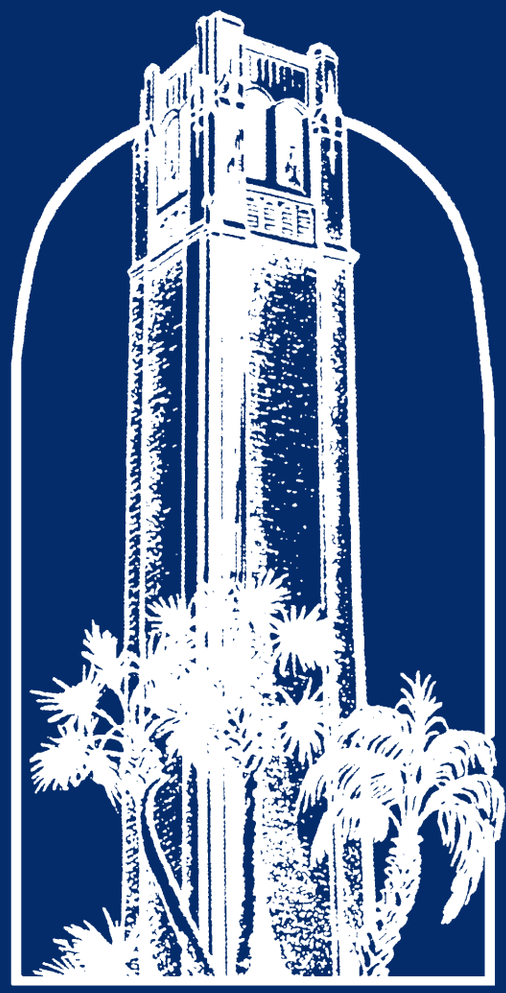

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FOREWORD

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NOTE

THE UNIFORM RESTRICTIVE AGREEMENT ACT IN A VAST SEA OF STRANGE REFORM: AN INTRODUCTION

Rachel Arnow-Richman

The law of noncompetes and other worker mobility restraints is up for grabs. Over the last decade, every aspect of this previously settled body of employment contract law has been called into question: from how such instruments should be regulated (and by whom) to whether they should exist at all. Fueling this debate is a burgeoning economic literature documenting employers' widespread and arguably indiscriminate use of mobility restraints—particularly noncompetes—as well as their adverse effects on workers and markets.[1]

These developments make the moment ripe for legal scholars and other experts to engage the future of worker mobility law. In this symposium, contributors consider one notable approach to the subject—the Uniform Restrictive Employment Agreement Act (UREAA or Act)[2]—against a universe of alternative state and federal reform proposals. Adopted in 2021, UREAA is a product of the Uniform Law Commission (ULC or Commission),[3] which since 1892 has been developing draft legislation in select areas of state law that, in its studied determination, can benefit from greater clarity and uniformity.[4]

At the time the ULC began investigating the UREAA project in 2018, states had been extraordinarily active in proposing and adopting new controls on the use and enforcement of employee noncompetes, a trend that continued throughout the committee's work.[5] Amidst this experimentation, the ULC drafters adopted a "middle-way"[6] approach to reform: the Act bans all restraints on lower-wage workers and proscribes detailed, comprehensive requirements permitting limited restraints for

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1. For helpful summaries of this research prepared for non-economists, see EVAN STARR, NONCOMPETE CLAUSES: A POLICYMAKER'S GUIDE THROUGH THE KEY QUESTIONS AND EVIDENCE (2023), https://eig.org/wp-content/uploads/2023/10/Noncompete-Clauses-A-Policymakers-Guide.pdf [https://perma.cc/GNP7-JJWP]; EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETE AND NO-POACH AGREEMENTS: A BRIEF REVIEW OF THE THEORY, EVIDENCE, AND RECENT REFORM EFFORTS (2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf [https://perma.cc/22GD-VBNL].

2. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(11) (UNIF. L. COMM'N 2021).

3. The ULC was previously known as the National Conference of Commissioners on Uniform State Laws (NCCUSL). Uniform Law Commission, "About Us," https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/Y26J-3L6R].

4. *See* Richard Cassidy & Kari Bearman, *The Uniform Law Commission and The Restrictive Employment Agreement Act*, 34 U. FLA. J.L. & PUB. POL'Y 245 (2024).

5. *Id.* at 249 (providing timeline of UREAA's creation and parallel statelaw developments).

6. *See* 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, 1231 (2020).

higher-wage workers.[7] The wisdom of those choices is a central theme of the articles that follow.

This symposium issue of Florida Journal of Law & Public Policy grows out of a January 2023 program at the American Association of Law Schools (AALS) Annual Meeting in San Diego. At the time. I was serving as Chair of the AALS Contracts Section and had recently completed my service on the ULC Drafting Committee that produced the newly adopted Act.[8] With the support of the Contracts Section Executive Committee, I invited key legal scholars to vet the Act and explore critical questions of workplace mobility policy in a program that introduced UREAA to the larger academic community.[9]

By coincidence, the day of the program, news broke of the Federal Trade Commission's (FTC) proposed rule banning all employee noncompetes and comparable restraints. This agency move was partly anticipated. Over the last decade, the federal government has frequently signaled support for greater regulation of worker mobility restraints. In 2016, President Obama issued a "call to action," urging state legislatures to adopt a recommended list of reforms to their state noncompete law.[10] The same year, the Department of Justice (DOJ) issued a joint statement with the FTC, warning human resource professionals about the antitrust implications of "no-poach" agreements.[11] The Antitrust Division stepped up prosecution of employers engaged in wage-fixing and labor market allocation.[12] The FTC began extensive study of the economic implications of noncompetes, convening an influential workshop in 2020, featuring testimony from economists and legal experts, that augured future agency action.[13] And throughout this time, federal lawmakers

7. For an exposition of UREAA's core features, see Stewart Schwab, *Noncompete Law, The Uniform Act, and the FTC Proposed Rule*, 34 U. FLA. J.L. & PUB. POL'Y 279, 281–87 (2024).

8. I served as an Observer on the ULC study committee as well as the drafting committee.

9. The program was jointly sponsored by the AALS Section on Labor & Employment Law.

10. *FACT SHEET: The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth* (Oct. 25, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition [https://perma.cc/NF4H-JW59].

11. Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/dl [https://perma.cc/XRZ3-7E92].

12. Acting Assistant Attorney General Richard A. Powers of the Antitrust Division Delivers Remarks at Fordham's 48th Annual Conference on International Antitrust Law and Policy (Oct. 1, 2021), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-richard-powers-antitrust-division-delivers-remarks [https://perma.cc/CZ8J-UFL2].

13. FTC Announces Agenda for Jan. 9 Workshop, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 3, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/01/ftc-announces-agenda-jan-9-workshop-non-competes-workplace-examining-antitrust-consumer-protection [https://perma.cc/2P83-5CA2].

introduced and considered a series of bills to regulate or ban noncompetes, though no legislation was adopted.[14]

When Joe Biden assumed the U.S. presidency in 2021, many expective swift administrative reform. In the first year of his administration, Biden called on the FTC directly to issue a ban on noncompetes as part of an executive agenda to promote competition.[15] Still the timing and scope of future agency action was unknown, and by 2023, two years into Biden's term, some had begun to wonder whether reform would arrive before the close of his presidency. Also in question was the expected reach of any agency action. For my part, I was skeptical about the FTC's willingness to issue a complete ban on noncompetes as opposed to a more limited ban targeting low-wage workers, an approach that has proved popular amongst the states.

The FTC's action was thus a long-awaited surprise. Its announcement served expeditiously as a foil for the AALS program, where panelists considered UREAA in juxtaposition to more aggressive reform. And it continues to play that role today, as the authors consider the choice between a state-level compromise statute and a full-throated federal ban within the pages of this symposium. During the intervening year, the FTC received and considered over 30,000 comments before adopting its Final Rule amidst significant controversy in April 2024.[16] These actions have the galvanized debates not only on the appropriate scope of reform, but also on the reach of agency authority more generally. Within two months of the FTC's Final Rule, the United States Supreme Court ruled on two closely watched cases challenging the constitutionality of defining aspects of the administrative state.[17] In both decisions, the Court found in favor of the challengers, constraining agency power. Not surprisingly, the FTC's Final Rule met swiftly with targeted litigation questioning its constitutionality. At least one court has already issued a preliminary injunction prohibiting the FTC rule from going into effect vis-à-vis the

14. For a chronology of these and other efforts, both at the federal and state level, see Fair Competition Law, https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ [https://perma.cc/RHY8-9H9Z].

15. FACTSHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/EX6D-76JA].

16. Non-Compete Clause Rule, 16 C.F.R. § 910.1 (2024).

17. SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (finding SEC administrative judges' assessment of civil penalties violated defendants' Seventh Amendment jury trial rights); Loper Bright Enterprises et al. v. Gina Raimondo, 144 S. Ct. 2244 (2024) (overruling *Chevron* deference).

employer-plaintiffs.[18] At the time this symposium went to press, at least three lawsuits were pending.[19]

These developments add urgency to this symposium—the first on worker mobility since the FTC's actions, as well as the first to engage the FTC rule itself. The authors consist of prominent academics and expert practitioners who have been front-and-center in the ongoing debate. Collectively they have litigated key cases, drafted legislation, counseled lawmakers, testified before government agencies, and contributed to the academic and political discourse in countless ways. They offer a range of perspectives on the legitimacy of the FTC's action, the desirably of a ban, the value of the ULC approach, and the necessary features of any alternative.

Several contributors express support for UREAA and see it as the obvious alternative to a federal ban. Attorneys Richard Cassidy and Kari Bearman provide context for this view.[20] Cassidy, a ULC Commissioner, served as Chair of the UREAA drafting committee; Bearman is legislative counsel to the Commission. Their contribution draws back the curtain on the rigorous, multi-layered uniform law process that yielded UREAA. Like all ULC adoptions, UREAA was years in the making: it began with research and study on the desirability of the project, comprised multiple rounds of drafting by a committee of experts, and culminated in a full Commission review and final vote. The process was not only painstaking, it was also nonpartisan. In the midst of a highly polarized discourse, UREAA offers a balanced, comprehensive, and workable final product, bearing the imprimatur of hundreds of neutral experts.

Taking things a step further, Professor Stewart Schwab, Chief Reporter for UREAA, promotes the Act as a superior alternative to the FTC ban based on its approach and staying power.[21] Schwab believes UREAA strikes the right balance in reigning in, but not eliminating, mobility restraints for higher earning workers. He also doubts the long-term viability of the FTC rule, which is premised on a novel interpretation of the agency's authority and vulnerable to the political whims of future administrations. Should the FTC ban go into effect, and for however long it remains in place, Schwab advocates for a "reverse preemption" solution that would permit states to opt out of the FTC ban by enacting UREAA.[22]

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18. Memorandum Opinion & Order, Ryan v. FTC, No. 3:24-cv-986m (N.D. Tex.) (July 3, 2024).

19. 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.).

20. Cassidy & Bearman, *supra* note 4.

21. Schwab, *supra* note 6.

22. *Id.* at 295.

In sharp contrast, Professor Orly Lobel, a leading scholar of worker mobility law, puts her weight fully behind the FTC.[23] She reminds us that reform is not merely about promoting fair employment contracts, but solving a market-level collective action problem that hurts workers and businesses alike. Entrepreneurship, innovation and regional and industry growth all depend on access to an unencumbered high-quality national labor market. Moreover, mobility restraints disproportionally burden women and other identity groups that face greater "search frictions" when seeking quality employment.[24] From this perspective, UREAA is a "step in the right direction" but ultimately Lobel concludes "[a] national absolute ban is the superior solution."[25]

My own contribution falls somewhere between Schwab's and Lobel's.[26] I share Lobel's preference for a ban and her belief in the legitimacy of the FTC's action. But like Schwab, I am pessimistic about the Final Rule's long-term prospects and anticipate the need for continued state lawmaking. I find UREAA an especially promising legislative model based on its inclusion of "front-end" reforms: provisions that target employers' rote use of standardized noncompetes.[27] UREAA forces employers to affirmatively justify their use of mobility restraints and permits only the least restrictive form of restraint. Such requirements can disrupt the "default use" of noncompetes by at least some compliance-oriented employers.[28]

At the opposite end of the spectrum, expert competition lawyers Russell Beck and Sarah Tishler assert that both UREAA and the FTC go too far.[29] Rather than ban all noncompetes or require a wage threshold like UREAA, Beck and Tishler would adopt a partial ban that prohibits noncompetes with lower-skilled, overtime-earning employees, but permits noncompetes with exempt professionals subject to specific limitations. Beck and Tishler draw inspiration from the 2018 Massachusetts Noncompete Act (MNCA), a comprehensive and deeply considered state overhaul, in which Beck played a leading role.[30] Beck and Tishler advocate for permissible noncompetes with exempt

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23. Orly Lobel, *Why We Need a National Absolute Noncompete Ban: Restrictive Covenants from Innovation, Antidiscrimination & Competition Policy Perspectives*, 34 U. FLA. J.L. & PUB. POL'Y 269 (2024).

24. *Id.* at 273.

25. *Id.* at 277.

26. Rachel Arnow-Richman, *Battling the Form: A Front-End Approach to Default-Use Noncompetes,* 34 U. FLA. J.L. & PUB. POL'Y 141 (2024).

27. *Id.* at 146.

28. *Id.* at 147.

29. 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 (2024).

30. MASS. GEN. LAWS ANN. ch. 149 § 24L(a) (West 2023).

employees, subject to legislative changes, such as requiring advance notice to the employee, adopting a "purple pencil" approach to judicial modification, and permitting judicially awarded or "springing" noncompetes, which would give lesser restraints like nondisclosure and non-solicitation agreements more remedial bite.

The remaining papers expand the lens beyond UREAA and the FTC rule. Professor David Doorey, a Canadian workplace law scholar, explores the parallel development of noncompete law in Canada, culminating in Ontario's conservative provincial government enacting a statutory ban in 2021.[31] Black letter Canadian common law looks much the same as its American counterpart. But, as Doorey explains, fundamental differences in Canada's workplace law architecture have led to a vastly more limited judicial understanding of what constitutes a justified, reasonable restraint. The consequence is that a statutory ban on noncompetes is sufficiently redundant and noncontroversial that conservative lawmakers supported it as a costless and strategically useful "give" to labor interests.

In contrast to this alternative, pro-worker landscape, workplace justice attorneys David Seligman and Rachel Dempsey expose the harsh reality of employer contracting practices on the ground.[32] Seligman and Dempsey are Executive Director and Staff Attorney, respectively, at Towards Justice, an impact litigation and policy non-profit that has been on the front-line in challenging some of the most egregious anti-competitive employer practices in courts across the country. These include "stay or pay" contracts that require employees to pay a penalty or face suits for damages should they leave their employers. Some stay-or-pay contracts purport to recoup employer training expenses; others blatantly indebt employees for the ordinary costs of doing business. The result is a modern-day form of indentured servitude that keeps employees trapped in unsafe and oppressive work environments. The authors credit UREAA with reaching beyond traditional mobility restraints to regulate any instrument that requires an employee to pay to exit, which would hopefully capture these practices.

Last but not least, recent graduate and former Senior Research Editor of this journal, Daniel Woodruff, tackles the elephant-in-the room.[33] Recent Supreme Court decisions have resurrected the nearly defunct non-delegation doctrine, yielding a refurbished Major Question Doctrine

31. David Doorey, *Non-Competition Clauses in Canadian Employment Law and the Doctrine of Inequality of Bargaining Power*, 34 U. FLA. J.L. & PUB. POL'Y 185 (2024).

32. Rachel Dempsey & David H. Seligman, *Worker Debt and Worker Exit*, 34 U. FLA. J.L. & PUB. POL'Y 251 (2024).

33. Daniel Woodruff, *Whose Lane is it Anyway: Anticipating the Effects of the Supreme Court's Major Question Doctrine on the Department of Labor*, 34 U. FLA. J.L. & PUB. POL'Y 303 (2024).

(MQD) that poses a formidable obstacle to progressive workplace regulation. Woodruff surveys a number of pending challenges to Department of Labor (DOL) rulemaking and speculates about more to come. Although he expresses confidence that many of the DOL's controversial promulgations will withstand challenge, he views the FTC noncompete ban as particularly vulnerable. Going forward, agencies will have to be cautious and creative in forging new workplace regulations.

Together these contributions offer a range of perspective on a pressing issue of economic freedom and workplace fairness. Mobility restraints profoundly affect workers' financial security, personal wellbeing, and their ability to realize their full professional potential. They constrain labor markets, limit competition, and impede innovation and economic growth. This symposium deepens the academic discussion of lawmakers' regulatory choices as well as the overarching stakes of the debate. Hopefully it can also enhance public understanding of the issues and guide lawmakers as they continue to seek a viable, lasting approach to regulation.

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

Rachel Arnow-Richman[*]

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

* Gerald Rosenthal Chair of Labor & Employment Law, University of Florida Levin College of Law; J.D. Harvard Law School; L.L.M. Temple Law School. Thank you to Laura Kessler and Catherine Smith for helpful feedback and to Phillip Gendro, Julia Lagnese and Benjamin Lima for valuable research assistance. A version of this Article was presented at the 18th Annual Colloquium on the Scholarship of Labor and Employment Law (COSELL) at the University of Minnesota.

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

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.

NON-COMPETITION CLAUSES IN CANADIAN EMPLOYMENT LAW AND THE DOCTRINE OF INEQUALITY OF BARGAINING POWER

*David J. Doorey**

Abstract

In 2021, the Ontario government legislatively prohibited most non-competition clauses, the first Canadian government to take this step. The move was unexpected because the political party in power (the Progressive Conservative Party, or PCP) has not traditionally been a strong supporter of workers' rights. However, the PCP wanted to demonstrate a new commitment to the working class, and it knew that banning non-competition clauses would attract little backlash from its business constituency since the common law renders almost all non-competes illegal in Canada anyway. The common law approach to the enforceability of non-competition clauses is similar in Canada and the United States. Courts in both countries are suspicious of these clauses because they restrict the right of workers to accept jobs within their field. However, Canadian courts are far less likely to enforce non-competition clauses than their American counterparts.

This divergence can partly be explained by fundamental differences in employment law architecture, including the fact that a doctrine of inequality of bargaining power guides Canadian courts. This doctrine, developed primarily by the Supreme Court of Canada over the past half-century, is comprised of both a descriptive and a normative element. Descriptively, the doctrine recognizes (1) that work has a psychological component and is integral to human dignity, personal identity, and self-worth in Canadian society; and (2) that the employment relationship is frequently characterized by inequality of bargaining power. Normatively, the doctrine of inequality of bargaining power posits that, due to the importance of work and the reality of inequality of bargaining power, the common law *should* develop in a manner that considers the vulnerability of employees.

Relying on the doctrine of inequality of bargaining power, Canadian courts have refused to sever or rectify unreasonable and over-broad non-competition clauses. This refusal marks a substantial divergence from courts in the United States, where courts routinely intervene on behalf of employers to read down unreasonable non-competition clauses to make them enforceable. This Article examines the treatment of non-competition clauses in employment contracts through a comparative lens, explaining how Canadian courts (and now legislators) have demonstrated much less tolerance for contractual restrictions on the right to work.

INTRODUCTION

In the fall of 2021, the Ontario government surprised the Canadian employment law community by becoming the first jurisdiction in the country to legislatively prohibit non-competition clauses in employment contracts.[1] The law came as a surprise because there was no public campaign to ban non-competition clauses, and the governing Progressive Conservative Party (PCP) in Ontario is hardly a staunch advocate for workers' rights. For example, among the PCP's first actions when they assumed power in 2018 was to introduce the Making Ontario Open for Business Act,[2] which repealed a set of worker-friendly laws enacted by the previous liberal government.[3] On the other hand, the conservative government's decision to prohibit non-competition clauses made sense in the political climate of 2021. An election was looming in the summer of 2022, and the PCP had rebranded itself as the party that is "Working for

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1. *See* Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.). Primary jurisdiction over employment law in Canada resides with the provinces. Approximately eight percent of Canadians are governed by federal employment legislation. *See* DAVID J. DOOREY, THE LAW OF WORK 279–80 (3d ed. 2024).

2. Making Ontario Open for Business Act, 2018, S.O. 2018, c 14 (Can. Ont).

3. Sara Mojtehedzadeh, *Amid Protests, Tories Pass Bill That Scales Back Workers' Rights and Freezes Minimum Wage*, TORONTO STAR (Nov. 21, 2018), https://www.thestar.com/politics/provincial/amid-protests-tories-pass-bill-that-scales-back-workers-rights-and-freezes-minimum-wage/article_3cb4e4b2-27e9-579f-9317-a16808f4daab.html [https://perma.cc/T62N-FKR2].

Workers."[4] For example, the government's Minister of Labor proclaimed that "the future of conservatism is a working-class future."[5] The ban on non-competition clauses fits with the government's newly adopted political strategy of introducing modest work law reforms that benefited workers but would not unduly alienate the PCP's core business constituency. Since most non-competition clauses in Canada are unenforceable anyway, the PCP no doubt felt confident that the law would receive little pushback from their allies in the business community while scoring points on the worker protection side of the political ledger

Canadian courts have long treated non-competition clauses in employment contracts with great suspicion. Non-competition clauses are presumed to be unenforceable restraints on trade, contrary to public policy. A narrow exception is carved out for "reasonable" non-competition clauses, but the reasonableness test has, in practice, resulted in courts striking down most challenged clauses. Although, on the surface, the test for enforceability of non-competition clauses in Canada appears to mirror the United States's "rule of reason" doctrine quite closely, in practice, the two legal models diverge in important ways.[6] Courts in the United States are much more inclined to enforce non-competition clauses than their Canadian counterparts.[7] This difference can partly be explained by fundamental differences in the countries' basic employment law infrastructure.

For example, Canada is not an "at-will" jurisdiction, and the default requirement for notice of termination in Canada has significant ramifications for the treatment of non-competition clauses.[8] More fundamentally, Canadian courts recognize that the employment relationship is usually characterized by unequal bargaining power and that work is fundamental to human self-identification and personal

4. *See* Patty Coates, *If Doug Ford Is Really 'Working For Workers', His Government Needs to Offer More than Slogans*, TORONTO STAR (July 18, 2022), https://www.thestar.com/opinion/contributors/2022/07/18/if-doug-ford-is-really-working-for-workers-his-government-needs-to-offer-more-than-slogans.html [https://perma.cc/HF8H-KGA4].

5. Monte McNaughton, *Monte McNaughton: The Future of Conservatism Will Be with the Working Class*, THE HUB (Apr. 28, 2023), https://thehub.ca/2023-04-28/monte-mcnaughton-the-future-of-conservatism-will-be-with-the-working-class/ [https://perma.cc/7T2U-89KL].

6. David Doorey & Rachel Arnow-Richman, *The Law and Politics of Noncompete Reform: A Cross-Border Perspective* ONLABOR BLOG (Feb. 24, 2022), https://onlabor.org/lessons-from-canada-on-the-prohibition-of-noncompete-agreements/ [https://perma.cc/X9HE-ELXH]. For a detailed summary of the "rule of reason" doctrine, *see* Rachel Arnow-Richman, *The New Enforcement: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision,* 50 SETON HALL L.R. 1223, 1228–29 (2020).

