREAA compares to a ban and acknowledge some of the Act's limitations. First, I argue that a subset of employers will likely forgo noncompetes rather than implement UREAA's front-end provisions. If so, UREAA offers a valuable second-best alternative to a ban. Second, I argue that UREAA need not be adopted as a uniform law to spur some legal change. It may instead serve as a set of best practices guiding judges and lawmakers in effecting incremental reform.

### A. *Too Much and Not Enough*

Thus far, I have described UREAA as imposing a series of rules that compel employers to evaluate their need for a noncompete in-depth, potentially on the individual employee-level. It is possible, perhaps likely, that some employers will not respond to the Act in the way I imagine. They may interpret the Act's requirements differently, reading the text as imposing obligations less onerous than I have described. Or they may implement the Act's requirements only in part—for instance, by conducting a superficial audit of their noncompete practices, while still maintaining default-use noncompetes with certain classes of workers.[153] And, of course, some employers may disregard front-end regulation altogether, continuing to reap the *in terrorem* effects of unlawful agreements.

There is little to be said about employers who knowingly violate the law. Predatory behavior is addressed through better enforcement and worker education rather than the type of front-end regulation that is the topic of this Article. On the other hand, the likelihood of a less fulsome reading or implementation of UREAA by employers and management-side counsel is a legitimate critique, both of my interpretation and the Act. To the extent UREAA preserves the traditional rule of reason, albeit with

153. This familiar problem is sometimes referred to as "symbolic compliance" in the managerialization literature. *See, e.g.*, Edelman et al., *supra* note 72. It has been explored extensively in connection with employers' adoption of ineffective sexual harassment policies. *See, e.g.*, Lauren B. Edelman & Jessica Cabrera, *Sex-Based Harassment and Symbolic Compliance,* 16 ANN. REV. L. SOC. SCI. 10.1, 10.13–16 (2020) (discussing how employer-adopted complaint procedures and training programs serve organizations in limiting liability s while doing little to ameliorate sexual harassment).

important new guardrails, it perpetuates some amount of legal uncertainty that employers can exploit.[154] In my view, that concern can only be fully assuaged through an outright ban. It is a pragmatic, as opposed to a policy-driven, justification for the most aggressive approach to reform. It may be that there is simply too much room for error in trying to define and identify a legitimate justification for a noncompete, and the economic stakes of aggregate misuse are unacceptably high.

Yet even partial employer compliance with UREAA's front-end provisions would represent a victory against default-use noncompetes. A lower incidence of these agreements means fewer restrained workers and a likely reduction in the economic harms associated with aggregate use. And, of course, UREEA does not operate solely as a front-end regime. Although not the focus of this Article, various other mechanisms within the Act constrain enforceability and make it easier for employees to challenge noncompetes.[155]

Conversely, employers will likely critique UREAA and its front-end reforms as requiring too much. They will argue that it is too costly and difficult to make the individualized assessment I have described. From my perspective, this is precisely the point. The stylized investment-based justification for noncompetes presumed that employer demand for noncompetes would be tempered by the need to pay workers a wage premium for their assent.[156] Yet we know that employees rarely bargain over the terms of post-employment competition, and our best evidence suggests that noncompetes reduce earnings.[157] In other words, employers *should* bear increased costs for the use of noncompetes, but they generally get them for free.

To the extent employers object to the increased cost of UREAA compliance, I would suggest it says a great deal about the legitimacy of their alleged need for the agreements. This assertion is born out by recent research on how employers respond to new restrictive legislation. In Washington, following adoption of a retroactive wage threshold for noncompete use, employers declined to minimally increase wages for workers earning just below the statutory threshold, a move that would have preserved their ability to enforce noncompetes with this

154. *See supra* Part I.B.

155. These include a wage threshold and duration caps, as well as enforcement channels, remedies, and a choice of law provision. *See* UREAA §§ 5 cmt., 8, 16, 17.

156. *See supra* Part I.A.

