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

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Abstract

The Uniform Restrictive Employment Agreement Act (UREAA) is the culmination of work by the appointed committee representing the National Conference of Commissioners on Uniform State Laws. Since its adoption in 2021 by the National Conference of Commissioners on Uniform State Laws, UREAA has been introduced as legislation in five states, while other state legislatures (and federal regulators) continue to propose novel ways of regulating restrictive covenants generally, and particularly noncompete agreements. As of August 2023, this year alone, eighty-four bills regulating noncompetes were pending in thirty-three states, with another five pending in Congress. UREAA is one piece of the noncompete puzzle that continues to keep practitioners and in-house counsel on their toes. This Article discusses UREAA's reach and its overlap with the FTC's actions, a Massachusetts state law that is closer to getting it right, and recommendations for moving forward.

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INTRODUCTION

The Uniform Restrictive Employment Agreement Act (UREAA)[1] is the culmination of work by the appointed committee representing the National Conference of Commissioners on Uniform State Laws.[2] The National Conference of Commissioners on Uniform State Laws adopted UREAA at its annual conference in July 2021.[3] In the two-and-a-half years since its adoption, UREAA has been introduced as legislation in five states (Colorado, Oklahoma, North Carolina, Vermont, and West Virginia),[4] but at the same time, there continues to be an avalanche of state legislative action in the realm of restrictive covenants, and noncompete agreements in particular.[5] As of April 2024, this year alone, seventy-two bills regulating noncompetes were pending in thirty-two states, with another six pending in Congress.[6]

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

2. *See id.* For purposes of disclosure, Russell Beck participated in the review and revision process for UREAA as a so-called "observer."

3. *Id.*

4. *See Restrictive Employment Agreement Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?communitykey=f870a839-27cd-4150-ad5f-51d8214f1cd2 [https://perma.cc/8YN6-6XRC] (last visited Nov. 9, 2023); H.R. 667, 2021–2022 Gen. Assemb., Reg. Sess. (Vt. 2022); S. 453, 2022 Leg., Reg. Sess. (W. Va. 2022); H.R. 22-1216, 73rd Gen. Assemb., 2nd Reg. Sess. (Colo. 2022).

5. *Noncompete bills update: 72 bills in 32 states, 8 dead, 1 enacted (Washington)*, FAIR COMPETITION L., https://faircompetitionlaw.com/2024/04/05/noncompete-bills-update-72-bills-in-32-states-7-dead-1-enacted-washington/ [https://perma.cc/S8AA-J56P] (last updated Apr. 17, 2024); *Death by a thousand cuts, new restrictive covenant laws in Louisiana and Minnesota*, FAIR COMPETITION L. (June 2, 2024), https://faircompetitionlaw.com/2024/06/02/death-by-a-thousand-cuts-new-restrictive-covenant-laws-in-louisiana-and-minnesota/ [https://perma.cc/UAA5-5ZPB].

6. *See id.*

2024 also saw continued activity in Congress[7] and, more immediately, significant action started in 2023 and continued in 2024 by two federal regulatory agencies. In January 2023, the Federal Trade Commission (FTC) proposed eliminating noncompete agreements, potentially broad nondisclosure agreements, and certain nonsolicitation, no-service, no-recruit, and no-hire agreements that can be interpreted as "*de facto*" noncompetes.[8] The FTC's Proposed Rule was then echoed by the National Labor Relations Board (NLRB), whose General Counsel issued a six-page memorandum outlining the arguments for why noncompetes violate the National Labor Relations Act.[9] On April 23, 2024, the FTC issued its Final Rule, which is scheduled to take effect on September 4, 2024, and incorporates the majority of the Proposed Rule.[10]

This Article will, therefore, discuss UREAA's reach and its overlap with the FTC's actions, a Massachusetts state law that is closer to getting it right, and recommendations for moving forward.

I. UREAA'S BROAD SCOPE AND ITS OVERLAP WITH THE FTC'S NONCOMPETE RULE

In order to properly understand the intended scope of UREAA, it is useful to first review its Prefatory Note.[11] The Prefatory Note first explicitly states that *all employer-employee* so-called "restrictive employment agreements"[12] are intended to be covered by the Act.[13] This

7. Congress had six noncompete-related bills pending in 2024. *See* Workforce Mobility Act of 2023, S. 220, 118th Cong. (2023); Workforce Mobility Act of 2023, H.R. 731, 118th Cong. (2023); Ensure Vaccine Mandates Eliminate Non-Competes Act (EVEN Act), H.R. 527, 118th Cong. (2023); Freedom to Compete Act of 2023, S. 379, 118th Cong. (2023); Conrad State 30 and Physician Access Reauthorization Act, S. 665, 118th Cong. (2023); Conrad State 30 and Physician Access Reauthorization Act, H.R. 4942, 118th Cong. (2023).

8. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3484 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) [hereinafter Non-Complete Clause Rule]. This proposed rule came on the heels of three unprecedented enforcement actions against companies using noncompetes, all filed in January 2023. *See FTC Brings Unprecedented Enforcement Actions*, FAIR COMPETITION L. (Jan. 5, 2023), https://faircompetitionlaw.com/2023/01/05/ftc-brings-unprecedented-enforcement-actions/ [https://perma.cc/Q5TF-K2LX] (summarizing the enforcement actions).

9. *See* Memorandum from Jennifer A. Abruzzo, NLRB General Counsel, to all Regional Directors, Officers-in-Charge, and Resident Officers (May 30, 2023), https://www.nlrb.gov/guidance/memos-research/general-counsel-memos [https://perma.cc/5QZM-K8Z9]. The Memorandum arguably goes further than noncompetes; *NLRB GC Says Noncompetes Violate the NLRA*, FAIR COMPETITION L. (May 30, 2023), https://faircompetitionlaw.com/2023/05/30/nlrb-gc-says-noncompetes-violate-the-nlra/ [https://perma.cc/VAP7-CWP7].

10. *See* Final Non-Compete Rule, 89 Fed. Reg. 38342 (May 7, 2024) [hereinafter Final Non-Compete Clause Rule]. The Rule is subject to legal challenges, which may affect whether and, if so, when the rule takes effect.

11. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021).