7. *Employment Law Differences Between Canada and the U.S.*, TORYS, https://www.torys.com/startup-legal-playbook/employment-law-differences-between-canada-and-the-us [https://perma.cc/77ER-K7V9] (last visited Feb. 7, 2024).

8. *See* DOOREY, *supra* note 1, at 155 (explaining the origins of divergent approaches to "at-will" employment in the U.S. and Canadian "reasonable notice").

growth.[9] These elements have influenced the development of employment law to a much greater degree in Canada than in the United States. This "doctrine of inequality of bargaining power" permeates the evolution of employment contract law in Canada, including the courts' approach to non-competition clauses. The influence of the doctrine can be witnessed in the refusal of Canadian courts to sever or rectify unreasonable restrictive covenant clauses. Whereas courts in some U.S. jurisdictions will rescue employers that draft unreasonably broad non-competition clauses by redrafting them to fit the judges' opinion of what seems fair, Canadian courts hold employers to a higher standard of drafting that does not overreach. In Canada, an unreasonable non-competition clause is void, full stop.[10]

This Article examines the common law and legislative approach to non-competition clauses in Canadian employment law through a comparative lens. Part I describes the history and development of the critical elements of the Canadian approach to non-competition clauses. Part II explains fundamental differences in the approach to non-competition clauses in Canadian and U.S. common law, including the impact of Canada's default requirement for the parties to an employment contract to provide "reasonable notice" of termination and the refusal of Canadian courts to sever or redraft unreasonable restrictive covenants. Part III then describes the development and influence of the doctrine of inequality of bargaining power in Canadian employment law and explores how that doctrine helps explain the divergent approaches to non-competition clauses in Canada and the United States. Finally, Part IV considers Ontario's new statutory prohibition on non-competition clauses and considers what impact it might have moving forward.

I. THE LAW OF NON-COMPETITION CLAUSES IN CANADIAN EMPLOYMENT CONTRACTS

The contemporary approach of Canadian courts to non-competition clauses in employment contracts can be traced to early British common law decisions concerning contracts in restraint of trade and public policy illegality.[11] In its 1894 decision in *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition*,[12] the House of Lords discussed the tension that exists between the concept of freedom of contract and public policy concerns against restraint of trade:

> The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with

9. *See* Machtinger v. HOJ Industries, (1992) 1 S.C.R. 986, 1003 (Can.); *see infra* Part III.
10. *See* Shafron v. KRG Insurance, [2009] 1 S.C.R. 157 (Can.).
11. *See* Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co., [1894] AC 535 (HL).
12. *Id.*

> individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule.[13]

The general rule identified in *Nordenfelt* was long ago adopted in Canada, leaving as a central question, to be determined on a case-by-case basis, what meaning to attribute to Lord Macnaghten's proviso, "if there is nothing more."[14]

In a 1935 decision called *Maguire v. Northland Drug Co.*,[15] the Supreme Court of Canada (SCC) summarized the rule as a rebuttable presumption that non-competition clauses are unenforceable as unlawful restraints on trade and are therefore contrary to public policy:

> The decision in this case must turn on the larger question of whether or not this particular covenant is one which ought to be enforced. Public policy, as interpreted by the courts, requires on the one hand that employers be left free to protect from violation their proprietary rights in business, and on the other hand, that every man be left free to use to his advantage his skill and knowledge in trade. In the weighing and balancing of these opposing rights, the whole problem in cases of covenants in restraint of trade is to be found. Less latitude is allowed in the enforcement of restrictions as between employer and employee than as between vendor and purchaser of good will. *Prima facie* all covenants in restraint of trade are illegal and therefore unenforceable. The illegality being a presumption only, is rebuttable by evidence of facts and circumstances showing that the covenant is reasonable, in that it goes no further than is necessary to protect the rights which the employer is entitled to protect, while at the same time it does not unduly restrain the employee from making use of his skill and talents. The onus of rebutting the presumption is on the party who seeks the enforcement, generally the covenantee. Reasonableness is the test to be applied in ascertaining whether or not the covenant is a fair compromise between the two opposing interests.[16]

The SCC noted that an employer seeking to enforce a non-competition clause against an ex-employee must demonstrate that the covenant aims to protect a legitimate proprietary interest instead of simply limiting

13. *Id.* at 565; *see also* Shafron v. KRG Insurance, [2009] 1 S.C.R. 157 (Can.).
14. *See Nordenfelt*, [1894] AC at 565.
15. [1935] 1 S.C.R. 412 (Can.).
16. *Id.* at 416.

competition by the former employee. "Competition as such" will not be restrained.[17]

In *Maguire*, the SCC directed that a restrictive covenant must go no further than is reasonably adequate to protect the identified proprietary interest: "If it goes too far or is too wide, either as to time or place or scope, it will not be enforced; and if bad in any particular, it is bad altogether."[18] Finally, the SCC noted that even where there is a proprietary interest in protecting customer lists and contacts that justifies a non-solicitation restraint, customers are free to change their patronage, and the mere fact that customers move to follow a former employee who has moved to a competitor or set up a competing business is not proof of a breach absent evidence of actual solicitation.[19]

Some forty years later, the SCC again considered the common law approach to non-competition clauses in employment contracts in *Elsley v. J.G. Collins Ins. Agencies*.[20] The SCC once more distinguished the situation of a non-competition clause included in a sale of business contract from one found in a standard employment contract. According to the court, in the former situation, there are valid reasons for the purchaser to insist that the vendor not immediately set up a competing business once the sale is complete, and inequality of bargaining power is presumed to be less of a concern since the parties are more likely to be sophisticated or represented by legal counsel.[21] However, in the case of an employment contract, the SCC noted:

> an imbalance of bargaining power may lead to oppression and a denial of the right of the employee to exploit, following termination of employment, in the public interest and in his own interest, knowledge and skills obtained during employment. . . . Although blanket restraints on freedom to compete are generally held unenforceable, the courts have recognized and afforded reasonable protection to trade secrets, confidential information, and trade connections of the employee.[22]

Elsley is a relatively rare example of a Canadian case in which the court upheld a non-competition clause against a former employee.[23] The employee, Elsley, was a senior insurance sales professional who had built a close personal relationship with hundreds of former employer

17. *Id.* at 416; *see also* American Building Maintenance Company Ltd. v. Shandley, (1966) 58 D.L.R. (2d) 525 (Can. BC CA).

18. *Maguire*, [1935] 1 S.C.R. at 417.

19. *Id*. at 418.

20. [1978] 2 S.C.R. 916 (Can.).

21. *See id*. at 924.

22. *Id.*

23. *Id.* at 929.

customers over many years.[24] When he left and immediately established a competing insurance business, almost half of the employers' customers followed Elsley to his new business even though there was no evidence that he had actively solicited the customers. The SCC ruled that a non-competition clause prohibiting Elsley from competing against the former employer for a period of five years within a geographic area in and around the City of Niagara Falls, home to the former employer's business, was reasonable.[25] The SCC concluded:

> in exceptional cases, of which I think this is one, the nature of the employment may justify a covenant prohibiting an employee not only from soliciting customers, but also from establishing his own business or working for others so as to be likely to appropriate the employer's trade connection through his acquaintance with the employer's customers.[26]

The test for the enforceability of non-competition clauses in the Canadian common law that emerged from these early SCC decisions can be summarized as follows:

1. A non-competition clause in an employment contract is *prima facie* void and unenforceable as an unreasonable restraint on trade.[27] A narrow exception has been carved out for "reasonable" non-competition clauses.[28]

2. A "reasonable" non-competition clause is one that satisfies the following criteria:

A. The contract language is unambiguous. An ambiguous restrictive covenant clause is unreasonable and, therefore, void.[29]

B. The employer has a "real proprietary interest" entitled to protection.[30]

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24. *Id.* at 921.
25. *Id.* at 929.
26. *Elsley*, [1978] 2 S.C.R. at 926.
27. *Id.* at 924.
28. *Id.*
29. Shafron v. KRG Insurance Brokers (Western) Inc., [2009] 1 S.C.R. 157, para. 27 (Can.); M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 36 (Can. Ont. C.A.); *see also* Rhebergen v. Creston Veterinary Clinic Ltd., [2014] B.C.L.R. 4th 97, paras. 53–68 (Can. B.C. C.A.) (discussing the meaning of "ambiguity" in this context).
30. *See Elsley*, [1978] 2 S.C.R. at 925.

C. The temporal and geographic limits in the restrictive covenant clause are reasonable, considering the nature of the work involved.[31]

D. The covenant clause is not overly broad in that a less intrusive non-solicitation or non-disclosure clause could not have addressed the employer's concerns.[32]

With regard to element B above, the courts have accepted trade secrets, confidential information, and customer lists as legitimate proprietary interests.[33] The SCC explained the scope of protected interests in *Maguire*:

> The practical question then is this, what are the rights which the employer is entitled to protect by such a covenant, and does the covenant not go beyond what is reasonably adequate in furnishing that protection. Proprietary rights, such as secrets of manufacturing process and secret modes of merchandising, clearly come within the group of rights entitled to protection. So also is the right of an employer to preserve secret information regarding his customers, their names, addresses, tastes and desires.[34]

In practice, a real proprietary interest has been recognized in two scenarios. The first involves a situation in which the nature of the work creates such a close personal relationship between the former employee and the customer that the employee essentially becomes the face of the business for the customer.[35] This point was summarized by the Manitoba Court of Appeal as follows:

> It can now be said with confidence that where the nature of the employment will likely cause customers to perceive an individual employee as the personification of the company or employer, the employer has a proprietary interest in the preservation of those customers which merits protection against competition from that individual employee after his termination.[36]

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31. *See id.*

32. *See* Mason v. Chem-Trend Ltd. (2011), 106 O.R. 3d 72, para. 26 (Can. Ont. C.A.); H.L. Staebler Co. v. Allan (2008), 92 O.R. 3d 107, para. 51 (Can. Ont. C.A.); Lyons v Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) ("Generally speaking, the courts will not enforce a non-competition clause if a non-solicitation clause would adequately protect an employer's interests.").

33. *See Elsley*, [1978] 2 S.C.R. at 924.

34. Maguire v. Northland Drug Co., [1935] 1 S.C.R. 412, 416 (Can.).

35. Winnipeg Livestock v. Plewman (2000), 192 D.L.R. 4th 525, para. 41 (Can. Man. C.A.).

36. Friesen v. McKague (1992), 96 D.L.R. 4th 341, para. 17 (Can. Man. C.A.).

In *Elsley*, the SCC found a proprietary interest existed because, to the employer's customers, "Elsley *was the business* . . . . Elsley met the customers, telephoned them frequently, placed their insurance policies and answered their queries."[37] The second scenario occurs where the nature of the work is such that the former employee gained special insight or "intimate knowledge of the client's particular needs, preferences, or idiosyncrasies" that provides the employee with an unusual competitive advantage in attracting that customer to follow them to their new endeavor.[38]

However, as criteria C and D above indicate, even if the court finds a proprietary interest at stake, there is still a strong possibility that the non-competition clause will fail the reasonableness test. Firstly, the courts will closely scrutinize whether the temporal and geographic boundaries are carefully crafted to not constitute an overreach given the employer's legitimate business concerns.[39] Secondly, courts regularly rule that a non-solicitation clause (rather than a more restrictive non-competition clause) is sufficient to address the employer's concerns.[40]

The Ontario Court of Appeal decision in *Lyons v. Multari*[41] provides a typical example of the Canadian approach to non-competition clauses. In that case, Multari accepted employment as a dental surgeon at Lyon's dental surgery practice.[42] The employment contract included a non-competition clause prohibiting Multari from working as a dental surgeon within a five-mile radius of Lyon's offices for a period of three years.[43] After a couple of years, Multari quit and joined another dental surgery office located within a five-mile radius.[44] Lyons sued Multari for breach of contract in an effort to enforce the non-competition clause.[45] The Court ruled that the former employer, Lyons, had a proprietary interest in the

37. *Elsley*, [1978] 2 S.C.R. at 920.

38. *Winnipeg Livestock*, 192 D.L.R. 4th 525 at para. 41.

39. *See* H.L. Staebler Co. v. Allan (2008), 92 O.R. 3d 107, para. 53 (Can. Ont. C.A.) (holding that a clause with no geographic boundary was unreasonable); MacMillan Tucker MacKay v. Pyper, [2009] B.C.L.R. 4th 694, para. 47 (Can. B.C. S.C.) (holding that a restriction on competition by lawyer within five miles of old law firm was unreasonable); Renfrew Insurance Ltd. v. Costese (2014), 574 A.R. 377, para. 17 (Can. Alta. C.A.) (holding that a six-month, sixty-kilometer restriction on former salesperson was reasonable); Kohler Can. Co. v. Porter (2002), 26 B.L.R. 3d 24, para. 48 (Can. Ont. S.C.J.) (holding that a restriction covering North America is unreasonable).

40. *See* Lyons v Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) (holding a non-competition clause unenforceable because a less intrusive non-competition clause would protect the employer's legitimate interests).

41. *Id.*

42. *Id.* at para. 4.

43. *Id.* at para. 6.

44. *Id.* at para. 7.

45. *Id.* at para. 9.

relationships with local dentists who refer the patients.[46] The Court described this relationship as "good will" built up over time in some professions.[47] Moreover, the court found that the geographic (five miles) and temporal (three years) boundaries were reasonable in these circumstances.[48] The non-competition clause was nevertheless unenforceable because the court ruled that Lyons' concerns about Multari attracting work from dentists with whom Lyons had built up good will could have been addressed by a less intrusive non-solicitation clause.[49]

II. FUNDAMENTAL DIFFERENCES IN THE LEGAL TREATMENT OF NON-COMPETITION CLAUSES IN CANADA AND THE UNITED STATES

So far, much of the description of Canadian law regarding non-competition clauses in employment contracts aligns quite closely with the general approach to those clauses in the United States' common law. As described by Professor Rachel Arnow-Richman and I:

> [T]he baseline common law [in the two countries] is similar: in states that allow them, the employer must demonstrate that the noncompete is necessary to protect a legitimate interest; that it is reasonable in scope; that it adheres to contract formalities; and, in some cases, that the agreement is not unduly harmful to the public.[50]

However, in several important respects, the Canadian approach diverges sharply from the approach taken by courts in many U.S. states. The result of these differences is that non-competition clauses are far less likely to be enforced in Canada. To understand why this is the case, one needs to understand certain fundamental differences in the broader employment law models of the two countries.

A. *At-Will Versus the Requirement for Notice of Termination*

The first significant difference is that Canada is not an at-will jurisdiction.[51] The default presumption in the Canadian common law of employment is that the parties must provide "reasonable notice" of

46. *Lyons*, 50 O.R. 3d 526 at para. 25.
47. *Id.* at para. 26.
48. *Id.* at para. 29.
49. *Id.* at para. 48.
50. Doorey & Arnow-Richman, *supra* note 6.
51. *See* Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. 2d 140, 143 (Can. Ont. H.C.J.) ("[T]here is implied in the contract of hiring an obligation to give reasonable notice of an intention to terminate the arrangement.") (citing Carter v. Bell & Sons (Can.) Ltd., [1936] 2 D.L.R. 438 (Can. Ont. C.A.).

termination of the employment contract.[52] The notice requirement exists as an implied contract term, and the courts decide how much notice an employer must provide by applying a well-known set of criteria, of which length of service is the most important.[53] The seminal decision on the assessment of implied reasonable notice, *Bardal v. Globe and Mail Ltd.*,[54] described the criteria to be considered as follows:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[55]

Applying these factors, courts have assessed reasonable notice at two years or more for very long-serving employees, although most employees are entitled to much less than that.[56] Since the requirement for reasonable notice of termination is an implied term, it can be avoided by an express agreement that sets out the amount of notice required.[57] For example, the parties could expressly agree that contract termination is possible without notice, effectively replacing presumed reasonable notice with an at-will contract. In practice, though, this possibility is constrained for most employees by overlapping statutory obligations in Canada that require employers to provide employees with minimum specified amounts of notice.[58] The statutory notice amounts are usually far less than what the

52. *See id.* There are some exceptions to the general presumption that reasonable notice is required, such as termination by the employer for cause (summary dismissal) and where there is frustration of contract, for example. *See generally* DOOREY, *supra* note 1, at ch. 12 (Summary Dismissal), ch. 11 (Frustration).

53. *Id.* at 143.

54. *Id.* at 140.

55. *Id.* at 145.

56. *See generally* DOOREY, *supra* note 1, at ch. 10; *see also:* Lowndes v. Summit Ford Sales Ltd (2006), 206 47 C.C.E.L. (3d) 198 (Can. Ont. C.A) (explaining that greater than two years' notice is possible in "exceptional cases"); Lynch v. Avaya Canada Corporation, (2023) ONCA 696 (CanLII) (upholding award of thirty months' reasonable notice for terminated employee with thirty-nine years' service in a speciality field).

57. Carter v. Bell & Sons (Can.) Ltd, [1936] O.R. 290 (Can. Ont. C.A).

58. *See* DOOREY, *supra* note 1, at 328–31. At-will contracts permitting termination with no notice are still permissible in Canada with respect to employees who are excluded from the statutory notice entitlements. *See id.* Statutory notice requirements often require a limited number of months' service before the notice entitlement is triggered. *See id.* For example, the requirement on an employer to provide notice of termination under the Ontario Employment Standards Act does not commence until the employee has been employed three consecutive months. Employment Standards Act, S.O. 2000, c 41 (Can.). In addition, many categories of employees are excluded entirely from all or parts of Canadian labor standards legislation. *See* DOOREY, *supra* note 1, at 332.

employee would be entitled to under implied reasonable notice, ranging from one to twelve weeks, depending on jurisdiction and length of service.[59] However, the parties are not free to contract out of statutory minimum notice requirements.[60]

Consequently, most Canadian employees are entitled to some amount of notice of termination. This feature of Canadian employment law has several important implications for our discussion of non-competition clauses. One is that these clauses are treated as unenforceable in Canada if the employer has terminated the contract without providing the required notice of termination. This principle has its roots in the seminal 1909 House of Lords decision *General Billposting Co. v. Atkinson*,[61] which held that wrongful termination of an employment contract effectively voids a restrictive covenant, rendering it unenforceable. Canadian courts long ago adopted the principle in *General Billposting*.[62] The rationale for the principle was described recently by the Alberta Court of Appeal as follows:

> [T]here are valid reasons for excusing a wrongfully dismissed employee from compliance with restrictive covenants. Most particularly, to hold otherwise would reward employers for mistreating their employees. For example, an employer could hire a potential competitor, impose a restrictive covenant on the employee, then wrongfully dismiss her a short time later and take advantage of the restrictive covenant. This would be a highly effective, but manifestly unfair, way of reducing competition. A second justification may be that enforcing a restrictive covenant in the face of wrongful termination prima facie negates the consideration (whether continued employment or something else) given by the employer to the employee when she accepted the restrictive covenant. Said another way, because the employment was prematurely and wrongfully terminated the employee will not "have received, during the period of his or her employment, an extra amount of remuneration for having conceded to be bound by the restraint in the contract."[63]

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59. *See* DOOREY, *supra* note 1, at 324 (depicting a list of notice periods in every Canadian jurisdiction).

60. *See* Roden v. Toronto Humane Society (2005), 259 D.L.R. 4th 89, para. 55 (Can. Ont. C.A.) (holding a notice of termination clause that defines how much notice is required enforceable provided that the clause does not violate labor standards legislation).

61. [1909] A.C. 118 (HL).

62. *See* Globex Foreign Exchange Corp. v. Kelcher (2011), 337 D.L.R. 4th 207, para. 48–54 (Can. Alta. C.A.).

63. *Id.* at para. 54; *see also* Cohnstaedt v. Univ. of Regina (1994), 113 D.L.R. 4th 178 (Can.

At trial, the issue of whether the employer terminated the contract without the required notice (known as wrongful dismissal) is typically consolidated with the issue of whether the restrictive covenant is enforceable.[64] If the court rules that required notice was not provided, it follows that the restrictive covenant clause is void, even if the clause would otherwise have satisfied the legal test for enforceability of such clauses discussed above.

A second implication of the requirement for notice of termination in Canada is that it is more difficult for an employer to introduce non-competition clauses after the original terms of the employment contract have been ratified. In the United States, courts often permit employers to introduce non-compete clauses mid-contract as a sort of "afterthought."[65] Professor Arnow-Richman described this type of modification as a "cubewrap" contract that involves the employer introducing new restrictive terms after the initial contract terms have been settled.[66] The practice is permitted under U.S. employment law because employment contracts are at-will: "It is precisely because employment is at-will that courts generally find cubewrap noncompetes to be valid contract modifications, supported by continued employment as consideration."[67] Canadian employers also occasionally attempt to introduce non-competition clauses after employment has commenced, but the legal principles governing that modification are very different.

The requirement for notice of termination of the employment contract means that neither side can unilaterally modify the contract.[68] The contract's original terms survive until the appropriate notice of termination of the contract has expired or both parties agree to a

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Sask.) (finding that an employer that wrongfully terminates an employee cannot then enforce a restrictive covenant clause).

64. *See Globex Foreign Exchange Corp.*, 337 D.L.R. 4th 207 at para. 2.

65. *See* Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1472 (1987); Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power Via Standard Form Noncompete*, 2006 MICH. ST. L. REV. 963, 966 (2006) [hereinafter Arnow-Richman, *Cubewrap Contracts and Worker Mobility*]; Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637, 641 (2007) [hereinafter Arnow-Richman, *The Rise of Delayed Term*] (discussing the common practice of employers introducing non-competition clauses after the terms of employment have already been agreed upon).

66. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 966.

67. *Id.* at 980.

68. *See* Wronko v. Western Inventory Serv. Lrd. (2008), 90 O.R. 3d 547 (Can. Ont. C.A.) (explaining that absent agreement by the parties supported by fresh consideration, a party wishing to modify terms of employment is required to terminate the contract by providing the contractual amount of notice required and then offer a new contract on revised terms).

modification supported by mutual fresh consideration.[69] Therefore, any attempt by an employer to introduce a new non-competition clause during the life of employment is treated as a midterm contract modification in Canada.[70] In theory, an employee can refuse to accept a proposed modification to the contract, at which point a persistent employer must terminate the contract by providing the requisite notice and then offer a new contract on revised terms, including, for example, a non-competition clause.[71]

Of course, in practice, most employees accept amendments the employer puts before them for fear of losing their jobs.[72] However, even if the employee "agrees" to a mid-contract introduction of a non-competition clause, that modification will only be enforceable if supported by fresh consideration.[73] If a non-competition clause is introduced mid-contract and not supported by fresh consideration, the courts will not enforce the covenant if the employer later attempts to rely upon it.[74] In contrast to the prevailing attitude in some courts in the United States, in Canada, continued employment alone does not constitute valid and fresh consideration to support an amendment.[75] This outcome follows logically from the fact that the contract can only be terminated with notice. As the Ontario Court of Appeal explained: "[T]he law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms."[76] None of this prevents an astute employer in Canada from lawfully introducing a non-competition clause mid-contract; it is not much of a hurdle for an employer aware of the legal framework to ensure fresh consideration accompanies the amendment.[77] The point is simply

69. *Id*. at para. 36.