157. *See* Lipsitz & Starr, *supra* note 8, at 143; Balasubramanian, et al., *supra* note 8; sources cited *supra* note 9. It is important to note that noncompetes *correlate* with higher wages; that is, higher earning workers are more likely than lower earning workers to have signed a noncompete, a fact that has led to some confusion in the political discourse surrounding noncompete reform. *See, e.g.,* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3542-43 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (Wilson, dissenting); *see generally* STARR, POLICYMAKER'S GUIDE, *supra* note 8, at 7–11 (explaining the distinction and summarizing best evidence).

population.[158] Surveyed attorneys reported that their corporate clients preferred to rely on other sources of protection, such as trade secret law and lesser restraints, rather than raise wages.[159]

Another possible explanation of these findings is that employers did not perceive these below-threshold workers as having assets sufficiently valuable to justify the increased costs of noncompete protection. If so, it would mean that the noncompetes previously imposed on this population were unnecessary and likely unlawful. As previously argued, employers may overstate their justifications for using noncompetes.[160] Their failure to increase wages in response to the new Washington law may reflect a closer assessment of whether this population of workers possessed truly proprietary assets that the law would recognize as a legitimate interest. In other words, companies may not raise wages following wage threshold legislation because they know their agreements with below-threshold workers are not enforceable anyway.

Either way, employer complaints about the onerousness of UREAA compliance should garner little sympathy. Their behavior suggests they are content to use noncompetes by default when they are essentially costless but are unwilling to do so when they must pay, however negligibly, for that privilege. Ultimately, if employers find UREAA's compliance regime too demanding, they will reduce their reliance on noncompetes. That is not a risk of UREAA; I submit it is a goal.

### B. *Adoption Alternatives: UREAA as "Influencer"*

Another set of UREAA critiques centers on the prospects for the Act itself. Thus far, the reaction to UREAA has been tepid. The Act has been introduced in only five states, and none has enacted it.[161] Thus, it is entirely possible that UREAA will not be widely adopted or even adopted at all.

Such a result would certainly be a disappointment from the perspective of jurisdictional uniformity, a key goal of the ULC process.[162] But full enactment need not be the only measure of UREAA's success.

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158. Takuya Hiraiwa et al., *Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach* at 2–3 (2024) (unpublished manuscript), https://ssrn.com/abstract=4364674 [https://perma.cc/X93A-W9XW].

159. *Id.* at 27. This despite vehement claims by the business community, in opposition to the FTC's proposed ban, that these other forms of protection are woefully inadequate.

160. *See supra* Part I.B.2.

161. H.B. 22-1216, 2022 Leg., Reg. Sess. (Co. 2022); H.R. 3435, 58th Leg., 2d Sess. (Okla. 2022); S. 453, 2022 Leg., Reg. Sess. (W. Va. 2022); H.R. 667, 2021-2021 Leg., Reg. Sess. (Vt. 2022); H.R. 812, 2023 Gen. Assemb., 2023 Sess. (N.C. 2023).

162. *About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/N522-27GW] (last visited Nov. 14, 2023) ("[ULC] commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.").

As this section explains, UREAA might be partially adopted through legislative or judicial action, either in letter or spirit. If so, at least some components of the Act, including those that disincentivize default-use noncompetes, may make their way into law.

### 1. A la Carte Legislation

It is unclear why UREAA got a limited reception upon arrival. One reason might be that states were awaiting the recent FTC rulemaking or anticipating other forms of federal action.[163] If so, we may not know UREAA's potential until current challenges to the FTC rule are resolved. Another possibility is that the obstacles to UREAA's consideration are ideological and pragmatic. The Act may be perceived as too aggressive in its anti-enforcement stance. Its capacious scope and sheer length might also impede widespread support.

If either speculation is true, UREAA may serve less as a uniform law than as a model for more incremental reform. UREAA is a composite that culls, extends, and improves upon the various approaches pioneered by key states over the course of the new enforcement regime. Its comprehensive approach is unquestionably integral to its effectiveness as a regulatory scheme.[164] But it can also be seen as a set of best practices with regard to any of its components. From this perspective, UREAA offers a menu of a la carte regulatory options from which lawmakers can select particular levers based on their reform goals and political strategy.

Arguably, this is what happened in Colorado, the only jurisdiction to have adopted any part of UREAA, albeit in concept rather than form. At the time of UREAA's introduction in the state legislature, Colorado had already recently amended its statute twice in trend with the emerging enforcement regime.[165] Presumably there was sufficient appetite for further prohibitions on noncompete use, but an understandable reluctance to start from scratch with a lengthy new text. Instead, HB 22-1317 was introduced by the same sponsors of UREAA and eventually enacted.[166] The final bill took inspiration from several of UREAA's key features, including notice requirements,[167] choice of law rules,[168] and an

163. Federal lawmakers have introduced legislation banning or limiting noncompetes in multiple sessions of Congress beginning in 2015 with the Mobility and Opportunity for Vulnerable Employees (MOVE) Act, *see* S. 504, 114th Cong. (2015–16), and as recently as 2023 with the Workforce Mobility Act. *See* S. 220, 118th Cong. (2023-24).