12. The term is meant to reference all restrictive covenant agreements in the context of an employment relationship. *Id.*

13. *Id.*

means the Act includes noncompetes, of course, but also extends to confidentiality and nondisclosure agreements, nonsolicitation agreements, no-business agreements,[14] no-recruit agreements,[15] payment-for-competition agreements, and training-repayment agreements.[16] Each of these is listed explicitly in the Prefatory Note.[17] The Prefatory Note states that the "core elements" of UREAA are its wide scope (covering "all restrictive post-employment agreements"), its prohibition on nearly all restrictive agreements on workers "making less than the state's annual mean wage," its requirement of advance notice for enforceability, its imposing of penalties by state departments of labor and private rights of action, and its prohibition on courts rewriting overly broad agreements (with limited exceptions).[18] When taken together, the core elements mirror much of the state legislative action that has occurred before and since UREAA was issued, though some states—notably California, Minnesota, North Dakota, and Oklahoma—go significantly further.[19]

UREAA's "core elements" also presaged the main components of the Final Rule.[20] As noted above, UREAA is intended to cover all employer-employee restrictive employment agreements.[21] While the Final Rule styles itself as a "Non-Compete Clause Rule," its "functional test" for what constitutes a noncompete is so broad as to encompass all of the post-employment restrictive covenants covered by UREAA.[22] The Final Rule's functional test provides:

> Non-compete clause means: . . . A term or condition of employment that prohibits a worker from, penalizes a worker for, *or functions to prevent* a worker from: (i)

14. These are also often known as "no-service agreements."

15. These are also often known as "employee no-service agreements."

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

17. *Id.* The inclusion of these other types of restrictive covenants also bring to mind the broad scope of the FTC's rule, as discussed in Section III of this Article.

18. *Id.*

19. *See* CAL. BUS. & PROF. CODE § 16600 (2024); MINN. STAT. § 181.988 (West 2023); N.D. CENT. CODE § 9-08-06 (2023); OKLA. STAT. tit. 15, § 219A (2023). As noted in the "Value of a Uniform Act" section of UREAA, commentators have observed the momentum for regulating restrictive covenants grow more powerful in recent years: "The momentum is unmistakable—and likely irreversible, as each new legislative success makes the next one easier to achieve. The challenge now is to evolve to a more coherent and comprehensive approach to reform that delivers stronger benefits to workers, entrepreneurs, and the broader economy. In any event, the rising tide of reform means this is one area of policy that is almost certain to become friendlier to workers, more embracing of competition, and more conducive to economic dynamism in the years ahead." UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021) (citation omitted).

20. *See* Final Non-Compete Clause Rule, *supra* note 10.

21. UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021).

22. *See* Final Non-Compete Clause Rule, *supra* note 10.

> seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.[23]

The Final Rule provides examples of other agreements that could be banned as "functional" noncompetes, including nondisclosure agreements that "span such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job" and certain nonsolicitation and training repayment agreements.[24] Of course, one can imagine many other examples of agreements potentially covered by the Final Rule because it would reach any agreement that "functions to prevent a worker from . . . seeking or accepting work . . . ."[25] As a result, while much of the commentary has focused on the effects of the Final Rule on noncompetes, its actual scope—like UREAA's—is far broader.[26]

Second, UREAA requires and prioritizes notice to employees, as does the Final Rule.[27] Of course, the significant difference is that the Final Rule's notice provision is designed to notify employees that their noncompete clause "the worker's non-compete clause will not be, and cannot legally be, enforced against the worker" since there are no valid noncompetes in the eyes of the Final Rule.[28] In contrast, UREAA sets forth detailed notice requirements designed to ensure workers understand what is prohibited by their restrictive employment agreement.[29] In particular, UREAA provides that a restrictive covenant agreement is "prohibited and unenforceable" unless notice is properly given.[30] For prospective workers, UREAA requires that the employer provide a copy of the proposed agreement to a prospective worker at least fourteen days

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23. *Id.* (emphasis added).

24. *Id.*

25. *Id.*

26. Note, however, that the Comment to § 2 of UREAA (Definitions) also includes a catch-all that would expand the scope of UREAA even further: "Even if an agreement does not meet the definition of a nonsolicitation agreement, confidentiality agreement or other named agreement, however, it is a restrictive employment agreement if it *prohibits, limits, or sets conditions on working elsewhere after the work relationship ends or a sale of business is consummated*." UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 cmt. (UNIF. L. COMM'N 2021) (emphasis added).

27. *Id.* at prefatory note; Non-Compete Clause Rule, *supra* note 8, at 3513.

28. Non-Compete Clause Rule, *supra* note 8, at 3513. It is also important to note that the Final Rule is designed to be retroactive, prohibiting enforcement of most existing agreements, while UREAA is not. *See id.*

29. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4 (UNIF. L. COMM'N 2021).

30. *Id.* § 4(a).

before the prospective worker accepts or commences work, whichever is earlier.[31] For current workers, a copy must be given at least fourteen days before the worker receives a material increase in compensation or before a worker accepts a change in job status or responsibilities, whichever is earlier.[32] And for departing workers who are "given consideration in addition to anything of value to which the worker is already entitled," the employer must provide a copy at least fourteen days before the agreement is required to be signed.[33] Moreover, along with the copy of the proposed agreement in each scenario listed above, the employer must provide the worker with the separate notice, in the preferred language of the worker (if available), that the State Department of Labor will create to inform the worker about the requirements of UREAA.[34] As noted in the comment to the notice section, the notice procedure "is one of the most important sections of the act, both because it expands beyond the common law and because failure to comply makes an agreement prohibited and unenforceable even if the agreement meets the substantive requirements of the act."[35]

Third, UREAA, like the Final Rule, provides a narrow exception in the context of the sale of businesses.[36] UREAA provides that "[a] noncompete agreement is prohibited and unenforceable unless (1) the agreement protects any of the following legitimate business interests: (A) the sale of a business of which the worker is a substantial owner and consents to the sale."[37] UREAA caps the length of permissible noncompetes under this section at five years.[38] Recognizing the necessary and legitimate business interests at stake in this context, the comment to this section notes that "even states that generally prohibit other noncompete agreements will allow for the enforcement of a noncompete pursuant to a sale of business."[39] Likewise, the Final Rule states as the main exception that its prohibition on noncompetes that they shall not apply to "*bona fide sales of business*," explained as follows:

> The requirements of this part 910 shall not apply to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership

31. *Id.* § 4(1)(A).
32. *Id.* § 4(1)(B).
33. *Id.* § 4(1)(C).
34. *Id.* § 4(2).
35. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4 cmt. (UNIF. L. COMM'N 2021). The comment continues and characterizes the notice provision as a "middle-ground approach," and it identifies Massachusetts as an example of a state statute following this approach. *Id.*
36. *Id.* § 8.
37. *Id.*
38. *Id.* § 8(3)(A).
39. *Id.* § 8 cmt.