70. *Id*.

71. *Id.* at para. 32; Hill v. Peter Gorman Ltd. (1957), 9 D.L.R. 2d 124 (Can. Ont. C.A.).

72. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 967.

73. Globex Foreign Exchange Corp. v. Kelcher (2011), 337 D.L.R. 4th 207 (Can. Alta. C.A.).

74. *Id.*

75. *See id.* at para. 87 ("[C]ontinued employment alone does not provide consideration for a new covenant extracted from an employee during the term of employment because the employer is already required to continue the employment until there are grounds for dismissal or reasonable notice of termination is given.").

76. Hobbs v. TDI Canada Ltd. (2004), 192 O.A.C. 141, para. 32 (Can. Ont. C.A.); *see also* Francis v. Canadian Imperial Bank of Commerce (1994), 21 O.R. 3d 75 (Can. Ont. C.A.) (stating that continued employment is not fresh consideration to an employee for a mid-contract modification benefiting the employer).

77. For example, Canadian courts have accepted the concept of forbearance as consideration. In the Canadian context, this refers to an exchange whereby if the employee agrees to the employer's proposed amendment, the employer agrees that it will not exercise its

that the default requirement for notice of termination adds a hurdle to be overcome by Canadian employers seeking to introduce non-competition clauses mid-contract.

Non-competition clauses interact with the notice requirement in Canadian employment law in other ways as well. For example, including a non-competition clause can penalize employers by leading courts to order longer periods of reasonable notice.[78] One of the key factors that courts consider in assessing the length of implied reasonable notice is the availability of similar, alternative employment.[79] Because the sole purpose of a non-competition clause is to impede the worker's ability to find similar alternative employment, it is not surprising that Canadian courts have ruled that the presence of a non-competition clause can extend the period of required reasonable notice. This reality can impose an economic cost on employers who elect to include a non-competition clause in employment contracts.

In addition, the presence of a restrictive covenant clause is relevant in assessing whether an employee mitigated their losses after being wrongfully dismissed. A lawsuit by an employee alleging termination without proper notice is an action for breach of contract, and, therefore, the standard rules of contract law generally apply, including the obligation for the aggrieved party to make reasonable efforts to mitigate their losses. In wrongful dismissal cases, this means that employees must make reasonable efforts to secure similar, alternative employment by searching and applying for jobs.[80] The onus is on the employer to prove that the employee failed to make reasonable mitigation efforts and that had the employee done so, they would likely have secured earnings that should be deducted from the damages awarded in the wrongful dismissal

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contractual right to terminate the contract with notice for some period of time into the future. Techform Products Ltd. v. Wolda (2001), 56 O.R. 3d 1, para. 25 (Can. Ont. C.A.); Maguire v. Northland Drug Co., [1935] 1 SCR 412, 416–17 (Can.); *see also* Lancia v. Park Dentistry Corp., [2018] O.J. No. 648, para. 28 (Can. Ont. S.C.J.) (finding that consideration provided in the form of a one-time signing bonus is sufficient to support a mid-contract modification).

78. *See* Watson v. Moore Corporation (1996), 134 D.L.R.4th 252, para. 48 (Can. B.C. C.A.); Ostrow v. Abacus Management Corporation Mergers & Acquisitions, [2014] B.C.J. No. 1046, para. 79 (Can. B.C.); Murrell v. Burns Int'l Security Servs. Ltd., [1997] 33 C.C.E.L. 2d 1 (Can. Ont. C.A.), para. 2 (noting that it is proper to consider a non-competition clause in assessment of the length of reasonable notice when the clause impeded the employee's job opportunities); Khan v. Fibre Glass-Evercoat Co., [2000] O.J. No. 1877, para. 28 (Can. Ont.) (extending notice period from four months to nine months because of a five-year non-competition clause).

79. Bardal v. Globe & Mail Ltd. (1960), 24 D.L.R. 2d 140 (Can. Ont.); DOOREY, *supra* note 1, at ch. 10.

80. Evans v. Teamsters Local Union No. 31, [2008] 1 S.C.R. 661 (Can.) (discussing the scope of an employee's duty to mitigate their losses from a wrongful dismissal)

lawsuit.[81] However, a court will not entertain an argument by the employer that the employee failed to mitigate by researching jobs that the non-competition clause would prohibit them from accepting.[82]

B. *Contrasting Approaches to Severance*

A second important difference between the two countries' approaches to non-competition clauses lies in the application of contract law doctrines of severance and rectification. In the United States, courts regularly redraft unreasonable and otherwise unenforceable clauses.[83] As many commentators have noted, this approach incentivizes employers to draft overly broad clauses with the knowledge that, if challenged, a court will simply fix the clause on behalf of the employer. For example, Harlan Blake notes: "If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down and enforced when the facts of a particular case are not unreasonable."[84]

Professor Arnow-Richman points to the Alabama case of *King v. Head Start Family Hair Salons*[85] as demonstrative of this approach to severance.[86] That decision involved a long-service hairdresser who signed a non-competition clause prohibiting her from working within a two-mile radius of any Head Start location for a period of one year after her employment with Head Start ended.[87] When King signed the contract, there were only fifteen Head Start salons, but that number had doubled to thirty by the time she quit sixteen years later.[88] The trial judge ruled that the non-competition clause was enforceable and issued a preliminary

81. *Id.*; *see generally* DOOREY, *supra* note 1, at 230–32 (discussing the duty to mitigate in wrongful dismissal lawsuits).

82. *See Ostrow*, [2014] B.C.J. No. 1046 at para. 104; *Khan*, [2000] O.J. No. 1877 at para. 28; *Watson*, 134 D.L.R.4th 252 at para. 48.

83. *See* Arnow-Richman, *supra* note 6, at 1256 ("Almost every jurisdiction that enforces noncompetes permits a court to pare down and partially enforce a noncompete that is otherwise overbroad in scope.").

84. Harlan Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 683 (1960); *see also* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 976 ("[T]the employer has the luxury of knowing that if an overbroad agreement is ultimately challenged in court, the judge is likely to reduce its scope rather than void it entirely."); Kenneth Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 223, 249–50 (2007); Charles Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO STATE L.J. 1127, 1134–35 (2009) (noting that when employers anticipate that courts will sever and read down an unreasonable non-competition clause to make it reasonable there is little risk in including an unenforceable clause in the contract).

85. 886 So. 2d 769 (Ala. 2004).

86. Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972.

87. *King*, 886 So. 2d at 770.

88. *Id.* at 771.

injunction.[89] On appeal to the Supreme Court of Alabama, the Court reversed the trial judge's finding that the non-competition clause was enforceable, ruling that the clause imposed an "undue hardship" on King.[90] However, the court modified the clause to protect Head Start's interests.[91] The court explained:

> To prevent an undue burden on King and to afford some protection to Head Start, the trial court should enforce a more reasonable geographic restriction—such as one prohibiting King from providing hair-care services within a two-mile radius of the location of the Head Start facility at which she was formerly employed or imposing some other limitation that does not unreasonably interfere with King's right to gainful employment while, at the same time, protecting Head Start's interest in preventing King from unreasonably competing with it during the one-year period following her resignation.[92]

Were the facts in *King v. Head Start Family Hair Salons* put before a Canadian court, it is almost certain that the non-competition clause would be struck down entirely for failing the *Elsley* reasonableness test.[93] Firstly, insofar as the employer's concern is that customers might follow King to a new hair salon, that interest would not likely be recognized as a legitimate proprietary interest worthy of legal protection but rather be perceived as an attempt by the employer to impede normal, healthy competition.[94] Therefore, Canadian courts are unlikely to recognize a proprietary interest in the relationship between low-wage service sector workers and their employer's customers. And even if a Canadian court accepted that a legitimate proprietary interest exists, it would likely strike down the non-competition clause in *Head Start* because a less restrictive non-solicitation clause would suffice. That is the lesson from cases such as *Lyons v. Multari*, discussed above.[95]

In addition, the non-competition clause in the *Head Start* case appears to prohibit King from working in any capacity at a competing hair salon, not just as a hairdresser.[96] A Canadian court would likely find this

89. *Id.* at 769.

90. *Id.* at 772.

91. *See id.*

92. *Id.* at 772.

93. *See* Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 923 (Can.).

94. *See* Maguire v. Northland Drug Co., [1935] 1 SCR 412, 416–17 (Can.) (noting that employers have no proprietary interest in preserving their customers against normal competition).

95. *See* Lyons v. Multari (2000), 50 O.R. 3d 526, para. 33 (Can. Ont. C.A.) (striking a non-competition clause because non-solicitation clause was sufficient to address former employer's concerns).

96. King v. Head Start Family Hair Salons, 886 So. 2d 769, 770 (Ala. 2004).

restriction overbroad, even if the court accepted that Head Start had a proprietary interest worthy of protection. For example, it is unclear what legitimate proprietary interest Head Start has in preventing King from working as a receptionist at another salon.

In a recent decision called *M&P Drug Mart v. Norton*,[97] the Ontario Court of Appeal struck down a non-competition clause applicable to a pharmacist because the clause restricted the employee from taking any job in a store that has a pharmacy.[98] The court ruled that this restriction was unreasonable.[99] Notably, in response to the employer's argument that the court should read the clause to restrict its application to just employment as a pharmacist, the court stated: "[T]he court is not empowered to rewrite the covenant to reflect its own view of what the parties' consensus *ad idem* might have been or what the court thinks is reasonable in the circumstances."[100] This unwillingness of Canadian courts to rectify or sever unreasonable non-competition clauses to make them reasonable is a significant point of departure from the American approach.

The leading Canadian case on severance is *Shafron v. KRG Insurance*,[101] a 2009 decision of the SCC. The non-competition clause in that case prohibited the former employee, Shafron, from competing against KRG Insurance in the sale of insurance for a period of three years within "the metropolitan City of Vancouver," a vague geographic description without legal meaning.[102] The employee accepted new employment within three years in the Vancouver suburb of Richmond.[103] In the application to enforce the non-competition clause, the British Columbia Court of Appeal ruled that the reference to the "metropolitan City of Vancouver" was ambiguous but applied the contract law doctrine of "notional severance" to construe the clause to mean the "City of Vancouver and environs," including Richmond.[104] Considering all the factors involved, the Court of Appeal ruled that the non-competition clause was reasonable and, therefore, enforceable.[105]

The SCC disagreed and overruled the Court of Appeal.[106] It began its analysis from the usual starting point: "At common law, restraints of trade are contrary to public policy because they interfere with individual liberty of action and because the exercise of trade should be encouraged and

97. [2022] O.A.C. 398 (Can. Ont. C.A.).
98. *Id.* at para. 45.
99. *Id.*. at para. 4.
100. *Id.* at para. 49.
101. [2009] 1 S.C.R. 157 (Can.).
102. *Id.* at para. 5.
103. *Id.* at para. 8.
104. *Id.* at paras. 45–46.
105. *Id.* at para. 46.
106. *Id.* at paras. 55, 58–59.

should be free."[107] A narrow exception exists for "reasonable" restrictive covenants.[108] In the case at hand, the SCC ruled that the clause's reference to "the metropolitan City of Vancouver" was ambiguous and, therefore, unenforceable according to the normal test for enforceability of non-competition clauses: "the general rule must be that a restrictive covenant in an employment contract found to be ambiguous or unreasonable in its terms will be void and unenforceable."[109]

The SCC then considered whether an ambiguous and, therefore, unreasonable non-competition clause could be severed to make it unambiguous and reasonable.[110] The SCC described "blue-pencil" and "notional" severance: "Severance, when permitted, appears to take two forms. 'Notional' severance involves reading down a contractual provision so as to make it legal and enforceable. 'Blue-pencil' severance consists of removing part of a contractual provision."[111] Following a brief discussion of the historical development of notional and blue-pencil severance in contract law generally, the SCC ruled that blue-pencil severance should be used only in "rare cases where the part being removed is trivial and not part of the main purpose of the restrictive covenant," and that "notional severance has no place in the construction of restrictive covenants in employment contracts."[112]

The SCC identified two reasons courts should not intervene through severance or rectification to fix ambiguous or unreasonable non-competition clauses. Firstly, the SCC ruled that severance should be avoided when there is no clear standard against which to measure "reasonableness" when the parties initially agree to the contract term.[113] The task of a court in applying severance is to give effect "to the intention of the parties *when they entered into the contract*."[114] The SCC noted that there are cases in which courts have applied notional severance to cure contract clauses that violate statutory rules where it is clear that the parties did not intend to violate the law.[115] However, with regards to non-

107. *Shafron*, [2009] 1 S.C.R. 157 at para. 16.

108. *Id.* at para. 17.

109. *Id*. at para. 36.

110. *Id.* at para. 28.

111. *Id.* at para. 29.

112. *Id*. at paras. 2, 37.

113. *Shafron*, [2009] 1 S.C.R. 157 at para. 38.

114. *Id.* at para. 32 (emphasis added). This contrasts with the U.S. approach, as noted by Professor Arnow-Richman where some courts look "to the situation of the parties at the time they appear in court and asks whether enforcing the noncompete would unduly disadvantage the employee." Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 970.

115. *See Shafron*, [2009] 1 S.C.R. 157 at para. 38 (citing Transport North American Express Inc. v. New Solutions Financial Corp., [2004] 1 S.C.R. 249, para. 134 (Can.) (severing a clause that required interest rate exceeding that permitted by the Criminal Code of Canada where evidence indicated that the parties did not intend to violate the Code).

competition clauses in employment contracts, "there is no bright-line test":

> In the case of an unreasonable restrictive covenant, while the parties may not have had the common intention that the covenant be unreasonable, there is no objective bright-line rule that can be applied in all cases to render the covenant reasonable. Applying notional severance in these circumstances simply amounts to the court rewriting the covenant in a manner that it subjectively considers reasonable in each individual case. Such an approach creates uncertainty as to what may be found to be reasonable in any specific case.[116]

Therefore, the SCC rejected the notion that courts should redraft non-competition clauses based on their subjective beliefs about what the parties would have thought was reasonable either at the time of contracting or at the time enforcement of the clause was attempted.[117]

The second reason why Canadian courts should not apply severance to fix an unreasonable non-competition clause, according to the SCC, is that doing so would encourage employers to overshoot what is reasonable with the comfort of knowing that if the employee challenges the clause, the courts will just read it down and rescue the employer.[118] On this point, the SCC cited the 1913 decision of the British House of Lords in *Mason v. Provident Clothing & Supply Co*.,[119] where Lord Moulton wrote:

> It would in my opinion be *pessimi exempli* if, when an employer had exacted a covenant deliberately framed in unreasonably wide terms, the Courts were to come to his assistance, and, by applying their ingenuity and knowledge of the law, carve out of this void covenant the maximum of what he might validly have required. It must be remembered that the real sanction at the back of these covenants is the terror and expense of litigation, in which the servant is usually at a great disadvantage in view of the longer purse of his master.[120]

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116. *Id.* at para. 39.

117. *Id.*; *see also* Churchill Cellars Ltd. v. Haider, [2022] N.S.R. 2d 352, para. 33 (Can. N.S. S.C.) ("In the present case, the restrictive covenant contains both a non-competition clause and a non-solicitation clause within the temporal and spatial limits specified. It is to be remembered, however, that courts decide on the validity of restrictive covenants as they are written by the parties and cannot 'write down' a restrictive covenant into narrower terms which the court considers to be more reasonable in scope in the employment context at hand.").

118. *See Shafron*, [2009] 1 S.C.R. 157 at para. 33.

119. [1913] A.C. 724.

120. *Id.* at para. 745.

This realist approach to restrictive covenants emphasizes the potential *in terrorem* effects of non-competition clauses. Lord Moulton recognized over a century ago that employees are restrained in practice even by unreasonable (and therefore unenforceable) non-competition clauses because the costs and risks of challenging such clauses are too formidable. In other words, employees will behave as if a non-competition clause is enforceable even if it is not.

In refusing to rectify the vague non-competition clause in *Shafron*, the SCC concluded as follows:

> While the courts wish to uphold contractual rights and obligations between the parties, applying severance to an unreasonably wide restrictive covenant invites employers to draft overly broad restrictive covenants with the prospect that the courts will only sever the unreasonable parts or read down the covenant to what the courts consider reasonable.[121]

Notably, the reluctance of Canadian courts to rescue unreasonable and unlawful contract clauses is not confined to the law of non-competition clauses.

The SCC has adopted a similar approach towards severance and rectifying contract terms violating labor legislation. A theme in Canadian employment law is that the common law should encourage employers to draft employment contracts carefully, with an eye on employee vulnerability and full knowledge that the courts will not rescue unlawful clauses. We can see this approach applied in *Machtinger v. HOJ Industries*,[122] for example, where the SCC refused to read down a notice of termination clause that permitted the employer to terminate the employee at-will (without notice) when the applicable labor standards legislation required that the employer provide the employee with at least four weeks' notice.[123] In rejecting the employer's argument that the Court should substitute for the unlawful clause a requirement that the employer provide only the minimum statutory four weeks' notice, the SCC concluded that: "If the only sanction which employers potentially face for failure to comply with the minimum notice periods prescribed by the Act is an order that they minimally comply with the Act, employers will have little incentive to make contracts with their employees that comply with

121. *Shafron*, [2009] 1 S.C.R. 157 at para. 33; *see also* Adrian Lang & Mel Hogg, *Injunctions to Restrain the Departing Employee or Fiduciary: What You Need to Know*, 37 ADVOC. Q. 231, 233 (2010) ("Reading down overly broad covenants would encourage employers to draft broad restrictive covenants in the hope that they would be upheld and thereby inappropriately increase the risk to the employee who may be forced to abide by an unreasonable restrictive covenant.").

122. Machtinger v. HOJ Indus. Ltd., [1992] 1 S.C.R. 986, 1013 (Can.) (noting that SCC refused to read down a contract that violated labor standards legislation).

123. *See id.*

the Act."[124] The SCC ruled that a requirement to provide "reasonable notice" is to be implied when a notice of termination clause violates labor standards legislation.[125] As a result, the employer in the *Machtinger* case was ordered to pay damages based on the amount the employee would have received had he worked for a period of implied reasonable notice, which the court fixed at seven months.[126]

The fact that Canadian courts will not sever or rectify an unreasonable non-competition clause focuses attention on the contractual language and not on what other language the parties might have used to craft a reasonable non-competition clause. As the SCC noted in *Elsley*: "The fact that [the clause] could have been drafted in narrower terms would not have saved it, for as Viscount Haldane said in *Mason v. Provident Clothing and Supply Co*., '. . . the question is not whether they could have made a valid agreement but whether the agreement actually made was valid.'"[127]

III. THE DOCTRINE OF INEQUALITY OF BARGAINING POWER IN CANADIAN EMPLOYMENT LAW

Concerns over inequality of bargaining power have influenced the development of the law of non-competition clauses in both Canada and the United States, although in different ways. Courts in both nations have long recognized that inequality of bargaining power is a relevant factor in assessing the reasonableness or legitimacy of non-competition agreements. The courts understand that employers sometimes include non-competition clauses in employment contracts assuming that the employee will lack either knowledge of its potential impact or the fortitude to resist it for fear of losing the job.[128] Of course, this is true of most other contract terms as well, but non-competition clauses are a special case because they involve restraint of trade that can restrict the employee's ability to earn a livelihood.[129] Therefore, courts in both nations accept that legal doctrine has a role in policing the legitimacy of non-competition clauses to ensure that employers are not exploiting their superior bargaining power to unfairly impede their employees' economic security.

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124. *Id.* at 1004.

125. *Id.* at 986–87, 993.

126. *Id.* at 986.

127. Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 925–26 (citation omitted).

128. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 964–65 (discussing the judicial reform based on the power imbalances between the contractual parties); Orkin Exterminating Co. v. Foti, 302 So. 2d 593, 596 (La. 1974) (noting that disparity of bargaining power justifies ruling non-competition clauses unenforceable); Shafron v. KRG Insurance, [2009] 1 S.C.R. 157, para. 23 (Can.).

129. *See Orkin Exterminating Co.*, 302 So. 2d at 596, 598.

However, in Canada, much more so than in the United States, the evolution of the common law of the employment contract has been directly influenced by judicial concern for the inherent inequality of bargaining power that defines most employment relationships.[130] While Daniel Barnhizer observed that courts in the United States "rarely acknowledge power explicitly" and compared the "legal doctrine of inequality of bargaining power" to "the socially embarrassing aunt or uncle that the family talks about but to whom no one really pays attention," in Canada inequality of bargaining power is front and center in employment law.[131] Indeed, it is impossible to understand much of Canadian employment law without acknowledging that inequality of bargaining power acts as a lens through which the normal rules of contract law are viewed and applied. The emergence and development of the "doctrine of inequality of bargaining power" in Canadian employment law has been driven largely by the SCC.[132]

In the *Machtinger v. HOJ Industries* decision described in the previous section, the SCC observed that "individual employees, and in particular non-unionized employees, are often in an unequal bargaining position in relation to their employers."[133] The SCC then cited with approval the following passage written by Professor (now Judge) Katherine Swinton:

> [T]he terms of the employment contract rarely result from an exercise of free bargaining power in the way that the paradigm commercial exchange between two traders does. Individual employees on the whole lack both the bargaining power and the information necessary to achieve more favourable contract provisions than those offered by the employer, particularly with regard to tenure.[134]

The SCC's recognition that inequality of bargaining defines most employment relationships is not merely descriptive. Rather, it is a normative direction to the judiciary on how the common law of employment must evolve.

The Alberta Court of Appeal recently described the emergence of Canadian employment law as a set of "judicially mandated principles of interpretation designed to protect employees because of perceived, and sometimes very real, inequality of bargaining power as between

130. Gillian Demeyere, *The Contract of Employment at the Supreme Court of Canada: Employee Protection and the Presumption of Employer Freedom* 38 Dalhousie L.J. 1, 3 (2015).

131. Daniel Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005).

132. Machtinger, v. HOJ Indus. Ltd., [1992] 1 S.C.R. 986, 1002–03 (Can.).

133. *Id*. at 1003.