164. *See supra* Part II.

165. *See* S.B. 18-082, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2022) (adding a provision allowing departing physicians to disclose their professional contact information to patients with rare disorders);. S.B. 21-271 (2018) (adding a provision making violation of the statute a misdemeanor).

166. H.R. 22-1317, 73d Gen. Assemb., 2d Reg. Sess. (Colo. 2022).

167. COLO. REV. STAT.§ 8-2-113(4).

168. *Id.* § 8-2-113(6).

enforcement mechanism with penalties for employers who violate the law.[169]

It is too soon to say whether partial legislative adoption will become a trend and also too soon to give up on the prospect of full adoption. Colorado, with its preexisting and idiosyncratic state statute, may be *sui generis*. States that continue to rely exclusively on common law present the best test case for adoption, followed by those whose statutes contain very general language.[170] Regardless, it is reasonable to expect that UREAA will play an important off-stage role in state reform efforts, particularly if federal-level action remains uncertain.

### 2. The Continuing Relevance of the Common Law

The state legislative process is not UREAA's only site of potential influence. The Act can also serve as a source of secondary authority in the continuing evolution of the common law, much like a Restatement. The nature of its influence would likely depend on whether the jurisdiction in question has adopted any noncompete reform legislation and in what form.

In states that have passed new legislation, courts may look to UREAA to fill statutory gaps post-enactment. As previously noted, new enforcement regime legislation has focused almost exclusively on noncompete reform, neglecting or, in some cases, affirmatively permitting the use of lesser restraints.[171] Consequently, state courts will likely continue to rely on existing common law in evaluating the enforceability of such agreements. UREAA can serve as persuasive authority for the many jurisdictions where such law is limited or opaque. Thus, in adjudicating nondisclosure and client nonsolicitation agreements, courts can rely on UREAA to interpret and refine caselaw shaped principally by noncompete disputes. A court might conclude that an NDA purporting to preclude a broad and unspecified body of

169. *Id.* § 8-2-113(8)(b). The law also adopts a wage threshold modeled on the state equivalent of the Fair Labor Standards Act's highly compensated employee exemption to overtime requirements. *See id.* § 8-2-113(3)(a). It has since been amended again to include stronger remedies and provide for enforcement by the State Attorney General. *See* H.B. 24-1324 (Co. 2024).

170. This would include statutes that merely recite the traditional common law rule of reason or assert the general unenforceability of contracts in restraint of trade. Such is the case in North Carolina where the Act was introduced in 2023. *See* N.C. GEN. STAT. § 75-2 (2023) ("Any act, contract, combination in the form of trust, or conspiracy in restraint of trade or commerce which violates the principles of the common law is hereby declared to be in violation of G.S. 75-1."); H.B. 812 (N.C. 2023).

171. *See supra* Part II.A.

information or a nonsolictation agreement purporting to apply to all clients the company has ever served is unreasonable at common law.[172]

In jurisdictions with no extant statute, courts can rely broadly on UREAA's noncompete provision as a source of persuasive authority in applying the traditional common law rule of reason. For instance, a court might consider salary in determining the likelihood that a worker had access to proprietary assets that would justify a noncompete under the state's common law. It could also rely on § 8's cap to support a conclusion that a noncompete enduring beyond one year is unreasonably broad.[173] Such decisions can push state law incrementally toward a more limited enforcement position within the traditional regime.

If an appropriate case reaches the state supreme court, a jurisdiction might go further, relying on UREAA to change existing rules or forge new ones. For instance, UREAA could provide support for shifting to the minority position on the enforceability of noncompetes imposed on incumbent workers—what I have called "mid-term" noncompetes.[174] Most courts hold that an employer may require an incumbent worker to sign a noncompete on penalty of termination, effectively altering theh worker's employment terms unilaterally.[175] UREAA adopts a version of the minority rule that an employer must provide so-called "additional consideration" for the agreement: it requires that the signing employee receive a "material increase in compensation."[176] A court could draw on UREAA as persuasive authority supporting the adoption of a comparable approach.