> interest in a business entity, or of all or substantially all of a business entity's operating assets.[40]

Interestingly, and in keeping with the difference in scope between UREAA and the Final Rule, UREAA also provides exceptions allowing for noncompetes in the context of protecting "(B) the creation of a business in which the worker is a substantial owner; (C) a trade secret; or (D) an ongoing client or customer relationship of the employer."[41] These are major exceptions that the Final Rule does not appear to contemplate, and it has been widely criticized for failing to do so.[42]

UREAA diverges from the Final Rule in its provisions that contemplate valid and enforceable types of restrictive covenants, including noncompetes, which it would ban completely.[43] Accordingly, UREAA also includes the following provisions:

- UREAA sets *maximum durations for restrictive agreements* ranging from six months to five years and establishes other substantive requirements for valid agreements.[44]

- UREAA's *requirements are mandatory and cannot be waived, except under limited circumstances*.[45]

- UREAA prohibits all "restrictive employment agreements" (except for confidentiality and training-reimbursement agreements) for low-wage workers, defined as those making less than the state's annual mean wage.[46]

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40. Non-Compete Clause Rule, *supra* note 8, at 3514.

41. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8 (UNIF. L. COMM'N 2021).

42. *See Six Things Companies Need to Do Now in Response to the FTC's Proposed Rule*, FAIR COMPETITION L. (Jan. 27, 2023), https://faircompetitionlaw.com/2023/01/17/six-things-companies-need-to-do-now-in-response-to-the-ftcs-proposed-rule/ [https://perma.cc/W2VS-UEPK] ("[T]he rule would almost certainly result in more trade secrets being unlawfully taken to a competitor. The theft of trade secrets is already estimated to cost the economy hundreds of billions of dollars a year and was a principal driver of the 2016 enactment of the Defend Trade Secrets Act (DTSA). Indeed, the protection of trade secrets was considered so important by Congress that the DTSA was passed by a unanimous Senate and nearly unanimous House. The elimination of noncompetes—a key tool used by companies to protect their trade secrets—runs directly counter the purposes of the DTSA.").

43. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT §§ 5, 8, 16 (UNIF. L. COMM'N 2021).

44. *See id*. § 8.

45. *Id.* § 15.

46. *Id.* § 5.

- UREAA prohibits the enforcement of restrictive agreements for workers who:
    - (1) resign for good cause attributable to their employer; or
    - (2) whose employment is terminated for a reason other than substantial misconduct or the completion of the agreed work or employment term.[47]

- UREAA replaces the typical reformation rule (i.e., a court re-writing an overly broad restrictive covenant to make it reasonable, called the "blue-pencil rule" in UREAA) in favor of two alternatives.[48]
    - Alternative A: a restrictive employment agreement that does not comply with UREAA is prohibited and unenforceable.[49]
    - Alternative B: a court may reform the agreement in certain circumstances if the employer entered the agreement reasonably and in good faith thinking it was enforceable.[50]

- UREAA creates penalties to be enforced by private actors in addition to state departments of labor, Attorneys General, or other state officials.[51] UREAA allows courts to award damages of up to $5,000 per worker per illegal agreement for each violation.[52]

II. THE MIDDLE APPROACH—THE MASSACHUSETTS NONCOMPETITION AGREEMENT ACT

In considering where UREAA falls on the spectrum of noncompete laws, one can imagine a state like New York, which lacks any statute regulating noncompetes and relies solely on common law, on one far end of the spectrum,[53] UREAA in the middle, and the Final Rule on the other end.

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47. *Id.* § 6.
48. *Id.* § 16.
49. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 16 (UNIF. L. COMM'N 2021).
50. *Id.*
51. *Id.* § 16(e).
52. *Id.*
53. *See Assemb. Bill A1278B*, THE N.Y. STATE SENATE, www.nysenate.gov/legislation/bills/2023/A1278/amendment/B [https://perma.cc/3GFJ-3ZDG] (last visited Mar. 23, 2024) (noting that while initially proposed, Governor Hochul later vetoed the bill). For additional

Massachusetts is one state that has taken a middle-of-the-road approach.[54] The approach taken by the Massachusetts legislature in 2018 in the Massachusetts Noncompetition Agreement Act (MNAA)[55] reflects a decade-long process that ultimately rejected the bludgeon of a ban in favor of a scalpel approach.[56]

Unlike UREAA and the Final Rule, the MNAA explicitly applies *only* to noncompete agreements.[57] Unlike UREAA, which exempts low-wage workers, the MNAA provides that specific categories of workers (including undergraduate or graduate interns, employees eighteen years old or younger, and employees classified as nonexempt under the Fair Labor Standards Act) are exempted entirely from being subject to noncompetes.[58] Like UREAA, the MNAA requires appropriate notice protections so employees know what they are signing.[59] The MNAA also requires that noncompetes be supported by garden leave or other mutually agreed upon consideration (the latter of which is contemplated by UREAA).[60] The MNAA also established a twelve-month cap on noncompetes with a possible one-year extension.[61] It does not have a retroactive effect. And since its passage in 2018, a handful of opinions from state and federal courts in Massachusetts have provided additional guidance for interpreting its terms, providing even more clarity and certainty for businesses, workers, and practitioners alike.[62]

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analysis of the proposed noncompete ban, *see Quick Update: NY Senate Passes Noncompete Ban*, FAIR COMPETITION L. (June 7, 2023), https://faircompetitionlaw.com/ 2023/06/07/quick-update-ny-senate-passes-noncompete-ban/ [https://perma.cc/F3J9-M6VE].

54. *See* MASS. GEN. LAWS ch.149, § 24L (2021). Massachusetts' middle approach was also noted by UREAA authors in the comment to the notice provision. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4 cmt. (UNIF. L. COMM'N 2021).