134. *Id.* (internal quotations and citation omitted).

employees and employers."[135] This concern for the inequality of bargaining power, which rests at the foundation of the employment relationship, is paired with a secondary recognition by the SCC, namely that work is more than a mere economic exchange but rather is fundamental to human self-worth and dignity. The SCC emphasized this point in an often-cited passage from a 1987 decision called *Re Public Service Employee Relations Act*[136]:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.[137]

The point is not that the normal rules of contract law fall by the wayside in Canadian employment law. It is more subtle than that; the lesson is that in the application of the rules of contract to the employment setting, judges are expected to contextualize, keeping in mind the significance of the role of work in society and to human growth and dignity, and the potential vulnerability of employees owing to inequality of bargaining power. The Ontario Court of Appeal recently explained that "courts interpret employment agreements differently from other commercial agreements. They do so mainly because of the importance of employment in a person's life."[138]

This contextual approach informs the application of contract law principles in significant ways. For example, in the *Machtinger* decision, the SCC's reference to the inequality of bargaining power and the importance of work provided the context for the SCC's explanation for why, given two plausible arguments as to what should happen when a contract term violates labor standards, courts should choose the

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135. Holm v. AGAT Laboratories Ltd., [2018] A.R. 23, para 40 (Can. Alta. C.A.) (O'Farral, J., concurring); *see also* Miller v. Convergys CMG Canada Ltd. P'ship (2014), 375 D.L.R. (4th) 171, para. 15 (Can. B.C. C.A.) ("As to employment contracts in particular, these will be interpreted in a manner that favours employment law principles, specifically the protection of vulnerable employees in their dealings with their employers."); Hobbs v. TDI Canada Ltd. (2004), 246 D.L.R. (4th) 43, para. 42 (Can. Ont. C.A.) (explaining that courts should be vigilant in requiring fresh consideration to support a midterm modification that favors the employer due to general "inequality of bargaining power between employees and employers").

136. [1987] 1 S.C.R. 313 (Can.).

137. *Id.* at 368. This passage has been cited with approval by the SCC on many occasions since. *See, e.g.*, *Machtinger,* [1992] 1 S.C.R. at 1002; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, para. 6 (Can.); Slaight Commc'ns Inc. v. Davidson, [1989] 1 S.C.R. 1038, para. 7 (Can.); *see also* Douglas Brodie, *Canadian Jurisprudence and the Employment Contract* 15 Ind. L.J. 626, 626 (2022) (noting the influence on the Canadian common law of employment of the belief that work is essential component of personal self-identity).

138. Wood v. Fred Deeley Imports Ltd. (2017), 134 O.R. (3d) 481, para. 26 (Ont. C.A.).

interpretation most favorable to the employee.[139] Ambiguities in employment contract language are resolved in favor of employees, recognizing both that employers usually draft the contracts and present them to the employee as a done deal and that the common law should protect vulnerable employees. In explaining its decision to accept the interpretation of ambiguous contract language that favored the employee's interests rather than the employer's, the Ontario Court of Appeal similarly referenced the need for courts to protect workers:

> In an important line of cases in recent years, the Supreme Court of Canada has discussed, often with genuine eloquence, the role work plays in a person's life, the imbalance in many employer-employee relationships and the desirability of interpreting legislation and the common law to provide a measure of protection to vulnerable employees.[140]

The requirement that mid-term contract amendments favoring the employer be supported by fresh mutual consideration is strictly enforced in Canada because courts recognize that employees are often unable to refuse the employer's proposed amendment.[141] In an often-cited decision called *Braiden v. La-Z-Boy*,[142] the Ontario Court of Appeal explained that the need for mutual consideration to support amendments to employment contracts is "especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers."[143] Inequality of bargaining power is also an element in the doctrine of unconscionability, which has been relied upon to strike down mandatory arbitration clauses and improvident settlement agreements that take advantage of vulnerable workers.[144]

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139. Machtinger, [1992] 1 S.C.R. at 1003.

140. Ceccol v. Ontario Gymnastic Fed'n, (2001), 55 O.R. 3d 614, para. 4 (Can. Ont. C.A.); *see also* Miller v. A.B.M. Can. Inc. (2015), 27 C.C.E.L. (4th) 190, paras. 15–16 (Can. Ont. S.C.J.) (Can. Ont.) (noting that due to importance of work to employees, ambiguity should be resolved in favor of employees); Wood v. Fred Deeley Imports Ltd. (2017), 134 O.R. 3d 481, para. 28 (Can. Ont. C.A.) (noting that Canadian courts expressly reference the need for the common law to be interpreted in a manner that respects the vulnerability of employees and the importance of work in their lives).

141. *See* Braiden v. La-Z-Boy (2008), 292 D.L.R. (4th) 172, para. 49 (Can. Ont. C.A.); Hobbs v. TDI Canada Ltd. (2004), 246 D.L.R. (4th) 43, para. 42 (Can. Ont. C.A.).

142. (2008) 292 D.L.R. (4th) 172 (Can. Ont. C.A.).

143. *Id*. at para. 49.

144. *See* Uber Tech. Inc. v. Heller, [2020] 2 S.C.R. 118, 119 (Can.) (holding mandatory arbitration clause in Uber digital contract unconscionable because it is an improvident arrangement based in inequality of bargaining power); Stephenson v. Hilti (Can.) Ltd. (1989), 63 D.L.R. 4th, para. 14 (Can. N.S.S.C.) (discussing a test for unconscionability in the employment law context).

The doctrine of inequality of bargaining power is probably most apparent in the Canadian common law rules governing the termination of employment contracts. For example, in a case called *Wallace v. United Grain Growers Ltd.*,[145] the SCC explained that employees are most vulnerable at the point of termination, and therefore, "the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal."[146] The SCC also recently recognized the right of terminated employees to recover aggravated damages for mental suffering when the manner in which they are terminated is unduly insensitive.[147] In reaching this conclusion and thereby expanding the scope of damages available to wrongfully terminated employees, the SCC noted that employees are "a vulnerable group" and that "for most people, work is one of the defining features of their lives."[148]

The doctrine of inequality of bargaining power is also central to the law of summary dismissal without notice for cause.[149] In Canada, employers must provide notice of termination to the employee unless the employee has committed a fundamental breach of contract.[150] In assessing whether employers have cause for summary dismissal and are relieved of their obligation to provide notice, the SCC requires a "contextual approach."[151] The contextual approach requires courts to assess all the circumstances relating to the employee's misconduct, including any mitigating factors, such as length of service, prior disciplinary record, the employee's family situation, and any other factors that might explain or justify the employee's actions. In application, this approach means that only very serious or sustained and repeated misdeeds or incompetence will justify summary dismissal.[152] In explaining why a contextual approach to summary dismissal is required, the SCC reiterated the importance of protecting vulnerable workers:

> Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which

145. [1997] 3 S.C.R. 701 (Can.).

146. *Id*. at para. 95.

147. *Id*. at para. 94; *see also* Honda Canada Inc. v. Keays, [2008] 2 S.C.R. 362 (Can.)

148. *Id.*; *see generally* David J. Doorey, *Employer Bullying: Implied Duties of Fair Dealing in Canadian Employment Contracts*, 30 QUEENS L.J. 500 (2005) (discussing the history of the law of aggravated damages for breach of employment contracts); Bruce Curran, *Negotiating About Bad Faith: The Impact of Honda v. Keays on Wrongful Dismissal Settlements*, 24 CAN. LAB. & EMP. L.J. 1 (2022) (discussing the scope and prevalence of damages for bad faith termination).

149. *See* DOOREY, *supra* note 1, at ch. 12.

150. *Id*. The requirement to provide notice is also waived in the event of frustration of contract. *Id.* at ch. 11.

151. McKinley v. BC Tel, [2001] 2 S.C.R. 161, para 34 (Can.).

152. *Id.* at para. 89.

> would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship.[153]

This brief overview is sufficient to identify the contours of the doctrine of inequality of bargaining power in Canadian employment law.

The doctrine comprises both a descriptive and a normative element.[154] Descriptively, the doctrine of inequality of bargaining power recognizes (1) that work has a psychological component and is integral to human dignity, personal identity, and self-worth in Canadian society; and (2) that the employment relationship is frequently characterized by unequal bargaining power. Normatively, the doctrine of inequality of bargaining power posits that due to the importance of work and the reality of inequality of bargaining power, the common law should develop in a manner that considers the vulnerability of employees.[155] Given the wide

153. *Id.* at para. 54.

154. The influence of inequality of bargaining power and the SCC's direction to recognize the importance of work in the development of Canadian employment law are widely acknowledged by courts, practitioners, and academics, although this influence is rarely given the label of the "doctrine of inequality of bargaining power" that I am deploying in this Article. My argument is that it makes sense for reasons of clarity, transparency, and accuracy to recognize the diverse impact of these factors in employment law as a legal doctrine. *See* Barnhizer, *supra* note 131 at 141 (referring to the "legal doctrine of inequality of bargaining power"); M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L.J. 359, 359 (examining 1970s' British decisions recognizing a 'legal doctrine of inequality of bargaining power' as a defense to contract enforcement, including Lloyds Bank v. Bundy, [1974] 3 W.L.R. 501 (H.L.) and Macaulay v. Schroder Publishing Co., [1974] 1 W.L.R. 1309 (H.L.); David Percy, *Book Reviews: What's Wrong with the Law?*, 9 ALTA. L. REV. 152, 153 (1971) (discussing the emergence of a "limited doctrine of inequality of bargaining power" in Canadian law).

155. Note that this description of the elements of the doctrine of inequality of bargaining power is consistent with the long-standing mantra of the International Labour Organization, "labour is not a commodity," which was adopted at the 1944 Philadelphia Convention. *See* GERRY RODGERS ET AL., THE INTERNATIONAL LABOR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009 171 (2009). The ILO has had a significant impact on Canadian collective bargaining law (especially public sector labor law) through its influence on the interpretation of freedom of association in the Canadian Charter of Rights and Freedoms. However, the fundamental idea underlying the mantra "labour is not a commodity"—that workers are human beings with psychological needs that should be protected from economic power in the marketplace—has also influenced the law of individual employment contracts in Canada. A full examination of this point is beyond the scope of this Article, but *see, e.g.*, David Beatty, *Labour is Not a Commodity*, *in* STUDIES IN CONTRACT LAW 313–55 (Barry Reiter & John Swan eds., 1980) (explaining the origins and meaning of the concept of labour is not a commodity); Geoffrey England, *The Impact of the* Charter *on Individual Employment Law in Canada: Rewriting and Old Story*, 13 CANADIAN LAB. & EMP. L.J. 1, 6 (2006–07) (noting that the idea that "labour is not a commodity" has "significantly influenced the development of employment contract law"); Brian Etherington, *Supreme Court of Canada Decisions and the Common Law of Employment in the 1990's: Shifting the Balance*

reach of the doctrine in the approach Canadian courts take to interpreting employment contracts, it should come as little surprise that the doctrine has influenced the courts' approach to non-competition clauses.

The doctrine appears most explicitly in the distinction courts draw between non-competition clauses in sale of business agreements and employment contracts. Courts are more inclined to enforce the former than the latter, particularly when the clause is considered in a sale of business contract that applies to sophisticated senior employees in circumstances where both parties had legal representation and real negotiations occurred in the lead-up to the sale agreement. As noted by the SCC in *Elsley*, "the courts have been disinclined to restrict the right to contract, particularly when that right has been exercised by knowledgeable persons of equal bargaining power."[156] Similarly, in *Shafron v. KRG Insurance Brokers (Western) Inc.*, the SCC distinguished non-competition clauses that apply to business principals in the context of a sale of business from those that govern regular employees:

> It is accepted that there is generally an imbalance in power between employee and employer. For example, an employee may be at an economic disadvantage when litigating the reasonableness of a restrictive covenant because the employer may have access to greater resources. The absence of payment for goodwill as well as the generally accepted imbalance in power between employee and employer justifies more rigorous scrutiny of restrictive covenants in employment contracts compared to those in contracts for the sale of a business.[157]

Between Rights and Efficiency Concerns, 78 CAN. B. REV. 200, 204–05 (1999) (noting the SCC's reference to "labour is not a commodity" and its direction that because of the importance of work in society, courts should "apply the common law doctrine . . . in a manner which will encourage employer compliance with legislation and protection of employees").

156. Elsley v. J.G. Collins Ins. Agencies Ltd., [1978] 2 S.C.R. 916, 923; *see also* Gauvreau v. Pelton, [2016] O.R. 3d, para. 19 (Can. Ont. S.C.J.) (stating that non-competition clauses in employment contracts "are struck down . . . because of inequality of bargaining power and because both the departing employee and the public have an interest in the ability of the employee to employ his or her skills to earn a living"); Lyons v. Multari (2000), 50 O.R. 3d 526, para. 36 (Can. Ont. C.A.) (noting non-competition clauses are more likely to be enforced if they are between parties of equal bargaining power); Tank Lining Corp. v Dunlop Indus. Ltd., (1982) 40 O.R. 2d 219, para. 20 (Can. Ont.C.A.) ("When two competently advised parties with equal bargaining power enter into a business agreement, it is only in exceptional cases that the courts are justified in over-ruling their own judgment of what is reasonable.").

157. Shafron v. KRG Ins. Brokers (Western) Inc., [2009] 1 S.C.R. 157, paras. 22–23 (Can.); *see also* Quick Pass Master Tutorial Sch. Ltd. v. Zhao, [2018] B.C.L.R. 683, para. 34 (Can. B.C S.C.) (noting that courts more closely scrutinize restrictive covenant clauses in employment contracts owing to inequality of bargaining power); Martin v. ConCreate USL Ltd. P'ship, [2013] O.A.C. 72, paras. 52–53 (Can. Ont. C.A.) ("The law distinguishes between a restrictive covenant

Therefore, in the case of a sale of a business, courts are less likely to be influenced by the doctrine of inequality of bargaining power because inequality of bargaining power is no longer presumed: the *absence* of inequality of bargaining power justifies lighter judicial oversight of non-competition clauses.[158]

Notably though, inequality of bargaining power is never deployed as justification to sever or rectify an unreasonable non-competition clause in Canada. If the non-competition clause is found to be unreasonable, assessed at the point the clause is ratified, it is struck down in its entirety. Canadian courts do not intervene to rescue an employer that drafted an unreasonably broad non-competition clause.[159] The Canadian approach stands in sharp contrast to that adopted by some U.S. courts, which have referenced inequality of bargaining power in the employment relationship to justify severing or rectifying an otherwise unreasonable non-competition clause rather than striking it down.[160]

For example, Professor Arnow-Richman explained that the *King v. Head Start Family Hair Salons* decision, discussed earlier, involved judicial intervention to protect a vulnerable employee from potential unfairness rooted in her inequality of bargaining power.[161] The employee in that case was a middle-aged single parent who needed work as a hairdresser to support herself and her daughter.[162] The Alabama Supreme Court ruled that the non-competition clause as drafted was unenforceable because it "worked an undue hardship" by preventing the employee from

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in connection with the sale of a business, and one between an employer and an employee. The former may be required to protect the goodwill sold to the purchaser, and does not usually involve the imbalance of power that exists between employer and employee. Accordingly, a less rigorous test is applied in determining the reasonableness of a restrictive covenant given in connection with the sale of a business. Greater deference is given to the freedom of contract of 'knowledgeable persons of equal bargaining power.").

158. *Shafron*, [2009] 1 S.C.R. 157 at paras. 18–19.

159. *See id.* at para. 47; *see also* M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 49 (Can. Ont. C.A.). (noting that courts are not empowered to rewrite the contract clause to reflect what the court believes would be reasonable).

160. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972; Maureen Callahan, *Comment, Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 710 (1985) (explaining that courts in most U.S. jurisdictions will recast non-competition agreements to fit what the court believes is reasonable, while in other jurisdictions courts use the "blue-pencil" approach to sever unreasonable parts of the agreement, or, consistent with the approach taken in Canada, courts will strike down unreasonable clauses in their entirety). Note that the approach in the United States is not uniform. *See* BECK REED RIDEN LLP, EMPLOYEE NONCOMPETES: A STATE-BY-STATE SURVEY (2016), https://beckreedriden.com/wp-content/uploads/2024/02/BRR-Noncompetes-20240219-50-State-Noncompete-Survey-Chart.pdf [https://perma.cc/7DPB-E29D] (summarizing which states permit non-competes and also permit judges to sever and reform unreasonable clauses).

161. *See* Arnow-Richman, *Cubewrap Contracts and Worker Mobility*, *supra* note 65, at 972.

162. King v. Head Start Family Hair Salons, Inc., 886 So.2d 767, 769–70 (Ala. 2004).

working in her field.[163] So far, this result is consistent with how a Canadian court would likely decide the dispute. However, as noted earlier, the Alabama Supreme Court ruled that the clause should be read down to impose less hardship on the employee while still protecting the employer's interests.[164] Therefore, the Alabama Supreme Court looked at the circumstances as they existed at the time the employer sought to enforce the non-competition clause and then redrafted the clause to satisfy the Court's own *post facto* opinion of what a fair compromise would look like that both recognized the employee's precarity and protected the employer's business interests.[165]

This approach is entirely foreign to Canadian employment law. As discussed earlier, the non-competition clause in the *Head Start Family Hair Salon* case would not survive judicial scrutiny in Canada because it is "unreasonably" broad.[166] That finding would resolve the matter. There is no second step in Canada in which the court then comes to the rescue of the employer by substituting its own view of what a reasonable clause would look like considering the situation when the employer seeks to enforce the unreasonable clause. Such an intervention would fly in the face of the doctrine of inequality of bargaining power by protecting the interests of the more powerful employer at the expense of restricting the employee's freedom to earn a livelihood. Severance, as it applies to employment contracts, has been explicitly rejected in Canada because it is inconsistent with the doctrine of inequality of bargaining power, which directs courts to develop the common law in a manner that recognizes the psychological needs of employees and the potential for employers to take advantage of employees by drafting overly broad and restrictive covenants.

IV. ONTARIO'S STATUTORY PROHIBITION ON NON-COMPETITION CLAUSES

The unwillingness of Canadian courts to rework unreasonable non-competition clauses does not eliminate the well-known *in terrorem* effects of these clauses.[167] Canadian employers still sometimes include non-competition clauses in employment contracts that have no chance of being enforced if challenged. Of course, the most effective way to address the *in terrorem* effect of non-competition clauses is to make it illegal to include them in employment contracts. In December 2021, the Ontario

163. *Id.* at 772.

164. *Id.*

165. *Id.* at 772–73.

166. *See supra* Part I.

167. *See* Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633, 665 (2020).

government enacted the Working for Workers Act, 2021,[168] which introduced Canada's first statutory ban on non-competition clauses in employment contracts.[169] The provisions now appear in Part XV.1 of the province's Employment Standards Act.[170] The main charging section provides as follows:

> **67.2** (1) No employer shall enter into an employment contract or other agreement with an employee that is, or that includes, a non-compete agreement.
>
> . . . .
>
> (2) For greater certainty, subsection 5(1) applies and if an employer contravenes subsection (1), the non-compete agreement is void.[171]

Section 5(1) prohibits employment contracts from contracting out of labor standards, with the result that the statute makes it an offense for an employer to include a non-competition clause in an employment contract.[172] The new prohibition applies prospectively to non-competes entered on or after October 25, 2021, which is the date the legislation was proclaimed in effect. Non-competition clauses that pre-date this effective date continue to be assessed under the common law test described above.[173]

The statutory ban on non-competes largely codifies the existing common law tests as they are applied in practice.[174] As described above, most non-competition clauses are ultimately ruled unenforceable if they make it before a court.[175] The statute carves out two exceptions that align roughly with scenarios in which courts have found non-competition agreements to be enforceable. Firstly, the prohibition on non-competition clauses does not apply to "executives," who are defined as senior

168. Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.).

169. *Id.* at c. 35, sched. 2, sec. 4.

170. Employment Standards Act, S.O. 2000, c. 41, P.XV.1 (Can.).

171. *Id.* at sec. 67.2.

172. *Id.* at sec. 67.1. ("'Non-compete agreement' is defined in the statute as follows: "an agreement, or any part of an agreement, between an employer and an employee that prohibits the employee from engaging in any business, work, occupation, profession, project or other activity that is in competition with the employer's business after the employment relationship between the employee and the employer ends."

173. *See* Parekh v. Schecter, [2022] ONSC 302, paras. 45–47 (Can. Ont.).

174. *Id.* at para. 48.

175. *See, e.g.*, M & P Drug Mart Inc. v. Norton, [2022] O.A.C. 398, para. 32 (Can. Ont. C.A.).

executives and officers of companies.[176] Many of the non-competition clauses that the courts have upheld apply to senior officials with intimate knowledge of company strategies and intellectual property or who are "the face of the company" to customers.[177] Secondly, the statute carves out an exception that applies when the seller of a business accepts a job with the purchaser, which also aligns with the common law courts' recognition that non-competes in sale of business agreements deserve greater deference because they are usually for valuable consideration and involve relatively sophisticated contracting parties.[178] Non-competition clauses excluded from coverage under the new statutory ban are not necessarily enforceable. Those clauses, if challenged, would continue to be assessed under the usual common law tests discussed in this Article.

The introduction of the statutory ban on non-competition clauses surprised the employment law community because there had been little warning or consultation about the issue. Since most non-competition clauses are unenforceable in Canada anyway, a legislative ban was not high on the list of demands from worker advocates, who were focused on other more pressing legislative reforms.[179] Certainly, employers were not lobbying the government for this change. Moreover, the governing party in Ontario at the time the law was introduced, the PCP, is not known for leading the way in terms of workers' rights; in fact, it is known for quite the opposite. The PCP markets itself as the business-friendly party of "less regulation," and consistent with this image, one of their first actions when elected in 2018 was to repeal a set of legislative reforms introduced by the former Liberal government that extended new protections to workers.[180] Therefore, the question arises as to why and how a legislative

176. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2(5) ("'[E]xecutive' means any person who holds the office of chief executive officer, president, chief administrative officer, chief operating officer, chief financial officer, chief information officer, chief legal officer, chief human resources officer or chief corporate development officer, or holds any other chief executive position").

177. *See, e.g.*, Elsley v. J. G. Collins Ins. Agencies, [1978] 2 S.C.R. 916, 926 (Can.). Note that in the common law model, courts examine the factual circumstances on a case-by-case basis in determining whether the employee stands in a special position of authority and visibility, whereas the statute simply cast a wide net over any employee who holds one of the listed titles.

178. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2(3). *See Elsley*, [1978] 2 S.C.R. at 929 (holding that a non-compete in a sale of business agreement applicable to a vendor who is hired by the purchaser was enforceable).

179. A significant public policy report commissioned by the Ontario government and released in 2017 on reform of labor standards legislation did not mention non-competition agreements: *See* C. MICHAEL MITCHELL & JOHN C. MURRAY, THE CHANGING WORKPLACES REVIEW: AN AGENDA FOR WORKPLACE RIGHTS 9 (2017), https://files.ontario.ca/books/mol_changing_workplace_report_eng_2_0.pdf [https://perma.cc/FRD9-TFW9].

180. *See* Robert Benzie, *How Politics Put an End to Ontario's Paid Sick Days*, TORONTO STAR (Apr. 27, 2021), https://www.thestar.com/politics/provincial/2021/04/27/how-politics-put-

ban on non-competition clauses made it onto the PCP's legislative agenda.