The examples thus far involve issues long within the scope of the common law. Imagining the judicial adoption of UREAA's front-end mechanisms is somewhat more complicated. A court obviously cannot impose a notice rule from the bench. At the same time, UREAA's notice provisions could support adopting and expanding on a unique

172. *See* UREAA § 9 (UNIF. L. COMM'N 2021) (providing that a permissible confidentiality agreement may not prohibit "use and disclos[ure] of information that arises from the worker's general training, knowledge, skill, or experience"); *id*. § 10 (providing that a permissible "no-business" agreement "applies only to a prospective or ongoing client or customer of the employer with which the worker had worked personally"). Perhaps the area most ripe for such influence is the assessment of training repayment agreements ("TRAPS"), an issue where relatively few jurisdictions have weighed in. In that context, a court might rely on UREAA to hold such agreements reasonable and enforceable only where pro-rated to reflect the worker's continued employment. *See id.* § 14 ("A training-repayment agreement is prohibited and unenforceable unless the agreement . . . prorates the repayment for work done during the post-training period."). On the harms of TRAPs and the ways in which such agreements simulate noncompetes, *see generally* Harris, *supra* note 98, at 751–52.

173. *Id.* § 8.

174. *See* Arnow-Richman, *supra* note 48, at 467–85 (arguing for a common law reasonable notice rule limiting mid-term noncompetes and other modifications of at-will employment).

175. *Id.* at 439.

176. UREAA § 4(a)(1)(B).

jurisdiction-specific set of cases involving default-use agreements signed on or after the first day on the job. In a handful of cases in New Hampshire, courts have held that an employer that fails to disclose a noncompete in advance of employment is not entitled to the equitable reform of an overbroad restraint.[177] It would be a short leap from this reasoning to hold that an employer's failure to disclose a noncompete precludes any enforcement at all.[178] Such a result would have an effect similar to a statutory notice rule.

In sum, even without legislative adoption, UREAA has the potential to play an influential role in the new enforcement regime. As the legislative landscape shifts, judicial views are likely to follow. UREAA can supply guidance to courts in this uncertain regulatory environment, spurring incremental change in the ever-evolving common law of noncompete enforceability.

## CONCLUSION

Nearly seventy-five years ago, the Ohio Supreme Court famously referred to the expansive common law of noncompete enforceability as a "vast . . . and bewildering" sea capable of supporting any possible legal argument, whether for or against these restraints.[179] Today, the legislative environment, comprised of some two dozen new state statutes, FTC regulations currently under challenge, and several pending state and federal bills,[180] feels almost as expansive and unnavigable as the case law. UREAA solves this uncertainty and the growing complexity of state-by-state reform. At the same time, it offers a more restrictive—and arguably more considered—alternative to a ban than any statute yet enacted. Above all, UREAA is the only approach to date that includes meaningful front-end reform, giving it the potential to disrupt the default use of

177. *See, e.g.*, Merrimack Valley Wood Prods. v. Near, 876 A.2d 757, 764–65 (N.H. 2005).

178. This would also be in keeping with UREAA's approach to judicial reform of overbroad noncompetes generally, another area of jurisdictional division within the common law. UREAA provides states a choice between permitting modification only upon a strong showing of employer good faith or foreclosing modification altogether. *See* UREAA § 16. For a discussion of the competing jurisdictional approaches to modification and an argument for a strict "red pencil" approach, *see* Arnow-Richman, *supra* note 6, at 1256–57 (asserting that noncompete legislation must void overbroad restraints to incentivize better drafting practices and reduce the *in terrorum* effects of overbroad restraints); *cf.* Lobel, *supra*, note 1, at 926 ("The insights of aggregation support the adoption of voidance of the entire contract as a default remedy rather severing clauses and voiding merely an individual term.").

179. *See* Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685, 687 (Ohio 1952) (describing the common law of noncompete enforcement as "a sea—vast and vacillating, overlapping and bewildering out of which "[o]ne can fish . . . any kind of strange support for anything").

180. *See The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country* FAIR COMPETITION L. (June 18, 2024), https://faircompetitionlaw.com/changing-trade-secrets-noncompete-laws/ [https://perma.cc/RF6B-V4H9].

standard form noncompetes. Finally, UREAA reminds us of critical first principles of noncompete enforceability, namely that no restraint of trade, however "reasonable," is lawful absent an exceptional justification.[181] Whether UREAA is ultimately enacted in its present form or serves merely as a form of secondary authority, the Act deserves serious consideration in the ongoing debate over the lawfulness of noncompetes and all forms of restrictive employment agreements.

181. *See* UREAA § 8.