55. MASS. GEN. LAWS ch.149, § 24L (2021).

56. *See id.*

57. *See id*.

58. *Id.*

59. *Id.*

60. *Id.*

61. MASS. GEN. LAWS ch.149, § 24L (2021).

62. *See, e.g.*, Cynosure LLC v. Reveal Lasers LLC, No. CV 22-11176-PBS, 2022 WL 18033055, at *8–10 (D. Mass. Nov. 9, 2022) (interpreting the MNAA's right to consult with an attorney requirement); KPM Analytics N. Am. Corp. v. Blue Sun Sci., LLC, No. 4:21-CV-10572-TSH, 2021 WL 2982866, at *32 (D. Mass. July 15, 2021) (interpreting the MNAA's right to consult with an attorney requirement and the consideration or garden leave requirement); Carroll v. Mitsubishi Chem. Am., No. CV 21-11801-JCB, 2022 WL 16573974, at *3 (D. Mass. May 19, 2022) (interpreting the MNAA's right to consult with an attorney requirement and the sale exception); Vicarious Surgical Inc. v. Tragakis, No. 2284CV02321-BLS2, 2023 WL 3304305, at *1-2 (Mass. Super. Apr. 27, 2023) (affirming the MNAA does not apply retroactively); Genzyme Corp. v. Melvin, No. 2384CV00664-BLS2, 2023 WL 3173131, at *2 (Mass. Super. Apr. 04, 2023) (reforming a non-compete clause to make its geographic scope reasonable).

That is not to say the MNAA is infallible:

> [T]he MNAA has also created a handful of ambiguities and questions concerning its meaning and effect. Perhaps the most significant—what consideration is required to support a noncompete entered into at the commencement of employment—was the subject of substantial controversy and legislative wrangling and compromise, and has since been the subject of extensive discussion and commentary. . . . Another ambiguity (albeit less controversial) is what is meant by "without cause" in the prohibition of the enforcement of noncompetes against employees who are terminated "without cause." (For example, does it follow the broad common law definition of "cause"? Does it incorporate the more colloquial meaning? Or can the parties define it by contract?").[63]

While the handful of cases to analyze the MNAA since it was passed have provided only limited guidance for navigating the nuances and ambiguities of the MNAA,[64] it nonetheless provides a useful roadmap for other legislatures considering statutory action to regulate noncompetes and other restrictive covenants. All of which, of course, will be rendered moot if the Final Rule takes effect.

III. THE CASE AGAINST THE FINAL RULE

In advancing its Rule, the FTC stated that its goals were to increase worker mobility and support worker earnings—both of which are commendable. But the academic research on which the FTC relies is flawed and inconsistent (as explained in Section IV) and could result in precisely the opposite result for many workers (lowering wages, decreasing training, and making workers worse off overall), and could make consumers worse off as well. The Final Rule would also result in several unintended and detrimental consequences.

First, as businesses and workers have already seen in California (which banned noncompete clauses in 1872 under what is now California Business and Professions Code § 16600),[65] outright bans of noncompete

63. Russell Beck, *Year-End Update on the Continuing Massachusetts Noncompete Legislative Efforts*, FAIR COMPETITION L. (Nov. 9, 2020), https://faircompetitionlaw.com/2020/11/09/year-end-update-on-the-continuing-massachusetts-noncompete-legislative-efforts/ [https://perma.cc/XA34-35JE].

64. *See* Marion Fam. Chiropractic, Inc. v. Seaside Fam. Chiropractic, LLC, No. 21-11930-MPK, 2022 WL 1003963 (D. Mass. Apr. 4, 2022); Lighthouse Ins. Agency, Ltd. v. Lambert, No. 2284CV01162-BLS2 (Mass. Super. Ct. June 8, 2022); Barton & Assoc., Inc. v. Green, No. 22-0002-C (Mass. Super. Ct. Jan. 6, 2022); Carroll v. Mitsubishi Chem. Am., 2022 WL 16573974 (D. Mass. May 19, 2022).

65. CAL. BUS. & PROF. CODE § 16600 (2024).

clauses appear to result in more trade secret litigation. Indeed, trade secret litigation in California outpaces trade secret litigation in any other state, which many practitioners believe results from the lack of noncompete clauses as a straightforward tool for protecting trade secrets in the first place.[66]

Second, the functional test will call into question other restrictive covenants (e.g., nonsolicitation agreements, no-service agreements, and nondisclosure agreements), spurring additional litigation over whether they fall under the Final Rule. The lack of a bright-line rule will only add uncertainty for employers and employees.

Third, some academic studies reveal that noncompetes actually aid innovation because companies are more willing to invest in training and research when they have safeguards against their investments being used to further a competitor's efforts.[67] Similarly, though studies vary on whether noncompetes result in fewer or more startups, the literature suggests that noncompetes promote *better* startups, i.e., startups more likely to survive and thrive.[68]

Fourth, the narrow exception for the sale of businesses would harm the small-business merger and acquisition environment. Instead of buying, potential acquirers could simply hire away key personnel and directly compete.

Finally, while the FTC relies on several academic studies for its proposition that banning noncompetes will benefit consumers, the

66. *See California Trade Secrets Litigation Supplants Noncompete Litigation*, FAIR COMPETITION L. (June 25, 2017), https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/ [https://perma.cc/9MNM-XQXY].

67. *See, e.g.*, Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 1029–30 (2020).

68. Though many have pointed to California's ban on noncompetes and Silicon Valley's success as proof of the opposite, there are many flaws with that analysis. For example, as a threshold matter, research (if one accepts it as accurate) shows that workers in California are nonetheless subject to noncompetes at the same rate as workers outside California (suggesting that the impacts of a ban are not as clear-cut as they may appear superficially). Evan P. Starr et al.,, *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECON. 53, 81 (2021). Further, companies in California have historically used intercompany no-poach agreements as an alternative, with a similar effect, further raising questions about what the actual impact of the ban really is. *See* Russell Beck, *The "New No-Poach Agreement" Is No More … Sort Of*, FAIR COMPETITION L. (Oct. 4, 2010), https://faircompetitionlaw.com/2010/10/04/the-new-no-hire-agreement-is-no-more/ There are many other flaws as well. *See Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston's Route 128*, FAIR COMPETITION L. (July 9, 2019), https://faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128/ [https://perma.cc/K24R-EGCS] (discussing the false narrative of noncompetes enabling the success of Silicon Valley, demonstrating why correlation does not equate to causation, particularly in the area of noncompetes).

research on this subject is quite mixed.[69] Several studies suggest the opposite.[70] As discussed in Section IV, there is a long way to go before the existing research can genuinely inform the policy debate.