There are at least two explanations. The first is that a provincial election was looming in the summer of 2022, and the PCP had adopted a new "pro-worker" campaign strategy.[181] Consistent with conservative movements in other countries, conservative politicians in Canada have in recent years more aggressively courted the "working class" vote, recognizing that this constituency is increasingly open to conservative policies and tiring of the identity politics that so often dominate discourse and policy in the more progressive political parties, including the centrist liberals and the leftist New Democratic Party.[182] Polling in the late 2010s showed that conservative parties in Canada were leading among voters who identified as "working class."[183] In the summer and fall of 2021, the PCP introduced the campaign slogan "working for workers," and part of its strategy was to introduce a set of legal rules that would be perceived as worker-friendly.[184]

The Working for Workers Act, 2021 (Bill 27)[185] was introduced in the fall of 2021 and included a bundle of new worker protections. The

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an-end-to-ontarios-paid-sick-days.html [https://perma.cc/WJD8-6EMV] ("After premier Doug Ford's Progressive Conservatives defeated the Grits in the June 2018 election, they moved quickly to freeze the minimum wage at $14 an hour and eliminate the two paid sick days. When Ford undid many of Wynne's labour changes in October 2018, he called the measures 'an absolute job killer' . . . ."); Brenda Bouw, *Ontario to Freeze Minimum Wage, Eliminate Mandatory Paid Sick Days*, THE GLOBE & MAIL, (Oct. 23, 2018), https://www.theglobeandmail.com/business/small-business/talent/article-ontario-government-rolls-back-liberals-labour-friendly-workplace/ [https://perma.cc/UA42-HMUA] ("Ontario's Progressive Conservative government says it plans to repeal chunks of the previous government's Fair Workplaces, Better Jobs Act.").

181. *See All of a Sudden, Conservatives Want To Be the Worker's Best Friend*, THE GLOBE & MAIL (Oct. 28, 2021), https://www.theglobeandmail.com/opinion/editorials/article-all-of-sudden-conservatives-want-to-be-the-workers-best-friend/ [https://perma.cc/7H48-LFJL].

182. In the U.S. context, *see generally* Ruy Teixeira, *Democrats' Long Goodbye to the Working Class*, THE ATLANTIC (Nov. 6, 2022), https://www.theatlantic.com/ideas/archive/2022/11/democrats-long-goodbye-to-the-working-class/672016/ [https://perma.cc/CMT6-47PF].

183. *See* Murad Hemmadi, *Why Conservatives and the NDP Are Fighting Over the 'Working Class'*, MACLEAN'S (Dec. 14, 2017), https://macleans.ca/politics/why-conservatives-and-the-ndp-are-fighting-over-the-working-class/ [https://perma.cc/5EH2-FWTG] ("While middle-class voters are on board with the Liberals, the Conservatives are leading among voters who see themselves as working class in EKOS's polling. That's a big change from the Tories' base . . . ."); Tom Parkin, *Why is Erin O'Toole Pitching Conservatism to Working Class Voters?*, PRESS PROGRESS (Apr. 5, 2021), https://pressprogress.ca/why-is-erin-otoole-pitching-conservatism-to-working-class-voters/ [https://perma.cc/8WE3-S5ZZ] (noting that "[a]mong working class Canadian voters, Conservatives lead," and explaining how conservatives in Canada are now targeting these voters).

184. *See* Randall Denley, *Doug Ford Makes Peace with Labour, the $15 Minimum Wage*, NAT'L POST (Nov. 2, 2021), https://nationalpost.com/opinion/randall-denley-whacking-businesses-with-wage-hikes-is-no-way-for-doug-ford-to-win-votes [https://perma.cc/ UF93-2W8M].

185. Working for Workers Act, 2021, S.O. 2021, c. 35 (Can.).

reforms included the prohibition on non-competition clauses as well as other rules, such as a requirement for employers with at least twenty-five employees to introduce a written policy on after hours work-related communications that the government heavily promoted as a "right to disconnect", and a requirement that businesses that use delivery workers permit those workers to use their on-site washrooms.[186] The reforms in Bill 27 were carefully selected and designed to achieve a distinct political objective, which was to permit the PCP-led government to promote that they were leading the way in workers' rights by being the first Canadian government to introduce such laws, while at the same time, the design of the laws imposed very little in terms of new substantive obligations on employers.[187]

For example, the much-hyped "right to disconnect" did not actually create a right to disconnect but instead simply required employers to post a policy describing expectations regarding after-hours communications.[188] The requirement that delivery people be permitted to use restaurant washrooms aligned with both existing best practices followed by most reputable businesses and basic human decency.[189] And the prohibition on non-competition clauses, as discussed above, essentially just codified what was the *de facto* common law anyways. Therefore, the government anticipated very little pushback from the employer community in response to any of the reforms in Bill 27, and they received little.

The second explanation for the Ontario government's decision to prohibit non-competition clauses was feedback from certain key industries, especially the entertainment and technology industries, that non-competition clauses were an impediment to attracting talent.[190]

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186. *Id.* at sched. 2, sec. 2, sched. 2, sec. 4, sched. 5. The requirement to adopt an after-hours communication policy now appears in the Employment Standards Act, S.O. 2000, c. 41, P.VII.0.1, Section 21.1. (Can.).

187. *See* David Doorey, *Ontario's Bill 27: One Good Law, One Vacuous Law, and One Missing Law*, THE L. OF WORK (Nov. 3, 2021), https://lawofwork.ca/ontariobill27/ [https://perma.cc/5CKP-P3UB].

188. *See id.*

189. *See* Robert Benzie, *Ontario Law Will Guarantee Washroom Access to Delivery Workers*, TORONTO STAR (Oct. 20, 2021), https://www.thestar.com/politics/provincial/ontario-law-will-guarantee-washroom-access-to-delivery-workers/article_dff7e320-54fc-5571-af1d-80168740c24f.html [https://perma.cc/SDS3-U483].

190. *See, e.g.*, Josh Rubin, *Ontario Government Bans Noncompete Clauses, Freeing Up Workers to Change Jobs*, TORONTO STAR (Oct. 25, 2021), https://www.thestar.com/business/ontario-government-bans-noncompete-clauses-freeing-up-workers-to-change-jobs/article_090b7ff4-f859-58cd-9d62-378df9c6329c.html [https://perma.cc/DER4-AVXA] ("The Ontario government is banning noncompetition clauses in employment contracts, a move it says will give workers more freedom to change jobs, and also help tech companies lure employees from the U.S.").

During debates leading to the enactment of the Working for Workers Act, 2021, Ontario's Minister of Labour said the following:

> We talk about attracting labour to Ontario. One of the major steps that we took—again, the first place in Canada—was to ban non-compete clauses, supported by 27,000 tech companies in Ontario. Of course, we now know through a recent study done over the last few days that Ontario and Toronto is the third-largest tech hub in all of North America, and they specifically said that banning the non-compete clause is really going to help grow that part of the economy.[191]

In a similar vein, PCP Member of Provincial Parliament Deepak Anand explained the background for the decision to enact a ban on non-competition clauses as follows:

> Our next proposal would, if passed, ban employers from using non-competition agreements. These agreements basically prevent an employee from leaving one company to take a new job at a direct competitor for a period of time after they leave their current job. While they are almost never legally enforceable, employers often use them to intimidate their employees. They prevent workers from seeking better and more meaningful opportunities. This limits workers from pursuing exciting opportunities that could help them grow professionally.
>
> We want Ontario to be a place where workers can advance their careers and where businesses can easily recruit the talent they need. We've seen this done in several other jurisdictions. California banned non-compete agreements many years ago, and yet Silicon Valley has flourished. Hawaii banned them in the tech sector in 2015, and following that there was an 11% increase in labour mobility in the sector and a 4% increase in new-hire salaries.
>
> Banning these agreements would increase the mobility of workers and it would improve Ontario's ability to attract top talent.[192]

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191. Monte McNaughton, Minister of Labour, statement to the Standing Comm. on Soc. Pol'y of the Legis. Assemb. of Ont. SP-158 (Mar. 28, 2022) (transcript available at 14). https://www.ola.org/en/legislative-business/committees/social-policy/parliament-42/transcripts/committee-transcript-2022-mar-28 [https://perma.cc/QVR9-YJUW].

192. Deepak Anand, MPP, statement to the H. of the Legis. Assemb. of Ont. 1176–77 (Nov. 25, 2021) (transcript available at https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2021/2021-12/25-NOV-2021_L024A.pdf [https://perma.cc/H2A9-ZCX8]).

Therefore, according to the government's talking points, the non-competition ban was part of a broader economic policy to attract and retain talent in certain key industries where labor mobility was perceived as especially attractive and necessary.

It is too soon to assess the impact of the legislative intervention. As noted, the law is prospective, so non-competition clauses that pre-date October 25, 2021 continue to be assessed according to the common law test described earlier.[193] One can anticipate, though, that the law will help address the *in terrorem* effects of non-competition clauses. As previously discussed, employees are often unaware that the non-competition clause in their employment contracts is unenforceable and may behave as if its terms restrict them. The new law not only renders non-competition clauses void but also makes it an offense to include the clause in an employment contract.[194] Under the Ontario Employment Standards Act, an employer found guilty of a first offense may be ordered to pay a fine of up to $50,000 CDN for an individual and $100,000 for a corporation.[195]

The anticipation is that moving forward, very few employment contracts in Ontario will include non-competition clauses as employers learn that there is little point and some financial risk associated with including them. At a minimum, the new law should ensure that a simple Internet search will inform employees that a non-competition clause in their contract is probably unlawful.[196] Therefore, one can anticipate that litigation over non-competition clauses will become relatively rare in Ontario. As of fall 2023, no other Canadian jurisdiction has followed Ontario's lead by similarly prohibiting non-competition clauses.

CONCLUSION

At a superficial level, common law doctrine pertaining to the enforceability of non-competition clauses appears similar in Canada and the United States. Courts in both countries are suspicious of non-competition clauses, which restrain workers from pursuing work within their chosen fields. Therefore, employers on both sides of the border must justify non-competition clauses based on a similar standard of reasonableness. However, on deeper inspection, it becomes evident that

193. *See* Parekh v. Schecter, [2022] ONSC 302, paras. 45–47 (Can. Ont.).

194. Employment Standards Act, S.O. 2000, c. 41, sec. 67.2 (Can. Ont).

195. *Id.*. at sec. 132. Imprisonment is also available for offenders, although in practice that option is rarely exercised. *See id.*

196. For example, my Google search of ["non-competition clause" and Ontario] finds as the top hit a guide produced by the Ontario Ministry of Labour advising that non-competition clauses are unlawful as of October 25, 2021. *Non-Compete Agreements*, ONT., https://www.ontario.ca/document/your-guide-employment-standards-act-0/non-compete-agreements [https://perma.cc/MB23-9EE4] (last visited Apr. 2, 2024).

Canadian courts are far less likely to enforce non-competition clauses than their U.S. counterparts. There are several reasons for this divergence, which are related to important differences in the employment law models of the two countries. For example, the fact that the default rule in Canada is that the employer must provide "reasonable notice" of termination, rather than the United States default of "at will" employment, introduces obstacles and disincentives for Canadian employers interested in restrictive covenants that do not exist in the United States.

More importantly, the doctrine of inequality of bargaining power explained in this Article that permeates Canadian employment law has led courts to adopt a less flexible approach to non-competition clauses. In contrast to the approach that prevails in many U.S. states, the notion that courts should intervene to save an unreasonable clause through legal doctrines of severance and rectification has been soundly rejected in Canada. A model that permits courts to rewrite overbroad non-competition clauses and thereby rewards employers that draft unreasonable restrictions on the right of their ex-employees to earn a livelihood is inconsistent with the fundamental idea prevalent in Canadian law that employment contracts should be interpreted in a manner that recognizes employee vulnerability and the importance of work to personal growth and identity.

Finally, the fact that almost all non-competition clauses in Canadian employment contracts are unenforceable provides the political context to explain why a conservative government in Canada's largest province recently legislated a ban on these clauses. By essentially codifying the existing common law approach, Ontario's Progressive Conservative government could present itself as a progressive advocate for workers, knowing it would face little political backlash from the business community. It is notable as well, given the ongoing political debates in the United States, that an influential conservative political movement in Ontario defended the statutory prohibition on non-competition clauses as a necessary step to remove barriers to labor mobility and productivity as part of a business development strategy to attract workers and investment from the United States and other nations where legal models sanction, justify, and even bolster restraints of worker freedom.

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

Russell Beck[*] & *Sarah C. C. Tishler*[**]

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.*

THE UNIFORM LAW COMMISSION AND THE RESTRICTIVE EMPLOYMENT AGREEMENT ACT

Richard T. Cassidy[*] *& Kari Bearman*[**]

I. THE UNIFORM LAW COMMISSION AND ITS IMPACT ON STATE LAW

Since 1892, the Uniform Law Commission (ULC) has provided the states with nonpartisan, well-conceived, and well-drafted legislation.[1] The ULC has drafted hundreds of uniform acts over its 132 years in existence, and legislatures have enacted them more than 6,000 times.[2] These uniform acts enhance the clarity and stability of state law. As the nation's oldest state governmental association, the ULC works with state legislatures to secure uniformity of state law where desirable and practicable.[3]

Each state, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands appoint Uniform Law Commissioners.[4] Only licensed attorneys are eligible.[5] More than 350 practicing lawyers, judges, law professors, and legislators volunteer their time as commissioners.[6] Commissioners receive no salary or compensation for

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1. *See About Us*, UNIF. L. COMM'N, https://uniformlaws.org/aboutulc/overview [https://perma.cc/8AYR-98VB] (last visited Mar. 3, 2024).

2. *See FAQs*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/faq [https://perma.cc/2HSL-4FP3] (last visited Apr. 3, 2024).

3. *See About Us*, *supra* note 1.

4. *See id.*

5. *See id.*

6. *See id.*

their work and donate thousands of hours of time and expertise annually.[7] By bringing together commissioners from fifty-three jurisdictions, the ULC provides a forum where legal experts can study current issues and, when appropriate, draft uniform acts for state legislatures to consider for enactment.[8]

Some of the ULC's most successful work includes the Uniform Commercial Code,[9] the Uniform Child Custody Jurisdiction and Enforcement Act,[10] and the Uniform Trade Secrets Act.[11] Uniformity assures businesses and individuals that predictable, consistent laws will govern transactions. Families can know that child custody, premarital and marital agreements, and other significant matters are regulated by laws that are the same or similar, even when family members live in different states. Enacting uniform laws across various subjects ensures rights and remedies reciprocity among the states and their residents.

Confusion of law among the several states may deter the free flow of goods, credit, services, technologies, and persons, restrain full economic and social development, disrupt personal planning, and justify federal preemption of subjects traditionally regulated by the states. The Uniform Law Commission strengthens the federal system by providing rules and procedures that offer consistency while still reflecting the diverse experience of the states. With the development of interstate transportation and electronic transactions, the states have become increasingly interdependent socially and economically.[12] Harmonization of state law reduces cost and uncertainty while allowing local flexibility and variation. The ULC seeks to alleviate these problems in areas of law traditionally left to the states.

II. THE ULC DRAFTING PROCESS AND PROCEDURES

The ULC adheres to a rigorous drafting process. Anyone can propose a uniform act,[13] and each one is years in the making.[14]

The ULC's Scope and Program Committee investigates each proposal act to determine whether it would make a desirable and feasible uniform law.[15] The Scope and Program Committee then reports its conclusions to

7. *See id.*
8. *See id.*
9. UNIF. COM. CODE (UNIF. L. COMM'N 1963).
10. UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT (UNIF. L. COMM'N 1997).
11. UNIF. TRADE SECRETS ACT (UNIF. L. COMM'N 1985).
12. Letter from Carl Lisman, President, Unif. L. Comm'n, to Nat'l Highway Traffic Safety Admin. (Aug. 23, 2019), https://lindseyresearch.com/wp-content/uploads/2019/08/NHTSA-2019-0036-0064-Uniform_Law_Commission_Comment_to_ANPRM_Removing_Regulatory_Barriers_for_ADS.pdf [https://perma.cc/SPL6-GC5V].
13. *See FAQs*, *supra* note 2.
14. *See id.*
15. *See id*.

the Executive Committee, which reviews the recommendation.[16] If the Executive Committee approves a recommendation, the President appoints a study committee to assess the project more deeply.[17] If the study reveals that the project has merit, the Scope and Program Committee recommends that a drafting committee be appointed.[18] The Executive Committee makes the final decision about whether to go forward with a draft.[19]

Drafting committees consist of commissioners, a reporter who is an expert in the subject matter and typically a law professor, advisors from the American Bar Association, and observers from other interested organizations.[20] While the title "observer" may suggest a limited role, observers make substantive contributions to the committee discourse.[21]

The ULC's study and drafting committees operate in an open and deliberative process that draws on the expertise of commissioners, legal experts, advisors, and observers representing the views of organizations interested in the particular subject matter and interested individuals.[22]

The ULC meets annually to consider the products of drafting committees.[23] Drafting committee members read each act aloud, section by section, to all commissioners sitting as a Committee of the Whole, typically at a minimum of two annual meetings.[24] Commissioners can comment, question, and propose amendments. With hundreds of trained eyes probing every concept, phrase, and word, it is a rare draft that leaves an annual meeting in the same form as initially presented.

Once the Committee of the Whole approves an act, its final test is a vote by states—one vote per state.[25] An act must receive the affirmative vote of thirty or more states to be approved.[26] Commissioners urge their legislatures to adopt Uniform Acts to "promote uniformity in the law among the states."[27] But the draft is still not finished. The ULC's Style Committee then edits the draft to ensure consistency with the ULC's drafting guidelines.[28]

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16. *See id.*
17. *See id.*
18. *See id.*
19. *See* UNIF. L. COMM'N BYLAWS. art. III, § 3.03.
20. *See Types of Committees*, Unif. L. Comm'n, https://www.uniformlaws.org/projects/overview/typesofcommittees [https://perma.cc/SG8K-HDUA] (last visited Apr. 3, 2024).
21. *See id.*
22. *See id.*
23. *See* UNIF. L. COMM'N CONST. art. III, § 3.03.
24. UNIF. L. COMM'N RULES OF PROC. Pt. 5 § 5.01; UNIF. L. COMM'N CONST. art. VIII, § 8.01.
25. *See* UNIF. L. COMM'N RULES OF PROC. Pt. 6 § 6.02; UNIF. L. COMM'N CONST. art. VIII, § 8.02.
26. UNIF. L. COMM'N CONST. art. VIII, § 6.02.
27. *Id.* at art. I, § 1.02.
28. *See id.* at UNIF. L. COMM'N CONST. art. III, § 3.03.

At times, the ULC also promulgates Model Acts designed to serve as guideline legislation that states can borrow from or adapt to suit their individual needs and conditions.[29]

III. THE UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT

Several factors led the ULC to decide that a uniform act on noncompete and other post-employment agreements was desirable and practicable. The ULC's study and drafting committees found a transformed landscape surrounding noncompetes.[30] While employers once used employment agreements to prevent only highly compensated employees from going to a competitor,[31] the ULC's research found that today, forty percent of all American workers have signed a noncompete agreement at some point in their careers.[32] And hourly-paid workers now comprise the majority of noncompete signers.[33]

Increased state legislative activity prompted swift action by the ULC. Between 2018, when the ULC started its process, and 2021, when it was promulgated, eighteen states introduced or passed legislation on the topic.[34] That number has only increased.[35] However, these state statutes have not been comprehensive—they tend to focus solely on noncompetes and omit reference to other employment agreements that inhibit worker mobility and restrain trade.[36]

Employers are increasingly national in scope in today's economy, and workers are more mobile than ever.[37] Balancing the legitimate interests of workers and employers regarding post-employment agreements would create a well-balanced and predictable body of law and maintain the states' traditional role in regulating the field. After a year of drafting, with considerable input from employment and employee advocates, the ULC

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29. *See What is a Model Act?*, UNIF. L. COMM'N, https://www.uniformlaws.org/acts/overview/modelacts [https://perma.cc/N797-X8EE] (last visited Mar. 6, 2024).

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

31. *See id*.

32. *Id*.

33. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3485 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

34. *See* Stewart J. Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 IND. L.J. 275, 283 (2022) ("Reacting to the growing concerns, at least eighteen states in the last five years have enacted statutes regulating noncompetes.").

35. *See* Justin A. Allen & Byrin A. Romney, *States Continue to Target Restrictive Covenants*, OGLETREE DEAKINS (Feb. 20. 2023), https://ogletree.com/insights-resources/blog-posts/states-continue-to-target-restrictive-covenants/ [https://perma.cc/WJ35-M7VV].

36. *See id.*

37. *See The Rise of The Mobile Workforce and Deskless Workers*, SKEDULO, https://www.skedulo.com/the-rise-of-the-mobile-workforce-and-deskless-workers/ [https://perma.cc/87ZL-ZWH3] (last visited Apr. 7, 2024).

finalized the Uniform Restrictive Employment Agreement Act (the "Act").[38]

IV. FEATURES OF THE UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT

The Uniform Restrictive Employment Agreement Act addresses a wide range of agreements restricting or limiting employees from working elsewhere after a working relationship ends.[39] The Act's broad framework applies to noncompete, nonsolicitation, payment-for-competition, and training repayment agreements, as well as other types of restrictive employment covenants.[40] Its comprehensive scope applies to employers and workers as well as independent contractors and franchisees.[41] The Act also applies a rule of reasonableness to enforcing all restrictive employment agreements,[42] which sensibly balances the employer's, worker's, and public interests.

One of the Act's defining characteristics is its protection for low-wage workers. Under the Uniform Restrictive Employment Agreement Act, restrictive agreements are prohibited for workers making less than the state's annual mean wage, except for confidentiality and training reimbursement agreements.[43] This prohibition applies when the agreement is entered if the worker's actual compensation falls below the mean yearly wage during employment.[44]

The Act is more nuanced for workers earning above the state's annual mean wage. It strictly limits noncompete agreements to those protecting legitimate employer interests in trade secret information and customer relations.[45] Except for noncompetes between sellers and buyers of businesses—where the restriction can last up to five years—noncompetes are limited to one year after the working relationship ends.[46] Most other restrictive employments are limited to between six months and five years.[47] Except for confidentiality or training repayment agreements, restrictive employment agreements are unenforceable if the worker

38. *See* Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIF. L. COMM'N (July 23, 2021), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer [https://perma.cc/X4YM-VU9B].

39. *See id.*

40. *Id.*

41. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(20) (UNIF. L. COMM'N 2021).

42. *Id.* § 7.

43. *Id.* § 5(1).

44. *Id.* § 5.

45. *Id.* § 8(1)(C)–(D).

46. *Id.* § 8(3).

47. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 10–14 (UNIF. L. COMM'N 2021).

resigns for good cause attributable to the employer, the employer terminates the worker for a reason other than willful misconduct, or the project reaches the end of its term.[48]

In addition, the Act requires employers to provide workers with advanced notice for a restrictive agreement to be valid.[49] Upon hiring, the employer must give the worker at least fourteen days to consider the agreement and a separate notice explaining the worker's rights under the Act.[50] A worker can waive the fourteen-day consideration period before hire, but if the period is waived, the employee will be entitled to rescind the agreement within fourteen days after receipt.[51] Notice enables a worker to make an informed decision, evaluating how the restrictive agreement will affect future work opportunities.[52]

Under current law, a restrictive employment agreement is usually unenforceable if it violates state law.[53] Even in states with a near blanket prohibition on restrictive employment agreements, many employers continue to use them.[54] Noncompetes are common in California, although it bars nearly all such agreements.[55]

The Act creates a right of enforcement in state labor departments to address the chilling effect of unenforceable agreements by authorizing them to penalize employers entering impermissible restrictive employment agreements.[56] However, the Act does not rely exclusively on already burdened government agency action for enforcement.[57] It also establishes a private right of action for workers, allowing them to deter illegal restrictive employment agreements by seeking statutory damages and attorneys' fees.[58]

A product of the ULC's rigorous drafting process, the the Uniform Restrictive Employment Agreement Act establishes a balanced and practical structure to regulate post-employment restrictive agreements.

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48. *Id.* § 6.
49. *Id.* § 4.
50. *Id.* § 4(a).
51. *Id.* § 4(b).
52. *Id.* § 4 cmt.
53. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021).
54. *See id.* ("Noncompetes are also found regularly in states such as California that do not enforce them.").
55. *See id.*
56. *Id.* § 16 cmt.
57. *Id.* § 16(b)–(c).
58. *Id.* § 16.

WORKER DEBT AND WORKER EXIT

Rachel Dempsey & David H. Seligman***

Abstract

One of the primary ways in which workers exercise power in the employment relationship is by leveraging competition among employers through the threat that they may go work for an employer that would pay them more or treat them better. Increasingly, employers have tried to undermine this core component of worker bargaining power through stay-or-pay contracts that charge workers penalties or threaten them with damages actions for leaving jobs before they have completed a prescribed term of employment. These contracts are intended and function to constrain worker mobility, suppress wages, and enable worker mistreatment.

Through case studies of contemporary litigation challenging stay-or-pay contracts in the courts, this Article examines enforcement opportunities offered by existing state and federal laws, including the Fair Labor Standards Act, consumer protection laws, the Trafficking Victims Protection Act, and state unfair competition and unfair and deceptive acts and practices laws. It proposes that, while these laws provide some useful tools for enforcement, effective regulation will require the development of clear and bright-line rules.

INTRODUCTION

Economist and former U.S. Department of Labor official David Weil has explained that the foundations of worker bargaining power are "worker exit" and "worker voice."[1] The latter is the opportunity for

* Staff Attorney at Towards Justice. Thank you to all of the academics, attorneys, and policy advocates who have done so much incredible work moving advocacy on these issues

workers to exercise their rights and power through formal channels such as unions and other collective action or by enforcing workplace rights. Worker exit is the threat of working elsewhere. Put simply, one of the key components of worker bargaining power is the mere threat that workers have to seek out different employment.

Over the past few years, employers have sought new ways to undermine the threat of worker exit. In November 2021, more workers left their jobs than at any other point in the prior twenty years.[2] The phenomenon widely became described as the "Great Resignation."[3] A variety of factors contributed to the trend, including the reopening of the job market following the effects of the COVID-19 pandemic, but the majority of workers who quit did so to secure better wages and working conditions.[4] Most of those who changed jobs during the Great Resignation reported that they earned more money, had more opportunities for advancement, had an easier time balancing work and family, and had greater flexibility in their new positions.[5]

Employers began looking for new ways to retain workers during this turnover wave. Undoubtedly, competition for workers induced some employers to offer increased wages and other benefits, as a model of a well-functioning market would predict. However, other employers have tried to impede worker mobility, including through the use of restrictive employment agreements, such as non-competes and, increasingly, stay-or-pay contracts that indebt workers to their employers for up to several years and seek to collect that debt if (and only if) workers quit.[6] These

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forward. Thank you also to Anna Arons for explaining to me what an author's footnote is, and to the editors of the University of Florida Journal of Law & Public Policy for their careful attention.

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1. Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 62 (2021).

2. Eli Rosenberg*, A Record 4.5 Million Workers Quit or Changed Jobs in November*, WASH. POST (Jan. 4, 2022), https://www.washingtonpost.com/business/2022/01/04/job-quits-november-2021/ [https://perma.cc/896Z-B2GY].

3. *See* Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, PEW RSCH. CTR. (Mar. 9, 2022), https://www.pewresearch.org/short-reads/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected/ [https://perma.cc/2NAV-N3KY].

4. *See id.*

5. *See id.*

6. *See, e.g.*, Jessica March, *Labor Shortages Sparks Rise in Non-Compete Lawsuits by Employers*, ALM BENEFITS PRO (May 10, 2022), https://www.benefitspro.com/2022/05/10/labor-of-law-amid-labor-shortages-more-employers-suing-to-enforce-non-competes-412-129910/?slreturn=20240222142746 [https://perma.cc/X8RZ-P9VF].

contracts undermine worker power, suppress wages, and enable employer abuse. Such contracts have become increasingly common, especially in industries where workers' services have increased in demand since the pandemic, like aviation and healthcare.[7] Notably, stay-or-pay contracts have profound deleterious effects on workers, whether or not a court would ever enforce them. For example, even if they blatantly seek to recoup costs that an employer should bear under wage-and-hour law, employers leverage the threat of potential debt, including litigation, credit reporting, and even blackballing, to undermine the viability of worker exit.[8]

This Article tracks the rise of stay-or-pay contracts across the American economy, describes how they harm both workers and the general public, and provides a framework for addressing them through litigation, legislation, and regulation. First, this Article provides background on the proliferation of stay-or-pay contracts across the labor market, especially as an alternative to more traditional non-compete agreements. Second, it provides several illustrations of how stay-or-pay contracts affect employees, drawn from real-life cases filed by the Article's authors. Third, it describes the legal framework applicable to assessing the legality of these contracts, analyzing theories of illegality under employment law, consumer law, unfair competition law, and forced labor law, among others, and examining the strengths and weaknesses of the various approaches. And fourth, it recommends that state regulators adopting the Uniform Restrictive Employment Agreement Act (UREAA), or similar reforms, set clear, bright-line rules protecting workers from abusive stay-or-pay contracts.

I. THE RISE AND FALL OF NON-COMPETES

In 2014, a Jimmy John's employee named Emily Brunner filed a lawsuit against Jimmy John's, a fast-food sandwich chain, for using non-compete agreements against its low-wage food service employees.[9] The non-compete agreements that Jimmy John's used blocked employees from working at any company within two to three miles that derived more than ten percent of its revenue from "submarine," "hero-type," "deli-style," "pita," and "wrapped" or "rolled" "sandwiches" for up to two

7. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/TK9R-APWH].

8. *See CFPB Report Shows Workers Face Risks from Employer-Driven Debt*, CFPB (July 20, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-shows-workers-face-risks-from-employer-driven-debt/ [https://perma.cc/JM2X-TWYA].

9. Brunner v. Liautaud, No. 14-C-5509, 2015 WL 1598106 (N.D. Ill. Apr. 8, 2015).

years after the end of their employment.[10] Other investigations and lawsuits followed, including ones from the Illinois and New York attorneys general, with New York's Attorney General describing the use of non-competes for low-wage workers as "unconscionable."[11] Jimmy John's quickly agreed to stop using non-competes for its retail food service workers.[12] But issues with non-competes and other restrictive covenants persist.

Non-compete agreements (sometimes referred to under the broader category of "restrictive covenants") have existed since approximately the late nineteenth century.[13] Traditionally, they have been used primarily to protect "trade secrets" and the related but broader category of "proprietary information."[14] In one early examination of non-competes, the 1711 case of *Mitchel v. Reynolds*,[15] the court reviewed a non-compete in which a bakery shop owner promised not to work as a baker within his parish for five years in connection with the sale of the bakery.[16] While the judge recognized that there was a presumption under the common law that restraints of trade are valid, he determined that it could be overcome under certain circumstances, developing a balancing of the interests test whose broad contours survive to this day.[17]

Subsequent caselaw has refined the balancing test to consider whether a restraint of trade (i) "is greater than required for the protection of the person for whose benefit it is imposed"; (ii) "imposes undue hardship on the person restricted"; or (iii) imposes "injury to the public" greater than "the benefit to the covenantee."[18] Factors considered often include the geographical scope, the length of time, and the breadth of the restriction.[19]

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10. Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit over Non-Compete Agreements*, REUTERS (Dec. 7, 2016), https://www.reuters.com/article/idUSKBN13W2J9/ [https://perma.cc/2V5V-2XPX].

11. *See A.G. Schneiderman Announces Settlement with Jimmy John's To Stop Including Non-Compete Agreements in Hiring Packets*, N.Y. STATE ATT'Y GEN. (June 22, 2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete [https://perma.cc/YS2T-KL5M].

12. *See id.*

13. *See* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441, 454 (2001).

14. *Id.* at 458.

15. 24 Eng. Rep. 347 (Q.B. 1711).

16. *Id.* at 351–52.

17. *See id.* Notably, the judge recognized that one category of restraints on trade, restraints on employment, reflected a particular danger for abuse. *Id.*

18. Harvey J. Goldscmid, *Antitrust's Neglected Stepchild: A Proposal for Dealing with Restrictive Covenants Under Federal Law*, 73 COLUM. L. REV. 1193, 1196 (1973).

19. *Id.*

Studies suggest that wages, job mobility, and job satisfaction are lower in industries where non-compete agreements are common.[20] This result makes sense on the most basic economic level. Non-competes quite literally prohibit competition; the less competition for workers, the less bargaining power they have, and the less money they are able to secure for their work. Research has shown that a significant portion of wage growth comes from changing employers. And as economist Evan Starr has noted, even the threat of leaving an employer can give a worker leverage to negotiate higher pay.[21]

Perhaps not coincidentally, non-competes had proliferated across the American economy by the 2010s, their use often unmoored from any genuine effort to protect trade secrets or other intellectual property.[22] A 2019 survey by the Economic Policy Institute found that half of respondent businesses used non-competes for at least some of their employees, and nearly a third used non-competes for all employees.[23] A similar survey in 2014 found that only eighteen percent of workers were covered by non-competes, suggesting that their use had exploded in the intervening years.[24] Although the popular perception of non-competes is that they primarily cover highly skilled and compensated workers, the Jimmy John's case was a striking illustration that this is not always true. In fact, the 2019 EPI study found that twenty-nine percent of responding establishments where the average wage was less than thirteen dollars an hour used non-competes for all their workers.[25] Another study from 2014 found that the modal worker subject to a non-compete was paid approximately fourteen dollars an hour.[26]

States have recognized the opportunity for abuse and increasingly banned non-compete agreements, particularly for low-wage workers.[27] Since approximately 2008, at least ten states have passed laws banning or limiting the use of non-compete agreements, and other states have

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20. Isaac Chotiner, *What a Ban on Non-Compete Agreements Could Mean for American* Workers, THE NEW YORKER (Jan. 10, 2023), https://www.newyorker.com/news/q-and-a/what-a-ban-on-non-compete-agreements-could-mean-for-american-workers [https://perma.cc/5QBZ-A32C]; Alexander Colvin & Heidi Shierholz, *Noncompete Agreements*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/V6EN-MYEB].

21. *See* Chotiner, *supra* note 20.

22. *See* Najah Farley, *How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color*, NAT'L EMP. L. PROJECT (May 18, 2022), https://www.nelp.org/publication/faq-on-non-compete-agreements/ [https://perma.cc/R6XG-3JHW] (noting that noncompetes are "increasingly being used by companies in low-wage industries to block workers from changing jobs").

23. *See* Colvin & Shierholz, *supra* note 20.

24. *Id.*

25. *Id.*

26. Chotiner, *supra* note 20.

27. *See id.*

banned them in certain industries.[28] In 2022, the Federal Trade Commission (FTC) introduced a proposed rule that would ban most non-compete agreements under its authority to regulate unfair methods of competition.[29] The FTC has estimated that the rule would increase the earnings of American workers by as much as $296 billion a year.[30]

II. STAY-OR-PAY CONTRACTS AS AN ALTERNATIVE TO TRADITIONAL NON-COMPETE AGREEMENTS

As traditional non-compete agreements have increasingly come under fire, especially for low-wage workers, employers are turning to other restraints on worker exit. One such tactic is stay-or-pay contracts, which shift business costs onto workers and threaten workers with debt for leaving a job.[31] Many employers may consider these contracts to have less legal risk than non-compete agreements, perhaps because employers often frame stay-or-pay contracts as penalties or damages for an employee's "breach" of an employment contract—namely, leaving before the end of a contractual commitment period.

Generally, stay-or-pay contracts purport to reimburse employers for some investment made in the worker.[32] One common form is a Training Repayment Agreement Provision (TRAP), which requires employees to pay back employers for their training—even when it is standard on-the-job training that provides no portable credential or benefit to the worker beyond simple work experience.[33] Other stay-or-pay contracts purport to indebt workers to their employers for costs of doing business like equipment purchases and immigration costs or to provide compensation to the employer for lost profits, loss of goodwill, or other potential

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28. Jane Flanagan & Terri Gerstein, *Welcome Developments on Limiting Noncompete Agreements*, ECON. POL'Y INST. (Nov. 7, 2019), https://www.epi.org/blog/welcome-developments-on-limiting-non-compete-agreements-a-growing-consensus-leads-to-new-state-laws-a-possible-ftc-rule-making-and-a-strong-bipartisan-senate-bill/ [https://perma.cc/YZ38-FF HD].

29. *See Non-Compete Clause Rulemaking*, FTC (Jan. 5, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking [https://perma.cc/XAQ8-SLNP].

30. *Id.*

31. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT prefatory note (UNIF. L. COMM'N 2021) (noting that, "[w]hile noncompete agreements get the most attention, they are part of a family of restrictive employment agreements" that includes training repayment agreement provisions).

32. *See* Jeffrey H. Ruzal & Alexandria Adkins, *Should I Stay or Should I Go? Federal Regulators and Employers May Face Impending Clash Over "Say or Pay" Clauses in Employment Agreements*, EPSTEIN BECKER GREEN (Dec. 22, 2023), https://www.tradesecretsandemployeemobility.com/should-i-stay-or-should-i-go-federal-regulators-and-employers-may-face-impending-clash-over-stay-or-pay-clauses-in-employment-agreements [https://perma.cc/7JE7-6RXM].

33. *See* Skye Schooley, *Don't Scare Employees with This Employment TRAP*, BUSINESS.COM (Feb. 21, 2023), https://www.business.com/hr/trap/ [https://perma.cc/DW6E-2D4J].

consequences of employee turnover.[34] While the purported justification is different, these contracts operate in much the same way as non-compete agreements. They require workers to pay their employers to change jobs (or open themselves up to potentially devastating litigation if they don't or can't pay), which ratchets up the consequences of job mobility, discouraging workers from seeking better wages and working conditions elsewhere.

Recent litigation provides stark examples of how stay-or-pay contracts seek to impede worker mobility. In August 2023, commuter airline Southern Airways Express (Southern) brought a lawsuit against former pilot Benjamin Ryan, seeking to collect $3,333 in unpaid training debt.[35] The debt arose from a TRAP that took the form of a promissory note, a kind of consumer credit instrument rarely seen in the employment context, that Ryan had been required to sign on his first day of employment.[36] The TRAP required Ryan to pay Southern up to $16,000 for what it described as an "advance" for the training provided by the company unless he stayed at his job for approximately two years.[37] This training was a credit product expressly tied to his employment relationship. Southern representatives clarified that it would fire anyone who did not sign the TRAP on the spot.[38]

Although more senior pilots can be highly compensated, Ryan was just starting his career, and his salary on hire was $12 an hour, making the $16,000 penalty for leaving his job far out of reach.[39] Ryan has alleged in litigation that once he started working, he quickly found the work wasn't just low-paid but also dangerous.[40] At one point, Southern required Ryan to fly a plane that began emitting smoke upon landing.[41] When he raised his concerns with mechanics, they told him they could see nothing wrong with the aircraft.[42] On another occasion, Ryan realized upon landing that several bolts in his plane's engine had shaken loose during flight because mechanics had overlooked a routine maintenance

34. Reed Shaw et al., Stay or Pay: Federal Actions to End Modern-Day Indentured Servitude Across the Economy (manuscript at 20), (2023), https://ssrn.com/abstract=4683210 [https://perma.cc/9CSJ-MJ9X].

35. Complaint at 1, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach Cnty. Ct. filed Aug. 4, 2023).

36. *See id.* at ¶ 18. The authors note that all citations to the Ryan Complaint reflect well-pleaded allegations and have not been proven at trial.

37. *Id.* at Exhibit A.

38. Class Counterclaim at ¶ 118, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach Cnty. Ct. filed Sept. 8, 2023).

39. *Id.* at ¶ 124.

40. *Id.* at ¶ 5.

41. *Id.* at ¶ 143.

42. *Id.* at ¶ 144.

step, placing the craft at risk of imminent engine failure.[43] These experiences were by no means isolated: Ryan both witnessed and experienced supervisors pressuring pilots to fly in unsafe conditions, such as icing, hail, and thunderstorms.[44] A Huffington Post reporter interviewed nineteen Southern pilots who said they had similar experiences, including being pushed to fly in icy conditions or while fatigued.[45] Many of these pilots said they feared they would jeopardize their pilot certificates, their lives, or the lives of their passengers if they continued to fly for the airline through their TRAP term.[46]

Fearing for his health and pilot's license, Ryan resigned from his job at Southern in October 2022.[47] At that time, he had $3,333 remaining on his TRAP term, which the promissory note required him to pay before his final date of employment.[48] He did not pay, and ten months later, in August 2023, Southern sued him in Palm Beach County small claims court.[49] Ryan is not the only pilot Southern has sued—between July and November 2023, Southern sued 100 former pilots.[50] Its chief executive officer has been explicit that these lawsuits are an attempt to keep pilots from quitting and punish those who have, describing the litigation as a "threat" to curb high employee turnover.[51] In other words, the TRAP wasn't just about shifting the costs of doing business onto workers—if that were all that it was about, Southern could have considered paying workers even less in exchange for their purported training—this was about using the threat of the debt to chill workers from leaving the company. It was, in effect, a supercharged non-compete.

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43. *Id.* at ¶¶ 146–48.

44. Class Counterclaim at ¶ 155, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

45. Dave Jamieson, *These Pilots Were Sued for Quitting. They Say It Was Dangerous to Stay*, HUFFINGTON POST (Oct. 6, 2023), https://www.huffpost.com/entry/southern-airways-express-pilots_n_651ee853e4b0bfc227bf9b9d [https://perma.cc/X6BY-G3EH].

46. *Id.*

47. Class Counterclaim at ¶ 136, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

48. *See id.* at ¶ 100.

49. Complaint, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Aug. 4, 2023).

50. *See* Class Counterclaim at ¶ 1, S. Airways Corp. v. Ryan, No. 50-2023-sc-010947-xxxx-mb (Fla. Palm Beach County Ct. filed Sept. 8, 2023).

51. Elaine Haskins, *Southern Airways Looking at Ways To Resolve Pilot Attrition Issue*, COURIER EXPRESS (Nov. 11, 2023), https://www.thecourierexpress.com/news/southern-airways-looking-at-ways-to-resolve-pilot-attrition-issue/article_bbef0086-7f0e-11ee-af65-9bef6450cd13.html [https://perma.cc/7KLS-PXRE].

TRAPs have received substantial media attention over the past year,[52] but they are by no means the only type of stay-or-pay contract plaguing workers today. Another common example of a stay-or-pay contract is illustrated by the case of Eliahkim Mabute, a nurse from the Philippines who immigrated to the United States in 2022 to work in a hospital in Beaumont, Texas.[53] Mabute was an employee of a nurse staffing company called Medliant, Inc. (Medliant), whose business model is to facilitate immigration for foreign-educated nurses and then place them in American hospitals.[54] Since the pandemic, nurse wages have increased substantially in some regions.[55] But many foreign-educated workers employed in this country on EB-2 or EB-3 green card visas are stuck in jobs with substantially below-market wages because their employers burden them with substantial debts if they depart before the end of a commitment period.[56]

In a complaint filed in November 2023, Mabute alleged that, in exchange for sponsoring his work visa, Medliant required him to sign a contract that committed him to work for the company for 5,200 hours (not counting overtime) or else pay "liquidated damages" in the amount of $2,500 for each month remaining on his contract, as well as any costs that Medliant expended in facilitating his immigration to the United States."[57]

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52. *See* Claire H. Brown, *They Quit Their Jobs. Their Ex-Employers Sued Them for Training Costs*, N.Y. TIMES (Sept. 27, 2023), https://www.nytimes.com/2023/09/27/business/training-repayment-agreement-debt.html [https://perma.cc/2ACJ-K566]; Karla L. Miller, *Work Advice: Training Debt Can Keep Employees Trapped at Jobs*, WASH. POST. (Feb. 9, 2023), https://www.washingtonpost.com/business/2023/02/09/training-repayment-agreement-worker-debt/ [https://perma.cc/4EXU-YDLJ]; Shannon Pettypiece, '*Indentured Servitude': Nurses Hit with Hefty Debt When Trying To Leave Hospitals*, NBC NEWS (Mar. 12, 2023), https://www.nbcnews.com/politics/economics/indentured-servitude-nurses-hit-hefty-debt-trying-leave-hospitals-rcna74204 [https://perma.cc/7DMG-73GB]; Dave Jamieson, *When This Pilot Quit Her Job, Her Employer Billed Her $20,000*, HUFF POST (Jan. 31, 2023), https://www.huffpost.com/entry/ameriflight-pilot-training-repayment-provisions_n_63a2214ee4b04414304bc464 [https://perma.cc/B3R4-RD39]; Caitlin Harrington, *Beware the Contract Clause Loading US Workers With Debt*, WIRED (Aug. 4, 2022), https://www.wired.com/story/contract-clause-loading-us-workers-with-debt/ [https://perma.cc/PV3L-VEX4].

53. Complaint at ¶¶ 43, 53-55, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023). The authors note that all citations to the *Mabute* Complaint reflect well-pleaded allegations and have not been proven at trial.

54. *Id.* at ¶ 2.

55. *See* Zelda Meeker, *Stay Informed with Career Insights from the 2022 Nurse Salary Report*, NURSE.COM BLOG (May 31, 2022), https://www.nurse.com/blog/stay-informed-with-insights-from-2022-nurse-salary-report/ [https://perma.cc/93UR-F4UU].

56. *See* Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, BLOOMBERG (Feb. 2, 2022), https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back [https://perma.cc/FWJ8-VPLL].

57. Complaint at ¶ 24, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023).

The liquidated damages alone could amount to as much as $80,000.[58]

Medliant also told departing nurses that immigration authorities would be informed of any employees who quit before their term was up, telling them that the authorities had "the power to determine that you intended to defraud the government" for failure to fulfill their contract with Medliant.[59] Mabute's complaint alleges that this threat is untrue, that the U.S. government does not enforce private contracts, and the visas on which Medliant nurses immigrate to the United States do not require workers to remain working for the company for a certain period of time.[60] But these threats were a powerful tool to keep employees from leaving their jobs, particularly combined with the damages provisions in the contract.[61]

Mabute soon found that the hospital he was assigned to was significantly understaffed, and his work was difficult and sometimes dangerous.[62] The intense work that he was required to perform caused a flare-up of psoriatic arthritis, for which his doctor prescribed light duty.[63] Medliant informed him that light duty was unavailable and required him to take unpaid leave to recover.[64] Shortly afterward, a Medliant representative called Mabute and told him that although rumors had been circulating about employee discontent, she wanted to remind him that he could not buy out his contract (i.e., pay a penalty to leave) and had no choice but to complete the full hours requirement.[65] If he failed to do so, she said, Medliant would report him to immigration as a fraud, he would be deported and banned from the United States, and he would have to pay Medliant as much as $100,000 in damages.[66]

Mabute worked for Medliant for several more months, but in November 2023, he resigned, filing a lawsuit challenging Medliant's stay-or-pay contract the same day.[67] Two weeks later, on November 21, 2023, Medliant sued him for breach of contract in Texas court.[68]

Ryan's and Mabute's experiences are by no means isolated. As outlined in a series of reports published in December 2023 by Towards Justice and a coalition of other nonprofits, stay-or-pay contracts are used across a broad range of industries, including transportation, health care,

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58. *Id.* at ¶ 6.
59. *Id.* at ¶ 31.
60. *Id.* at ¶ 35.
61. *Id.* at ¶ 36.
62. *Id.* at ¶ 61.
63. Complaint at ¶ 69, Mabute v. Medliant Inc., No. A-23-881156-C (Clark Cty. Nevada Dist. Ct. filed Nov. 8, 2023).
64. *Id.* at ¶ 71.
65. *Id.* at ¶ 72.
66. *Id.*
67. *Id.* ¶ 8.
68. Complaint, Medliant Inc. v. Mabute, No. 1:23-CV-00419 (E.D. Tex. Nov. 21, 2023).

retail, aviation, and tech.[69] Sandeep Vahesan, the legal director of the Open Markets Institute, observed that these contracts can be even more restrictive than a traditional non-compete: "While noncompete clauses prevent employees from working for a competitor or in the same occupation, TRAPs and liquidated damages provisions can stop workers from leaving their employer entirely."[70]

While stay-or-pay contracts can sometimes fly under the radar, regulators have started to take notice. Citing UREAA, the FTC's proposed rule on non-competes recognized that TRAPs can operate as de facto non-competes and proposed banning them alongside non-competes to the extent that "the required payment [for leaving] is not reasonably related to the costs the employer incurred for training the worker."[71] The National Labor Relations Board has signaled that the use of TRAPs can be an unfair labor practice, including by filing an enforcement action against Juvly Aesthetics for several alleged violations of the National Labor Relations Act, including using a TRAP to seek to keep workers from exercising the right to leave their jobs.[72] The Consumer Financial Protection Bureau has suggested that stay-or-pay contracts may violate consumer protection laws.[73] And through a series of enforcement actions, the U.S. Department of Labor has taken the position that some forms of stay-or-pay contracts can be illegal kickbacks against wages in violation of the minimum wage laws.[74]

III. CURRENT ENFORCEMENT OPTIONS

While efforts to comprehensively regulate stay-or-pay contracts alongside non-competes as a form of restrictive covenant are just beginning, using such contracts implicates a range of existing protections

69. *See* Shaw et al., *supra* note 34, at 5.

70. Sandeep Vaheesan, *Beyond Noncompetes, Firms Use These Tactics To Stop Workers from Leaving*, WASH. POST (Apr. 13, 2023), https://www.washingtonpost.com/opinions/2023/04/13/noncompete-agreements-worker-restrictions-employers/ [https://perma.cc/MZC8-XJEU].

71. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt 910).

72. *See Region 9-Cincinnati Issues Complaint Alleging Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs)*, NLRB (Sept. 7, 2023), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non [https://perma.cc/ZTF2-T4G5].

73. *See Consumer Risks Posed by Employer-Driven Debt*, CONSUMER FIN. PROT. BUREAU (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/ [https://perma.cc/XPS5-QR5D].

74. *See* Press Release, Dep't of Lab., Department of Labor Seeks Court Order to Stop Brooklyn Staffing Agency from Demanding Employees Stay 3 Years or Repay Wages (Mar. 20, 2023), https://www.dol.gov/newsroom/releases/sol/sol20230320 [https://perma.cc/AZ7E-GADE] (describing lawsuit seeking injunction forbidding an employer from seeking to recover lost profits, attorneys' fees, and arbitration costs from departing worker).

and authorities. These authorities provide a useful, if somewhat patchwork, set of tools to combat abusive employer-driven debt.

One law that is proving powerful in limiting the use of stay-or-pay contracts to keep workers from leaving their jobs is the federal Fair Labor Standards Act (FLSA).[75] While primarily a minimum wage law, the FLSA recognizes that it is not enough to pay the minimum wage; instead, it must be paid "finally and unconditionally" or "free and clear."[76] Accordingly, an employer violates the FLSA when it requires an employee to kick back "directly or indirectly to the employer . . . for the employer's benefit the whole or part of the wage delivered to the employee."[77] Deductions can be unlawful whether they are actual (i.e., taken directly out of a paycheck) or "de facto" (i.e., that the employee is required to pay an expense that is legally the employer's to bear).[78] Moreover, when employers pay wages subject to a potential kickback that would bring those wages below the minimum for a given pay period, they fail to pay the minimum wage "free and clear," which does not require that an employer actually *collect* a kickback.[79] Instead, the FLSA's implementing regulations provide that wages that are not paid "finally and unconditionally"—such as wages paid subject to the condition that the employee continue to work for the employer for additional workweeks—"cannot be considered to have been paid by the employer and received by the employee."[80]

The FLSA provides a powerful tool to combat employer's efforts to weaponize contract law against workers. In the typical contracting relationship, a party can require another to provide services for a period of time and then sue for breach if the other party terminates the contract

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75. 29 U.S.C. § 201, *et seq.*

76. 29 C.F.R. § 531.35.

77. *Id.*; *see also* Ramos Barrientos v. Bland, 661 F.3d 587, 594 (11th Cir. 2011) (holding that the FLSA "prohibits any arrangement that 'tend[s] to shift part of the employer's business expense to the employees' . . . to the extent that it reduce[s] an employee's wage below the statutory minimum." (quoting Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972)); Arriaga v. Fla. Pac. Farms, LLC, 305 F.3d 1228, 1235–36 (11th Cir. 2002) (holding that unreimbursed costs that employer was legally required to bear were "de facto deductions" from employee wages); Davis v. Colonial Freight Sys., Inc., No. 3:16-CV-674, 2017 WL 11572196, at *6 (E.D. Tenn. Nov. 22, 2017) ("[B]ecause he alleges Defendants required repayment of alleged wages already delivered to him, Plaintiff pleads sufficient facts to support a claim that Defendants did not deliver the minimum wage 'free and clear.'"); Perez v. Westchester Foreign Autos, Inc., No. 11 CIV. 6091 ER, 2013 WL 749497, at *9 (S.D.N.Y. Feb. 28, 2013) (holding the "free and clear" requirement was violated by a policy that required employees to pay back a draw on commission).

78. *See Arriaga*, 305 F.3d at 1235–37.

79. *See, e.g.*, Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199; *Davis*, 2017 WL 11572196, at *6; *Perez*, 2013 WL 749497, at *9.

80. 29 C.F.R. § 531.35.

early.[81] Damages for such a breach could include "expectation damages," which intend to put the non-breaching party in as good of a position as the non-breaching party would have been in were it not for the breach.[82] Under this framework, employers argue that they can recover the amounts they would have received had the worker not departed (their "lost profits") or for the amounts they expend to respond to the breach (like the costs of hiring a replacement).[83] But recovering these amounts would turn the minimum wage laws on their head. In every employment relationship, every worker would be under constant threat of having to pay back their wages if they terminate their employment due to the headaches to employers of worker turnover. The U.S. Department of Labor, including in a case filed on behalf of a Towards Justice client, has expressly articulated that these practices violate minimum wage laws.[84]

However, the FLSA's reach is limited to prohibiting employers from recouping debts when those debts are primarily for the employer's benefit.[85] Thus, courts have found that training which provides some form of transferrable licensing and credentials does not fall within the statute's authority to regulate.[86] While it is sometimes apparent that training primarily benefits the employee (e.g., when an employer pays for an employee's master's in business administration degree at an accredited business school) or the employer (e.g., standard on-the-job training involving work for paying customers), in many cases, the primary beneficiary question can be resource-intensive, which somewhat limits the FLSA's utility, particularly in cases involving low-wage workers.

In addition to wage laws (and sometimes as an alternative), federal consumer laws may apply to stay-or-pay contracts, which employment contracts often frame as a forgivable consumer loan from employer to employee without attention to any of the legal requirements for such loans.[87] One potential hook available to private litigants who cannot enforce all of the Dodd-Frank Act's protections against unfair practices in the consumer lending space is the Truth In Lending Act (TILA),[88] which requires lenders to provide certain disclosures in connection with

81. *See* 17 AM. JUR. 2D *Contracts* § 702 (1964).

82. RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. L. INST. 1981).

83. 17 AM. JUR. 2D *Contracts* § 711 (1964).

84. *See* Brief for Dep't of Just. as Amicus Curiae in Support of Neither Party, Burrell v. Staff, 60 F. 4th 25 (3d Cir. 2023) *cert. denied sub nom.* Lackawanna Recycling Ctr. v. Burrell, 143 S. Ct. 2662 (2023).

85. *See, e.g.*, Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972) (discussing that debts cannot "tend[] to shift part of the employer's business expense to the employees").

86. *See, e.g.*, Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir. 2010); Bland v. Edward D. Jones & Co., 375 F. Supp. 3d 962, 977 (N.D. Ill. 2019).

87. *See* 12 C.F.R. § 1026.1.

88. 15 U.S.C. § 1601 *et seq.*

offering a loan, including any finance charge and annual percentage interest rate.[89] As with the FLSA, however, TILA's reach may be limited by the unique properties of stay-or-pay contracts. For example, TILA applies only to loans payable in installments or loans that include a finance charge.[90] Many stay-or-pay loans are due in a lump sum shortly after—or even before—the end of employment.[91]

A third possible recourse for employees seeking relief from a stay-or-pay contract is the Trafficking Victims Protection Act (TVPA),[92] a federal law prohibiting forced labor.[93] The TVPA was enacted to address "a broad range of conduct,"[94] including "increasingly subtle" methods of forced labor such as "nonviolent" and "psychological" coercion.[95] Under the TVPA, an employer, among other things, may not use the threat of "serious harm" or "abuse of legal process" to coerce workers into continuing to work for them.[96] Serious harm is explicitly defined to include financial harm, as well as psychological and reputational damage.[97]

Not all stay-or-pay contracts rise to the level of forced labor. Still, courts have concluded in several cases that the threat of collecting a large debt against a departing worker can be a threat of serious harm, and the threat of filing litigation or arbitration over such a debt can be threatened abuse of legal process.[98] TVPA cases are prevalent in the foreign nurse staffing industry, where employers frequently seek to recover damages of $20,000 or more from nurses who desire to quit their jobs and routinely threaten them with lawsuits and other consequences to compel them to stay.[99] Although it is unnecessary to state a claim under the statute, courts

89. *See* 12 C.F.R. § 1026.6(a).

90. *Id.* § 1026.1(c)(1)(iii).

91. Since the value of the product or service being provided in a stay-or-pay contract (e.g., training) is often highly inflated, it may be the case that this inflated valuation constitutes a finance charge in some stay-or-pay contracts.

92. 22 U.S.C. § 7101.

93. *See id.* § 7101(a).

94. Burrell v. Staff, 60 F. 4th 25, 37 (3d Cir. 2023), *cert. denied sub nom.* Lackawanna Recycling Ctr. v. Burrell, 143 S. Ct. 2662 (2023).

95. United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011) (citation omitted); United States v. Bradley, 390 F.3d 145, 150, 156 (1st Cir. 2004), *rev'd on other grounds*, 545 U.S. 1101 (2005).

96. 18 U.S.C. § 1589(a)(2)–(4).

97. *Id.* § 1589(c)(2).

98. *See* United States v. Dann, 652 F.3d 1160, 1169 (9th Cir. 2011).

99. *See, e.g.*, Salcedo v. RN Staff Inc., No. 121CV01161SEBDLP, 2023 WL 2403832, at *11 (S.D. Ind. Mar. 8, 2023) (noting that a $20,000 liquidated damages provision is sufficient to plead serious harm); Vidal v. Advanced Care Staffing, LLC, No. 122CV05535NRMMMH, 2023 WL 2783251, at *14 (E.D.N.Y. Apr. 4, 2023) (noting that unspecified damages including "lost profits" and "expenses" were sufficient to plead serious harm); Paguirigan v. Prompt Nursing Emp. Agency LLC, 286 F. Supp. 3d 430, 438 (E.D.N.Y. 2017) (noting that threats of payment of $25,000 are "more than enough to rise to the level of harm necessary to state a TVPA claim").

often find allegations of some form of bait-and-switch or an especially punishing working environment compelling.[100]

Finally, state unfair competition laws or unfair and deceptive acts and practices laws—which often incorporate existing state laws banning non-competes—may also restrict the use of stay-or-pay contracts. For example, Texas and Tennessee courts have recognized that state prohibitions on "restraints of trade" apply to contracts that restrict employee mobility by imposing economic penalties on employees seeking to change jobs.[101] And other states, like Colorado, have explicitly identified how and when TRAPs violate their own non-compete laws.[102] However, not all states have such laws, and even in those states that do, some courts have taken the position that a financial penalty does not restrict employee mobility.[103]

IV. THE FUTURE OF PROTECTING WORKER MOBILITY

In light of the current landscape, state and federal policymakers must set up clear and bright-line rules regarding using stay-or-pay contracts. The existing patchwork of state and federal law lends considerable uncertainty as to whether stay-or-pay contracts are enforceable and, if so, under what circumstances. As both research and experience demonstrate, this uncertainty has a substantial chilling effect on employees' exercise of their rights, even when their contracts are entirely unenforceable.[104] Research into non-competes shows little difference in the effect of including a non-compete in an employment contract in states where non-competes are unenforceable versus states where they are enforceable.[105] This is because worker choices about mobility are generally driven by fears about the likelihood of court enforcement of a non-compete, the likelihood that an employer will sue to enforce the non-compete, and

100. *See, e.g.*, Carmen v. Health Carousel, LLC, No. 1:20-cv-313, 2023 WL 5104066, at *7; Vidal v. Advanced Care Staffing, LLC, No. 1-22-cv-05535-NRM-MMH, 2-23 WL 2783251, at *5 (E.D. N.Y. Apr. 4, 2023).

101. Peat Marwick Main & Co. v. Haass, 818 S.W.2d 381, 388 (Tex. 1991); Spiegel v. Thomas, Mann & Smith, P.C., 811 S.W.2d 528, 530–31 (Tenn. 1991).

102. *See* COLO. REV. STAT. § 8-2-113 (2023).

103. *See, e.g.*, Heder v. City of Two Rivers, 295 F. 3d 777, 782 (7th Cir. 2002); McFall v. NCH Healthcare Sys., No. 2:23-cv-572-SPC-KCD, 2024 WL 111920, at *3 (M.D. Fla. Jan. 10, 2024) (holding that the program requiring employee to pay for training expenses was not a forbidden restraint of trade).

104. *See* Robin Kaiser-Schatzlein, *Pay Thousands To Quit Your Job? Some Employers Say So*, N.Y. TIMES (Nov. 20, 2023), https://www.nytimes.com/2023/11/20/magazine/stay-pay-employer-contract.html [https://perma.cc/EJE4-F3JB].

105. *See FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, *supra* note 7; Evan Starr et al., *The Behavioral Effects of (Unenforceable) Contracts*, 36 J. LAW, ECON., & ORG. 633, 636 (2020).

reminders about the existence of the non-compete from the employer rather than an actual court order.[106]

Furthermore, while basic economic theory suggests that an employer will only file an enforcement lawsuit if "litigation is likely to result in enforcement and is not overly costly,"[107] this disregards that employers who sue their employees may see themselves as not simply trying to collect money they believe they are owed from the employee they sue, but also to send a message to current employees that quitting has consequences. The chief executive officer of Southern articulated this with unusual candor when he told a local newspaper that the company needed to "use a combination of carrots and sticks" to keep pilots from leaving their jobs for better ones and described the lawsuits filed to enforce the company's TRAPs as "trying to control . . . the behavior" of pilots.[108] Similarly, Mabute's complaint against Medliant alleges that when the company began to suspect that he was discontented at his job, a company representative called him and told him that another employee who had left the company before his contract was up owed $100,000.[109]

Meanwhile, the costs to workers of even an unsuccessful enforcement lawsuit are often astronomical, and defending against litigation is frequently out of reach.[110] As a result, employees are generally stuck choosing between proceeding pro se against a represented employer or paying a lawyer an hourly rate likely to exceed the challenged debt quickly. Even for a represented litigant who can afford to pay a lawyer, a lawsuit is an extraordinary commitment, requiring time spent responding to discovery, sitting for a deposition, and traveling to hearings or trial.

As such, in practice, it rarely matters if a debt is unlawful—getting to that outcome is simply too hard for the average worker. Meanwhile, the risk for the employer is relatively limited: The worst-case scenario is frequently no more than a ruling that a stay-or-pay provision in a contract is unenforceable, leaving the employer to walk away from the contract with no consequences other than perhaps the attorneys' fees incurred in trying to defend it. As a result of these deeply skewed incentives, the vast majority of employer-driven debt cases end up in default judgments or settlements where the worker is forced to cave to the employer's demands.[111]

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106. Starr et al., *supra* note 105.

107. *Id.* at 634.

108. Haskins, *supra* note 51.

109. Complaint at ¶ 72, Mabute v. Medliant Inc., No. 2:23-cv-02148-APG-DJA (D. Nev. filed Dec. 28, 2023).

110. *See, e.g.*, Haskins, *supra* note 51.

111. OFF. OF GEN. COUNSEL, NLRB, MEMORANDUM GC 23-08, NON-COMPETE AGREEMENTS THAT VIOLATE THE NATIONAL LABOR RELATIONS ACT (2023).

In this context, two overarching principles become clear. First, to be effective, any law regulating restrictive employment agreements must provide relative certainty as to whether and when stay-or-pay contracts are permissible and when they are not. And second, it is not enough to simply make contract terms imposing improper employer-driven debt voidable or unenforceable.

Importantly, UREAA recognizes stay-or-pay contracts as a type of restrictive employment agreement, as they "probihit[], limit[], or set[] conditions on working elsewhere after the work relationship ends."[112] It explicitly addresses TRAPs, providing in § 2 that such contracts must be prorated, last no longer than two years after the completion of training, and be limited to "special training," defined as:

> instruction or other education a worker receives from a source other than the employer that: (A) is designed to enhance the ability of the worker to perform the worker's work; (B) is not normally received by other workers; and (C) requires a significant and identifiable expenditure by the employer distinct from ordinary on-the-job training.[113]

Beyond TRAPs, UREAA's discussion of stay-or-pay contracts is substantially more limited. However, it recognizes that any agreement that requires an employee to pay their employer to quit their job operates as a restraint on employment.[114] UREAA's Section 16, which provides for awarding attorneys' fees to a party that successfully challenges a restrictive employment agreement,[115] is especially crucial in discouraging employers from including unlawful stay-or-pay provisions in their employment contracts. The statutory damages provision is also helpful in this regard, although the default amount of $5,000 per violation is unlikely sufficient for workers challenging stay-or-pay contracts, at least not in the absence of attorney's fees.[116]

CONCLUSION

Employers seek to justify stay-or-pay contracts based on the purported "freedom of contract." Just like other contracting parties, they assert employers should be able to impose consequences on the other party to the contract in the case of a breach. But that analysis turns the employment relationship on its head. The freedom to move between

112. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 cmt. (UNIF. L. COMM'N 2021).

113. *Id.* § 2(15).

114. *See id.* § 2 cmt. (noting that an arrangement where an "[e]mployee agrees to pay employer $1,000 if she leaves employment without employer's permission" would be unlawful under UREAA).

115. *Id.* § 16(c).

116. *Id.* § 16(e).

employers for higher pay or better treatment is one of the foundations of worker bargaining power and dignity and is the basis for prohibitions against indentured servitude, peonage, and non-compete agreements. Employers should not be permitted to sidestep these basic principles through fine-print contract terms and damages actions. The problem is that right now our legal system is too stacked against workers to give them a fair shot to fight back. Most have no meaningful opportunity to negotiate over contracts or hire a lawyer when hauled into court. In this context, even unenforceable contractual terms can exert extraordinary harm. We must implement policies with this fact in mind and establish clear and bright-line rules against coercive contracts that restrict worker mobility, including stay-or-pay contracts.

WHY WE NEED A NATIONAL ABSOLUTE NONCOMPETE BAN: RESTRICTIVE COVENANTS FROM INNOVATION, ANTIDISCRIMINATION & COMPETITION POLICY PERSPECTIVES

Orly Lobel[*]

Abstract

Noncompete law stands at the intersection of competition, equality, innovation, and employment policy. While the Uniform Restrictive Employment Agreements Act (UREAA or the Act) is a positive step forward in curtailing the use of restrictive covenants, the Act is limited in its scope because it adopts a partial noncompete ban rather than a comprehensive ban. Because noncompetes harm not only workers by suppressing mobility and wages but also innovation, entrepreneurship, competition, equality, and market growth, enforcing noncompetes for higher-skilled workers can be particularly harmful from an economic policy perspective.

The research on noncompetes—which has become robust in recent years—supports a national, absolute ban on all noncompetes at all employment levels. This Article, written for the University of Florida Levin College of Law's Journal of Law & Public Policy symposium on UREAA, argues that an absolute ban on noncompetes is superior to the standard of reasonableness that the UREAA would adopt for higher-skilled employees. At the same time, it explains why the Act rightfully tackles not only noncompetes but also the family of restrictive covenants that limit workers' ability to compete post-employment. This Article describes a growing body of academic, empirical, experimental, and theoretical research that demonstrates that the common use of boilerplate employment contracts, which bundle restrictive clauses—including noncompete, non-disclosure, non-solicit, non-poaching, non-dealing, and non-disparagement clauses, with choice-of-law, choice-of-forum, and severability clauses—have detrimental effects on mobility and innovation. This Article concludes that a national solution is superior to a uniform act adopted by states because the research shows that state variation, choice-of-law and choice-of-forum clauses, and misinformation among workers have led to noncompetes and other restrictive covenants being highly prevalent even in states that do not enforce them. Therefore, this Article commends the Federal Trade Commission's recent action in implementing the rule to ban all noncompetes and de facto noncompetes in the United States.