Above all, the Final Rule would bring a screeching halt to state-level activity on noncompetes, depriving the states of their function as, to paraphrase Justice Brandeis, the laboratories of democracy.[71] Nearly two-thirds of the United States have changed their noncompete laws and policies in the last decade alone to account for their specific interests and unique economic environments.[72] A policy that may work well in Boston, Massachusetts, may not be the right fit for Bangor, Maine. Examples of this tailored approach abound: some states have established varying wage thresholds, some have exempted certain professions, and some have limited noncompetence duration by statute.[73] These are just a few different policy choices that states can make to fit the needs of their particular economies, considering their workforce, major industries, and demand for services. As states learn from the experiences of others, more nuanced and creative policy measures will appear in state legislatures.

IV. WHERE TO GO FROM HERE—A CRITIQUE OF EXISTING RESEARCH AND SUGGESTIONS FOR MOVING FORWARD

The more the field of noncompetes and restrictive covenants is studied, the more it becomes clear that existing research is flawed or otherwise limited in ways that, while understandable, raise serious concerns about their reliability and the wisdom of using them to inform legislative, regulatory choices, or both. Stated otherwise, although the research is sufficient to identify concerns, it does not support solutions. At the same time, empirical research in this area is more critical than ever because the issue has become so politically polarizing.

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69. *See, e.g.*, Sarah Oh Lam et al., *Is a Ban on Non-Competes Supported by Empirical Evidence?*, 29 FORDHAM J. CORP. & FIN. L. 1, 18–19 (2023).

70. *See id.* (describing theories of why a noncompete ban would have a detrimental effect on consumers and citing to the FTC's NPRM as acknowledging evidence in support of these theories).

71. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

72. *See The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, FAIR COMPETITION L. (Dec. 27, 2023), https://faircompetitionlaw.com/changing-trade-secrets-noncompete-laws/ [https://perma.cc/5NVX-C7P2] (contextualizing the changes over the last decade in trade secrets laws and noncompete laws in the United States).

73. For a summary of these differences, *see 50 State Noncompete Chart*, BECK REED RIDEN LLP (Nov. 11, 2016), https://beckreedriden.com/50-state-noncompete-chart-2/ [https://perma.cc/4SWM-ABT2].

As one of the leading researchers in the field, Evan Starr and Bureau of Labor Statistics economist Donna Rothstein recently identified "critical" deficiencies with most of the research.[74] They warn of the following:

> A growing stream of academic research has aided this debate [about the pros and cons of noncompetes] by seeking to understand how [noncompetes] and the policies that regulate them influence economic activity. The vast majority of this research examines [noncompete] policies alone, however, without any information on the actual use of [noncompetes]. ***This omission is critical***, given that the limited data we do have on [noncompetes] suggests that they are frequently found in states where they are per se unenforceable, that workers perceive their [noncompetes] to be enforceable when they are not, and that [noncompetes] can limit employee mobility regardless of the law.[75]

Starr and Rothstein highlight that drawing causal inferences is unwise.[76] Part of the difficulty with studying the impact of a noncompete policy is that there are too many variables to isolate the effects attributable to noncompete agreements reliably.

These conclusions can be highlighted with an example of a study that the FTC relied on in drafting its Proposed Rule (and Final Rule).[77] In 2015, Hawaii banned the use of noncompetes—and no-recruit agreements—in the tech sector.[78] This "policy shock" provided a "natural experiment" that was studied, with the results published in 2022.[79] The study concluded that the elimination of noncompetes in the tech industry resulted in, among other things, an eleven percent increase in employee

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74. Donna S. Rothstein & Evan Starr, Mobility Restrictions, Bargaining, and Wages: Evidence from the National Longitudinal Survey of Youth 1997 (Dec. 7, 2021) (unpublished manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974897 [https://perma.cc/GLQ3-9R3F].

75. *Id.* at 1–2 (emphasis added) (citations omitted). The study goes on to explain, "[m]ore broadly, existing data on NCAs have four limitations: (1) they are not publicly available; (2) they come from either selected occupations or non-random sampling schemes; (3) they are cross-sectional; (4) they are not repeated cross-sections of the same population or sampling frame." *Id.* at 2.

76. *See id.* at 19 ("As a result, we recommend interpreting the main correlations with due caution.").

77. Non-Compete Clause Rule, *supra* note 8, at 3503 (describing the study as extrapolating a 4.8% increase in earnings—though missing that the increase is cumulative after eight years).

78. Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers*, 57 J. HUM. RES. 349, 351 (2020).

79. *Id.* at 351, 367.

mobility and a four percent increase in new-hire wages.[80] It also anticipated 4.6% higher cumulative earnings over an eight-year period.[81]

However, many potentially unobserved and unobservable factors may have impacted the statistics discussed in this study. As a threshold matter, it is impossible to distinguish between the impact of the ban on noncompetes compared to the impact that the ban on no-recruit agreements may have or how the combination differs from a single change.[82] As a separate issue, at the time that Hawaii enacted this ban, Hawaii was simultaneously making significant efforts to attract tech talent, with the goal of implementing steps to increase the number of tech jobs and raise wages for tech workers.[83] This effort is something that, if any steps were, in fact, undertaken at the time, could have had a significant impact on the observed increase in wages paid in Hawaii's tech industry following the legislative change. But they were not studied as part of the research on the impact of noncompetes on wages. Accordingly, we do not know what impact they may have had on the "natural experiment" or the magnitude of any such impact.[84]

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80. *Id.* at 349.

81. *See id.* at 352. This determination was based on other data comparing how tech workers' careers faired in states where noncompetes were determined to be more or less enforceable relative to non-tech workers. *Id.*

82. The study acknowledges that the existence of the coincident ban of nonsolicits might impact the results. *Id*. at 366. But the study also mistakenly assumed that the ban applied to agreements concerning solicitation of customers. *Id.* It did not. The ban applied to no-recruit agreements (restrictions on soliciting employees). *See* HAW. REV. STAT. § 480-4(d) (2023) ("'Nonsolicit clause' means a clause in an employment contract that prohibits an employee from soliciting employees of the employer after leaving employment with the employer."). Presumably, such no-recruit agreements would have had a more direct impact on mobility (and therefore on the results of the study) than a nonsolicit would have had. However, regardless of the mistake, the study attempts to avoid the impact of the secondary agreement through a separate analysis of data from other states, showing similar results. Balasubramanian et al., *supra* note 78, at 367–88. Of course, the fact that the results are similar simply begs the question of why that would be when different agreements have been affected differently in different states, and none of the impacts of those other agreements have been isolated.

83. For example, in mid-2014, Hawaii had established a task force of "an array of partners in the public and private sectors" with the goal of "creat[ing] 80,000 technology jobs in Hawaii that pay $80,000 or more in the next 15 years." Eric Pape, *Living Hawaii: Can We Overcome the Problem of Low Salaries?*, HONOLULU CIV. BEAT (Mar. 9, 2015), https://www.civilbeat.org/2015/03/living-hawaii-can-we-overcome-the-problem-of-low-salaries/ [https://perma.cc/Z6Y4-U5CF].

84. In addition, this study also suffers from a lack of granularity. Specifically, "because the study is based only on average salaries, it cannot compare job qualifications of new hires before and after the NCC ban." Stephen Bronars, *FTC Evidence That Non-Competes Reduce Earnings Is Inconclusive*, BLOOMBERG L. (Mar. 7, 2023), https://news.bloomberglaw.com/us-law-week/ftc-evidence-that-non-competes-reduce-earnings-is-inconclusive [https://perma.cc/69HM-MJGF]. These limitations are similar to but separate from Professor Starr's prior observation that most of the current research fails to "isolate random variation in the use of non-competes" that would be

Recent scholarship by Professors Natarajan Balasubramanian, Evan Starr, and Shotaro Yamaguchifurther calls into question the existing research.[85] The professors observe that because companies bundle multiple restrictive covenants, the results of the prior studies, which focus on just noncompetes, turn out to be unreliable.[86] In other words, it is impossible to parse the impacts of noncompetes because they are typically co-adopted with other restrictions; when firms omit noncompetes, they also often refrain from using some or all of the otherwise co-adopted provisions.[87]

It is important to note that not just the failure to consider the bundled agreements identified in that paper (*i.e.*, nondisclosure agreements, nonsolicitation agreements, and no-recruit agreements) leads to unreliable studies.[88] There is also an absence in most of the research of any information concerning the impact of other types of agreements and approaches, much less the separation of those impacts from the impacts of noncompetes.[89] For example, training repayment agreements may have a significant impact that has not been separated from the impact of noncompetes, especially where they are bundled together for low-wage, low-skilled workers.[90] It is similarly impossible to know from existing

necessary to establish noncompetition agreements as the cause of negative outcomes. *See* Evan Starr, Remarks at Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 158–59 (Jan. 9, 2020) (transcript available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf [https://perma.cc/EXM5-ZJJ8]) ("[W]hen you compare workers who have signed a non-compete to those who haven't, you have to worry that there are other differences between those workers, not just whether they have signed the non-compete, which could be driving any outcomes you observe. And it makes it really tricky, and I don't think we really have any great studies so far that really isolate random variation in the use of non-competes.").

85. *See* Natarajan Balasubramanian et al., Employment Restrictions on Resource Transferability and Value Appropriation from Employees (Jan. 18, 2024) (unpublished manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403 [https://perma.cc/R596-9V7M].

86. *Id*. ("Analyses of earnings and a single restriction (e.g., only noncompetes) yields opposite results from those that consider joint adoption, likely because of selection.").

87. *Id*. at 21.

88. *See id*. at 11.

89. *See id.* at 1.

90. Terri Gerstein (director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program and a senior fellow at the Economic Policy Institute) commented that, in some ways, training repayment agreements are "even more insidious than non-competes" because they can effectively lock employees into a company, as opposed simply to preventing them from working for a competitor. Terri Gerstein, Remarks at Making Competition Work: Promoting Competition in Labor Markets 67 (Dec. 6, 2021) (transcript available at https://www.ftc.gov/news-events/events/2021/12/making-competition-work-promoting-competition-labor-markets [https://perma.cc/V9BK-DYH5]). A similar perspective was also expressed by LMU Loyola Law School Professor Jonathan Harris in his recent paper. *See* Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 726, 749 (2021).

research how much of the perceived impact of noncompetes is actually the result of "increased reliance by employers on various forms of outsourcing, which allows employers to fill persistent vacancies without having to raise wages or improve conditions for incumbent workers."[91] Likewise, it is impossible to know how much the results are influenced using no-poach agreements.[92]

> An additional global problem with the research is that many of the studies are the product of surveys and questionnaires of individual workers. This creates a potential minefield of errors undergirding many of the studies. [For example, a] major source of confusion that permeates the existing research is that people often conflate or confuse noncompete agreements with nondisclosure agreements and nonsolicitation covenants.[93]

Individuals and companies alike make this mistake, often even after the differences are explained.[94] This confusion is a potential foundational problem in the data used in many studies assessing the effects of noncompetes, as the agreements being compared are not necessarily noncompetes, much less noncompetes with the same time, scope, or geographic restrictions.[95]

So, where to go from here? As the authors and many others have proposed to the FTC, a category-based, relatively bright-line standard for regulating noncompetes and other restrictive covenants is ideal.[96] Above all, "clarity and predictability benefit all parties. It is not just a corporate interest; workers signing noncompetes need to understand" what they are signing equally; "[u]sing reasonably objective standards helps to provide that certainty. Indeed, all stakeholders, including the courts, would

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91. Non-Compete Clause Rule, *supra* note 8, at 3503.

92. *See id*. at 3503 n.269 (citing Alan B. Krueger, Luncheon Address: Reflections on Dwindling Worker Bargaining Power and Monetary Policy 273 (Aug. 24, 2018) (transcript available at https://www.kansascityfed.org/Jackson%20Hole/documents/6984/Lunch_JH 2018.pdf [https://perma.cc/EER7-TXUZ]).

93. Letter from Russell Beck to FTC 24 (Apr. 19, 2023), https://faircompetitionlaw.com/wp-content/uploads/2023/04/FTC-20230419-Joint-Submission-of-Trade-Secret-Lawyers-Beck-et-al.pdf [https://perma.cc/MJL4-KBJW].

94. *What's the Difference Between a Non-Compete Agreement and a Non-Disclosure Agreement?*, WONDER.LEGAL (Oct. 30, 2020), https://www.wonder.legal/us/guide/what-the-difference-between-non-compete-agreement-and-non-disclosure-agreement [https://perma.cc/F9TD-J64S]. While one might assume that companies are sophisticated in their understanding of the nuances of restrictive covenant agreements, many are not. This is especially true for small companies and companies that do not have experienced human resource professionals or sophisticated in-house counsel.

95. *See* Balasubramanian et al., *supra* note 85, at 1–2.

96. *See* Letter from Russell Beck to FTC, *supra* note 93, at 51–52.

benefit from applying a bright-line rule in any enforcement proceeding."[97]

In the authors' view, the most practical, workable, and nonarbitrary approach would be prohibiting noncompetes for workers who are not exempt under the Fair Labor Standards Act (FLSA).[98] As Professor Starr explained, "roughly [eighteen] percent of the U.S. workforce [was] bound by a non-compete [in 2014]. Among low-skill workers . . . without a college degree, it's about [fifteen] percent."[99] But, because low-skill workers represent a high percentage of the workforce, that fifteen percent likely translates to fifty-three percent of all workers covered by non-competes.[100]

Using exempt status under the FLSA as the standard has the benefit of capturing both wage-based limitations and limitations based on job functions. While not a perfect one-to-one alignment, nonexempt workers tend to be those who do not have access to trade secrets or substantial goodwill and, therefore, tend not to be in a position to harm the former employer to such an extent that a noncompete would be required or would outweigh the impact on the employee from a policy standpoint.[101] This standard was adopted first in Massachusetts,[102] followed by Rhode Island;[103] Nevada adopted a similar-concept ban based on whether the employee is paid hourly.[104]

Using exempt status also avoids the arbitrariness and inconsistencies of wage thresholds. While wage thresholds have the benefit of clarity, how much an employee is compensated has less to do with their exposure to trade secrets and company goodwill and more to do with whether it is "fair" (from a policy perspective) to allow them to be subject to a noncompete. Further, because the cost of living varies markedly around the country, a one-size-fits-all approach will affect different people

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97. *Id.*

98. 29 U.S.C. § 203.

99. *Study Finds Many Companies Require Non-Compete Clauses For Low-Wage Workers*, NPR (Nov. 7, 2016, 4:17 PM), https://www.npr.org/2016/11/07/501053238/study-finds-many-companies-require-non-compete-clauses-for-low-wage-workers [https://perma.cc/CE3C-N3GD].

100. Non-Compete Clause Rule, *supra* note 8, at 3485. Note that Professor Starr's comments reference workers without a college degree. The reference to fifty-three of all workers covered by noncompetes refers to workers who are on an hourly wage. While there may not be complete overlap between one and the other, hourly wage is often used as a proxy for workers without a college degree.

101. *Id.* at 3493.

102. MASS. GEN. LAWS ch. 149, § 24L(c) (2023). Massachusetts added additional restrictions based on age, status as a student, and whether the employee's employment had been terminated without cause. *Id*.

103. 28 R.I. GEN. LAWS § 28-59-3 (2023). Rhode Island added additional restrictions based on age, status as a student, and whether the employee's earnings exceed "two hundred fifty percent (250%) of the federal poverty level for individuals . . . ." *Id.* §§ 28-59-2(7), 28-59-3.

104. NEV. REV. STAT. § 613.195(3) (2023).

differently. For example, while a wage threshold based on a median wage would insulate half of the entire state's population from noncompetes, that threshold would need to vary significantly by state. Further, as the FTC has observed, it would need to be adjusted annually for the number to have the same impact each year, thereby creating more uncertainty.[105] Alternatively, setting the threshold as a multiple of the federal minimum wage provides clarity but, like wage thresholds, does not allow for variations in the cost of living.[106] Similarly, the threshold as a multiple of the federal poverty level also provides clarity but fluctuates annually and does not allow for variations in the cost of living.[107]

Accordingly, the authors reiterate here what was recommended as guiding principles to the FTC in the authors' written submission on its Proposed Rule in the following subsection.

A. *Fairness and Transparency*

Several steps would help to balance the playing field and ensure fairness.

- A **ban** or significant restriction on noncompetes for **low-wage workers** (defined as employees who are not exempt under the Fair Labor Standards Act). There is rarely a need for such workers to be bound by noncompetes, and even when the need might exist in the abstract, the potential detriment to the worker would typically outweigh it.
- **Guidance** or a **requirement** that employers provide **advance notice** that a noncompete will be required.[108]

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105. Different states have taken different approaches to these thresholds based on both amount and when the threshold must be met. In Illinois, for example, the threshold must be met at the time the agreement is executed. 820 ILL. COMP. STAT. 90/10(a) (2023). In Oregon, it must be met at the time of enforcement. OR. REV. STAT. § 653.295(1)(e) (2023). And in Colorado, the threshold must be met both at the time of contracting and at the time of enforcement. COLO. REV. STAT. § 8-2-113(2)(b) (2023).

106. New Hampshire is experimenting with this approach, having adopted a threshold of two times the federal minimum hourly wage. *See* N.H. REV. STAT. ANN. § 275:70-a(I)(b) (2023).

107. Maine and Rhode Island are experimenting with this approach, having adopted a threshold of four times and two and a half times the poverty level for individuals, respectively. *See* ME. STAT. tit. 26, c. 7, § 599-A(3) (2023); 28 R.I. GEN. LAWS §§ 28-59-2(7), 28-59-3(a)(4) (2023).

108. The FTC has expressed concern that, while advance notice "may increase earnings, increase rates of training, and increase job satisfaction for that worker, the Commission does not believe this alternative would achieve the objectives of the proposed rule. Merely ensuring workers are informed about non-compete clauses would not address one of the Commission's central concerns: that, in the aggregate, they are negatively affecting competitive conditions in labor markets—including impacts on workers who are not bound by non-compete clauses—and in markets for products and services. Moreover, the benefits of a disclosure rule may be limited due to the differential in bargaining power between many workers and their employers, which would hamper those workers' ability to negotiate for better employment terms." Non-Compete

- **Guidance** or a **requirement** that employers provide each employee with a short "clear and conspicuous" summary of the restrictive covenants it is asking the employee to agree to.[109]
- A **ban** on noncompetes in the limited circumstances where the relationship between the person subject to the noncompete and identifiable third parties (other than the new employer) is of the kind that must be given priority over the protection of the former employer's trade secrets and other legitimate business interests.[110]
- **Penalties** for companies that willfully violate the law.[111]

Clause Rule, *supra* note 8, at 3521. These assumptions may be correct, but they may not be. It very well may be the case that if all employees had advance notice, the other concerns might be eliminated as a consequence.

For example, according to a 2021 study, more than half (fifty-two percent) of people presented with a noncompete chose to "forgo[] the opportunity to negotiate [because] the terms were reasonable," while forty-one percent assumed they were not negotiable, the latter of which could be addressed with advance notice. Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. LAW ECON. 53, 72 (2021). Indeed, fifty-five percent of people presented with a noncompete before they accepted the offer thought it was reasonable, and forty-eight percent thought they could negotiate it. *Id.*

Further, with full notice, workers can make the types of informed decisions about whether to accept a job or not, irrespective of whether they have the leverage to negotiate (for those who are not important enough to the employer to negotiate for). Those changes might eliminate not only the perceived direct problems with noncompetes, but the surmised spill-over effects, as well.
The FTC also raised that concerns that the "cognitive biases" exhibited by consumers "in the way they consider contractual terms . . . may be true of workers." Non-Compete Clause Rule, *supra* note 8, at 3503. The FTC theorizes that this may "explain why the imbalance of bargaining power between workers and employers is particularly high in the context of negotiating employment terms such as non-compete clauses." *Id*. However, the research that the FTC relies on shows that those concerns diminish and positive impacts of noncompetes emerge when employees are provided advance notice. It is also not true for the high percentage of workers who choose not to negotiate noncompetes, because they believe them to be reasonable.

109. This is similar to an approach implemented in Colorado in 2022. *See* COLO. REV. STAT. § 8-2-113(4)(b) (2023).

110. By way of example, attorneys typically may not be bound by noncompetes because they owe fiduciary duties to their clients, and those clients should not be denied the right to be represented by the attorney of their choosing. There are very few industries in which the arm's-length, economic relationship between the persons with whom an employee does business on behalf of an employer could be described in a similar manner.

111. One of the concerns raised by the FTC is that some companies may use noncompetes knowing that they are unenforceable, or worse, that violate the law. *See* Non-Compete Clause Rule, *supra* note 8, at 3503. While, somewhat ironically, this seems to be an issue in California—a state that does precisely what the FTC is contemplating with the goal of avoiding the very result experienced in California—we are unaware of evidence of widespread use of noncompetes in violation of applicable laws. Nevertheless, a solution to the potential problem could be to require the payment of the employee's legal fees or to impose penalties for willfully using noncompetes that violate the statute. *See* COLO. REV. STAT. § 8-2-113(8)(B) (2023); 820 ILL. COMP. STAT. § 90/30(d) (2023);ME. STAT. tit. 26, c. 7, § 599-A(6) (2023); WASH. REV. CODE § 49.62.080 (2023); D.C. CODE § 32-581.04 (2023). To avoid adversely impacting small, less-sophisticated

1. Limitations on Use to Only What Is Necessary

Recognizing that noncompetes are an important tool in protecting trade secrets (and other business interests recognized by many states), the following are worthy of consideration in attempting to provide for agreements that are used only where needed and only in a non-overreaching way.

- Mandate the so-called "**purple pencil**" rule to address overly broad noncompetes. States take one of three general approaches to overly broad noncompetes: *reformation* (sometimes called "*judicial modification*," in which the court essentially rewrites the language to conform the agreement to a permissible scope); *blue pencil* (in which the court simply crosses out the offending language, leaving the remaining language enforceable or not); and *red pencil* (also referred to as the "all or nothing" approach, which, as its name implies, requires a court to void any overly broad restriction, leaving nothing to enforce).[112] Although in its new law, Massachusetts retained the reformation approach (which it and the majority of states have historically used), an equitable, middle-ground option is the "purple pencil" rule (a term coined by a Massachusetts state senator). The "purple pencil" rule is a hybrid of the reformation and red pencil approaches, requiring courts to strike the noncompete in its entirety unless the language reflects a clear good-faith intent to draft a reasonable restriction, in which case the court may reform it.[113]
- Provide for "**springing**" (or "**time-out**") noncompetes. To encourage employers to limit their reliance on noncompetes, they must have a clear and viable remedy when an employee violates other (less-restrictive) obligations (such as nondisclosure and nonsolicitation obligations), misappropriates the employer's trade secrets, or breaches their fiduciary duties to the employer. In Massachusetts and Rhode Island (copying Massachusetts), the new noncompete laws expressly allow courts to prohibit the employee from engaging in specific work when, based on the employee's breach of certain enforceable obligations, the court is convinced that the individual cannot be trusted to perform the work without continuing to violate their other obligations.[114] These are colloquially referred to as "springing noncompetes" (or sometimes "time out" noncompetes) because they are not required of the employee in the

companies or other companies that make a good-faith mistake, any penalties could be tempered with a required showing of knowing, bad faith use, such as continued use after the company's noncompetes have been identified as violating any applicable limitations.

112. 1 BUSINESS TORTS § 4.06 (2023).

113. MASS. GEN. LAWS ch. 149, § 24L (2023).

114. *Id.*

first instance but are only activated if the employee engages in particular unlawful behavior.[115]

CONCLUSION

UREAA is an important uniform law that joins much of the state and federal action on noncompetes and other restrictive covenants that preceded it and have followed. While UREAA's contributions were well-reasoned and measured, the primary obstacle in this area is the lack of empirical research on the impacts of noncompetes and other restrictive covenants. Without that research, it is far too easy for the debate to fall into the usual political camps, quickly becoming polarizing. Accordingly, while the guiding principles above are broad recommendations for a middle-of-the-road approach, the strongest recommendation by the authors is to encourage and fund additional research in this area.

115. *Id.*