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INTRODUCTION

Noncompete law stands at the intersection of competition, equality, innovation, and employment policy. While the Uniform Restrictive Employment Agreements Act (UREAA or the Act)[1] is a positive step forward in curtailing the use of restrictive covenants, the Act is too limited in its scope because it adopts a partial noncompete ban rather than a comprehensive ban.[2] The UREAA adopts an employment law contract perspective while neglecting the other policy aspects of innovation, equality, and competition that are inherently part of restrictive covenants law.[3] The Act would make noncompetes unenforceable only for low-wage workers while allowing "reasonable" noncompetes in the higher-skilled, higher-paid labor market.[4] Because noncompetes suppress workers' mobility and wages and reduce innovation, entrepreneurship, competition, equality, and market growth, enforcing noncompetes for higher-skilled workers can also be particularly harmful from an economic policy perspective. The research on noncompetes—which has become robust in recent years—supports a national, absolute ban on all noncompetes, not just for low-wage workers but at all levels of employment.[5]

This Article argues that an absolute ban on noncompetes is superior to the standard of reasonableness that the UREAA would adopt for higher-skilled employees. At the same time, it explains why the Act rightfully tackles not only noncompetition but the entire family of restrictive covenants that limit workers' ability to compete post-employment. This Article presents a growing body of academic research,

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

2. *See id.* § 3.

3. *See id.*

4. *Id.* § 7.

5. Evan Starr, *Noncompete Clauses: A Policymaker's Guide through the Key Questions and Evidence*, ECON. INNOVATION GRP. (Oct. 31, 2023), https://eig.org/noncompetes-research-brief/ [https://perma.cc/8TEB-8GAT].

empirical, experimental, and theoretical, which demonstrates that the common use of boilerplate employment contracts, which bundles restrictive clauses—including noncompete, non-disclosure, non-solicit, non-poaching, non-dealing, and non-disparagement clauses, with choice-of-law, choice-of-forum, and severability clauses—have detrimental effects on mobility and innovation. New empirical research shows that this type of bundling of restrictive provisions in employment contracts is exceedingly common, covering over eighty percent of workers and seventy percent of firms.[6] Moreover, because it is well documented that employers often require employees to sign noncompetes in jurisdictions with noncompete bans, the Act rightfully provides an enforcement mechanism and remedies for inserting invalid clauses into employment contracts.[7] Finally, this Article argues that a national solution is superior to a uniform act adopted by states because the research shows that state variation, choice-of-law and choice-of-forum clauses, and misinformation among workers have led to noncompetes and other restrictive covenants being highly prevalent even in states that do not enforce noncompetes.

This Article proceeds as follows. Part I presents contemporary research on restrictive covenants and explains why an absolute ban on noncompetes at all levels of employment is the optimal policy. Part II argues that a ban focused solely on prototypical noncompetes fails to address how other restrictive covenants operate as de facto noncompetes to suppress talent mobility. Part III describes the 2024 Federal Trade Commission's (FTC) rule banning all noncompetes and de facto noncompetes in the United States and explains why this national ban is superior to a uniform state law.

I. THE HARMS OF RESTRICTIVE COVENANTS & WHY AN ABSOLUTE BAN IS NEEDED

An estimated thirty million American workers are bound by noncompetes, ranging from volunteers to executives.[8] These restrictions on mobility not only harm workers but also have adverse effects on our entire economy and society. When workers can move between jobs easily, the economy performs better, as employees are permitted to find employers that most value their skills (and vice versa). Noncompetes

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6. *See* Natarajan Balasubramanian et al., *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (Mar. 2021) (unpublished manuscript at 1), https://extranet.sioe.org/uploads/sioe2021/balasubramanian_starr_yamaguchi.pdf [https://perma.cc/VA7Q-SDTN].

7. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 16(e) (UNIF. L. COMM'N 2021).

8. *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC, https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf [https://perma.cc/B5AB-27MN] (last visited Feb. 18, 2024).

hinder competition, innovation, wages, and equality. Noncompetes and related restrictive agreements have been found to negatively impact employees, entrepreneurial activities, and the growth of industries and regions.[9]

Implementing and enforcing noncompetes results in (1) decreasing general worker mobility; (2) steering outgoing employees away from competitors and directing them to non-competing sectors in varied industries; (3) diminishing entrepreneurship, stifling innovation in startups, slowing job growth; and (4) constricting the job market, pushing down salaries, and perpetuating gender and racial wage disparities. In my book, *Talent Wants to be Free*, and a series of research articles, I argue that regions that care about innovation and growth should adopt policies that ensure all employees—whether low-skilled or high-skilled—can transition between competitors.[10] This approach promotes various interconnected objectives of economic progress, encompassing the spread of knowledge, robust networks, job matching quality, benefits of business clusters, employee motivation and behaviors, reward and punishment systems, entrepreneurial spirit, attracting talent, wage-setting monopolies and wage dynamics, and fostering equality.[11] Noncompetes stifle workforce movement, impede the spread of knowledge, monopolize markets, and diminish workers' motivation to bolster their professional skills. Furthermore, noncompetes hinder the emergence of new businesses. Owing to curtailed mobility, salaries in regions upholding noncompete agreements tend to plateau or even diminish.[12] Contrarily, states that void noncompetes attract skilled professionals because these states value experience, expertise, and the freedom to transition between jobs.

Empirical research on labor market concentration and the behavioral effects of post-employment restrictions also suggests that restrictive

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9. *See id.*

10. *See* ORLY LOBEL, TALENT WANTS TO BE FREE 5 (2013); *see also* Orly Lobel, *Non-Competes, Human Capital Policy & Regional Competition*, 45 J. CORP. L. 931, 947 (2021) (describing ten distinct benefits in regions that ban noncompetes).

11. *See generally* On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833 (2013) (finding behavioral and dynamic growth effects that explain the advantage of regions with fewer restrictions on human capital); On Amir & Orly Lobel, *How Noncompetes Stifle Performance*, HARV. BUS. REV. (Jan.–Feb. 2014), https://hbr.org/2014/01/how-noncompetes-stifle-performance [https://perma.cc/3FCP-7KPH] (explaining study findings that workers exhibit less motivation and worse performance under noncompete conditions).

12. *See* EVAN STARR, THE USE, ABUSE, AND ENFORCEABILITY OF NON-COMPETES AND NO-POACH AGREEMENTS 7 (2019); 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, 349 (2020); Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study* (Aug. 5, 2020) (unpublished manuscript at 8), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3172477 [https://perma.cc/2Y69-86YC].

covenants have a disproportionate effect on certain protected identities, primarily women, minorities, and older workers.[13] These protected identities often already have greater employment search friction—their geographic constraints are, on average, greater, and noncompetes artificially add to these frictions.[14] Women, for example, more frequently face the burdens of coordinating dual careers, considering family geographical ties, and navigating job market re-entry after family leave.[15] The vicious circle of a gender pay gap means that the wife—often the lower earner—makes her search secondary to the husband's primary job search.[16] Moreover, women and minorities have disproportionate non-monetary preferences about workplace culture, such as working in a diverse, harassment-free, and equal-opportunity corporate environment.[17] Post-employment restrictions foreclose this valuable competition over corporate culture preferences. A recent analysis has shown that noncompetes affect women more severely than men by more substantially curbing their mobility, reducing their pay, and postponing their ambitions to establish and lead their businesses.[18]

Debates about noncompetes are often distorted through the lens of labor versus business.[19] The benefit of employee mobility has been framed as a worker's right to pursue her profession, while the benefit of restriction is framed as a corporation's right to protect its investment in intangible property and training.[20] A better framing is that mobility benefits regions, including firms, but without a mobility policy, firms will attempt to prevent their employees from moving to competitors.[21] In optimal competitive market equilibrium, every firm should eschew this anti-competitive impulse in advance so everyone can benefit from a continuous, high-quality labor pool over time. The individual desires of

13. Orly Lobel, *Exit, Voice & Innovation: How Human Capital Policy Impacts Equality (& How Inequality Hurts Growth*, 57 HOUS. L. REV. 781, 806 (2020).

14. *See id.* at 801.

15. *See id.*

16. Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Market*, 59 SANTA CLARA L. REV. 663, 688 (2019).

17. *See* Emily Field et al., *Women in the Workplace 2023*, MCKINSEY & COMPANY (Oct. 5, 2023), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace# [https://perma.cc/MZ74-H2AM].

18. *See* Matt Marx, *Employee Non-compete Agreements, Gender, and Entrepreneurship*, 33 ORG. SCI. 1756, 1756 (2021).

19. Mark Lemley & Orly Lobel, *Banning Noncompetes is Good for Innovation*, HARV. BUS. REV. (Feb. 6, 2023), https://hbr.org/2023/02/banning-noncompetes-is-good-for-innovation [https://perma.cc/G4RU-9M8J].

20. *See* Kathryn Anne Edwards, *Worker Mobility in Practice: Is Quitting a Right, or a Luxury?* ECON. POL'Y INST. (May 12, 2022), https://www.epi.org/unequalpower/publications/worker-mobility-in-practice/ [https://perma.cc/Y994-YJ7X].

21. *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, 578 (1999).

companies to limit competition create a collective-action issue. Therefore, a law is needed to address this collective action failure, banning noncompetes from fueling competition and growth across all industries and all employment levels.

II. DE FACTO NONCOMPETES

A formal noncompete clause hinders an employee's ability to engage (1) in competitive work; (2) in a geographic area; and (3) for a period of time following their departure from a current employer.[22] Notably, other restrictive covenants that frequently appear in conjunction with a formal noncompete in an employment contract can also prevent former employees from competing with their employer.[23] These include non-solicitation clauses, which prohibit former employees from soliciting an employer's customers; non-poaching clauses, which prohibit the hiring of former co-workers; broad non-disclosure agreements (NDAs), which claim much of the employee's knowledge and skills as proprietary information; and broad pre-innovation assignment clauses, which transfer all of an employee's inventions and creativity back to the employer, sometimes even after the employee has left.[24]

The UREAA covers any agreement between an employer and worker that "prohibits, limits, or sets a condition on" working after the relationship ends, including noncompetes, nonsolicitation agreements, no-business agreements, no-recruit agreements, confidentiality agreements, payment-for-competition agreements, and training-reimbursement agreements.[25] The UREAA provides that a confidentiality agreement is "prohibited and unenforceable" *unless* the worker may use and disclose information that: "(1) arises from the worker's general training, knowledge, skill, or experience, whether gained on the job or otherwise; (2) is readily ascertainable to the relevant public; or (3) is irrelevant to the employer's business."[26] This requirement is an important move toward banning noncompetes and any arrangement designed or used to suppress competition in the talent market.

Moreover, an important strength of the UREAA is that it includes an enforcement mechanism. The Act establishes statutory damages of $5,000 per worker per agreement for an employer who knows or

22. Lobel, *supra* note 13, at 791.

23. *See* Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 893 (2021).

24. *See id.* at 894; Orly Lobel, *Enforceability TBD: From Status to Contract in Intellectual Property Law*, 96 B.U. L. REV. 869, 875 (2016); Orly Lobel, *The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property*, 93 TEX. L. REV. 789, 813 (2015).

25. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 (UNIF. L. COMM'N 2021).

26. *Id*. § 9.

reasonably should know the Act prohibits the agreement.[27] It also allows for an action by the state attorney general or a private right of action (with attorney's fees if successful).[28] The availability of action is vital because empirical findings suggest the importance of understanding mobility-in-action and how noncompetes and other restrictive covenants extend beyond what the law currently allows.[29] California's policy of non-enforcement of noncompetes, for example, is underenforced. California employers insert noncompetes into their employment contracts at rates similar to those of non-California employers.[30] Unenforceable noncompetes still chill the movement of employees. Most invalid contracts will not be tested in court. Instead, they will have a terrorem effect on employees. Evan Starr and his collaborators have found, after surveying 11,500 labor force participants, that signing a noncompete results in less mobility and redirects mobility away from competitors to noncompetitors whether or not the noncompete was signed in a state that enforces noncompetes.[31] A private right of action and a public proactive enforcement mechanism with real remedies for inserting unlawful clauses into employment contracts are important steps to reducing such noncompliance harms.

III. THE FTC RECENTLY IMPLEMENTED RULE AS SUPERIOR TO A UNIFORM STATE LAW

In the recent past, the use of noncompetes was regulated by a confusing and inconsistent patchwork of state laws. Most states enforced noncompetes based on a vague "reasonableness" standard, leading to uncertainty and legal disputes.[32] Even in states where noncompetes were categorically banned, some employers employed unlawful noncompetes as a scare tactic.[33] Moreover, employers in noncompete-banning states may have used a choice-of-law provision in contracts to impose the law of a noncompete-enforcing state, effectively bypassing their state's regulation. This complexity added to the overall problem, discouraging workers from challenging unreasonable noncompetes and restricting

27. *Id*. § 16(e).

28. *Id*.

29. *Id.* at prefatory note.

30. Norman Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VANDERBILT L. REV. 1, 34 (2015).

31. *See* Evan Starr et al., Noncompetes in the U.S. Labor Force (Oct. 12, 2020) (unpublished manuscript at 7) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [https://perma.cc/2ZTF-XEZ6].

32. *See* Sterling Miller, *Ten Things: Drafting an Enforceable Non-Compete Agreement*, TEN THINGS YOU NEED TO KNOW AS IN-HOUSE COUNS. (Feb. 13, 2019), https://tenthings.blog/2019/02/13/ten-things-drafting-an-enforceable-non-compete-agreement/ [https://perma.cc/D5KX-UREE].

33. Starr et al., *supra* note 31, at 2.

mobility. As my co-author Mark Lemley and I recently argued in an article in the Harvard Business Review, a national solution was needed and has now since been implemented.[34]

On April 23, 2024, the FTC passed a new rule that effectively makes noncompetes nationally void and unlawful.[35] The rule enforces a comprehensive ban on new noncompetes—nationwide, in all industries, and for all levels of employment.[36] The final rule allows existing noncompetes involving senior executives to remain in effect, as these individuals are less likely to suffer the harms associated with noncompetes that affect other workers.[37] However, existing noncompetes for non-executive workers become unenforceable after the rule's effective date. [38]

The final rule also includes contractual terms in its ban, resulting in de facto noncompete clauses.[39] The FTC rule adopts a "functional" test for deciding what constitutes a noncompete.[40] Under this test, a "non-disclosure agreement" is possibly a de facto noncompete clause if it is so broadly worded "that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer."[41]

The FTC also recognizes the need to address other restrictive covenants, such as unreasonable Training Reimbursement Agreements (TRAs), Nonsolicitation Clauses (NSCs), Nondealing Clauses (NDCs), and Nonpoaching Clauses (NPCs). These restrictive covenants may "function to prohibit" employees form pursuing or accepting other work or creating a business after their employment ends.[42] As a result, they

34. *See* Lemley & Lobel, *supra* note 19.

35. *See Chamber of Commerce of the United States v. FTC*, 2024 U.S. Dist. LEXIS 81436 at 3.

36. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (proposing noncompete clauses be deemed an unfair and unlawful method of competition engaged by employers).

37. 1 Labor & Employment in California § 1-4 (2024) at 87.

38. *Id.*

39. Non-Compete Clause Rulemaking, 88 Fed. Reg. 3482, 3509 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

40. *Id.*

41. *Non-Compete Clause Rulemaking*, FTC (Jan. 3, 2023), https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking ("[Proposed rule § 910.1(2)(i) states:] Functional test for whether a contractual term is a non-compete clause. The term non-compete clause includes a contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer. For example, the following types of contractual terms, among others, may be de facto non-compete clauses: . . . A non-disclosure agreement between an employer and a worker that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.").

42. *See id.*

would satisfy the FTC's definition of a noncompete clause and would therefore be prohibited. [43] In upcoming legal challenges to the final rule, businesses will likely argue that noncompete clauses do not qualify as an "unfair method of competition" under the Federal Trade Commission Act.[44] Additionally, they will presumably contend that the FTC does not have the power to adopt the rule under the "major questions doctrine," which requires explicit statutory authority for agency rules with significant economic and political impacts or that interfere with areas traditionally governed by state law..[45]

Our national economy relies increasingly on a workforce that spans the entire country.[46] Many workers are employed by companies with a national presence, and the rise of remote work has made many jobs accessible from anywhere.[47] In this environment of growing opportunity, employees need the guarantee of labor mobility. The patchwork of state noncompete laws hinders our national labor force and economy. As illustrated above, noncompetes are unfair to workers, hinder competition, and suppress economic growth. A federal ban on noncompetes and addressing other restrictive covenants is necessary to alleviate the negative impact of these agreements and promote a more dynamic and equitable labor market. The FTC's recent implementation of this ban is a commendable step in the right direction.

CONCLUSION

This Article makes the case that although the UREAA is a step in the right direction and signals a new era of understanding the harms of noncompetes, it is insufficient. Banning restrictive agreements solely in low-wage employment markets ignores that these agreements harm workers at all levels and cause market-level economic harm. A national absolute ban is the superior solution to the sticky problem of anti-competitive post-employment restrictions to protect workers, fuel innovation, and support market competition and economic growth.

43. *See id.*

44. 1 Organizing Corp & Other Business Enterprises § 9.12 (2024) at 61.

45. *Id.*

46. *See* Nicholas Bloom et al., *Survey: Remote Work Isn't Going Away – and Executives Know It*, HARV. BUS. REV. (Aug. 28, 2023), https://hbr.org/2023/08/survey-remote-work-isnt-going-away-and-executives-know-it [https://perma.cc/P9VK-Z4RL].

47. *See id.*

NONCOMPETE LAW, THE UNIFORM ACT, AND THE FTC PROPOSED RULE

Stewart J. Schwab[*]

Abstract

This Article summarizes the Uniform Restrictive Employment Agreement Act and compares it to the proposed Federal Trade Commission rule that bans noncompete agreements. The Uniform Act regulates the whole family of restrictive employment agreements, including noncompetes but also confidentiality agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training-repayment agreements. By contrast, the FTC rule covers only noncompete agreements and their functional equivalents. Both the Uniform Act and the FTC rule cover all workers, including employees and independent contractors. While the FTC rule bans noncompetes for all workers, the Uniform Act bans agreements for low-wage workers (defined as those earning less than the state average annual wage) and regulates but does not ban restrictive agreements for higher-wage workers. For these latter agreements, the Uniform Act requires employers to give workers advance notice. The Uniform Act also establishes clear substantive criteria for each type of agreement, including that the restrictive period cannot last more than a year in most cases. The Uniform Act also establishes penalties and allows a private right of action. The FTC rule has more limited enforcement procedures and no private right of action.

This Article concludes that, on balance, the Uniform Act does a better job of enhancing worker mobility while protecting legitimate employer interests. Additionally, this Article suggests that the FTC include a reverse preemption clause in its final rule so that a state legislature that enacts the Uniform Act would not have to comply with the total noncompete ban of the FTC rule.

The bulk of this Article was written before the FTC issued its final rule. In a postscript, this Article analyzes the role of the Uniform Act under two scenarios: First, the final FTC rule never goes into effect because a court enjoins it or a subsequent administration rescinds it; Second, the FTC rule remains in enforce indefinitely. Under either scenario, the Uniform Restrictive Employment Agreement Act could play a useful role and state legislatures should consider adopting the Act.

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INTRODUCTION

Noncompete law is hot. Since 2018, almost two dozen states have enacted statutes regulating employee noncompete agreements, including near-total bans on noncompetes by Minnesota and New York in 2023 (the latter vetoed by the governor).[1] In 2021, the Uniform Law Commission (ULC) promulgated the Uniform Restrictive Employment Agreement Act (the Uniform Act).[2] In 2023, the Federal Trade Commission (FTC) issued a notice of proposed rulemaking that would make all noncompete

1. S. 3100A, 2023–24 Reg. Sess. (N.Y. 2023); S. 3035, 93rd Sess. (Minn. 2023).

2. The complete text of the Uniform Restrictive Employment Agreement Act, with and without commentary, can be found at https://www.uniformlaws.org/viewdocument/final-act-7?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2&tab=librarydocuments [https://perma.cc/WS6C-VYWR]. For an explanation of the Act and its relation to the common law, see Stewart J. Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 IND. L.J. 275 (2022).

agreements unenforceable.[3] Still, most states rely on the common law to regulate noncompete agreements.[4]

In this Article, I compare the Uniform Act and the proposed FTC rule. I conclude that, on balance, the Uniform Act does a better job of enhancing worker mobility while protecting legitimate employer interests. Additionally, I suggest that the FTC include a reverse preemption clause in its final rule so that a state legislature that enacts the Uniform Act would not have to comply with the total noncompete ban of the FTC rule.

I. KEY FEATURES OF THE UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT

After several years of study and drafting, the ULC promulgated the Uniform Restricive Employment Agreement Act in 2021.[5] Several states have already formally introduced bills on the Act, and others have enacted legislation that closely tracks parts of the Act.[6] However, progress on adoption was significantly impaired when the FTC in January 2023 proposed a national regulation that would ban noncompete agreements. Whether the FTC will issue a final rule that survives court challenge, and whether states will enact the Uniform Act, remains to be seen. Here are some of the key features of the Uniform Act.

A. *All Workers Covered*

Most employment statutes apply only to employees and not independent contractors or other workers.[7] The incessant litigation over whether Uber drivers are employees exemplifies how thorny this issue can be. The Uniform Act avoids this issue by applying to all workers broadly defined, including employees, independent contractors, partners,

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3. *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FTC (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/Y5FE-L26Q].

4. Jeffrey Scott Tenenbaum, *Employee Non-Compete Agreements: What Every Association Needs to Know in a Rapidly Evolving Legal and Regulatory Landscape*, AM. BAR ASS'N (May 17, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-june/employee-non-compete-agreements-what-every-association-needs-to-know/ [https://perma.cc/L5TH-CSBM].

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

6. *See* Tenenbaum, *supra* note 4.

7. *My Employer Says I Am an Independent Contractor: What Does This Mean?*, CWA, https://cwa-union.org/about/rights-on-job/legal-toolkit/my-employer-says-i-am-independent-contractor-what-does-mean [https://perma.cc/R3FL-2EXZ] (last visited Jan. 27, 2024).

or others.[8] The proposed FTC regulation likewise defines workers broadly.

B. *All Restrictive Agreements Covered*

The Uniform Act applies to any agreement that prevents or restricts a worker from working elsewhere after an employment relationship ends.[9] The most obvious type is the noncompete agreement, which expressly prohibits the worker from working at all for a competitor upon termination of employment.[10] In addition to noncompetes, though, the Act governs nonsolicitation,[11] no-recruit,[12] no-business,[13] confidentiality,[14] payment-for-competition,[15] and training-repayment agreements.[16] These other agreements can also limit a worker's ability to compete against the former employer.

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8. "'Worker' means an individual who works for an employer. The term: (A) includes an employee, independent contractor, extern, intern, volunteer, apprentice, sole proprietor who provides service to a client or customer, and an individual who provides service through a business or nonprofit entity or association; (B) does not include an individual, even if the individual performs incidental service for the employer, whose sole relationship with the employer is: (i) as a member of a board of directors or other governing or advisory board; (ii) an individual under whose authority the powers of a business or nonprofit entity or association are exercised; (iii) an investor; or (iv) a vendor of goods." UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(20) (UNIF. L. COMM'N 2021).

9. "'Restrictive employment agreement' means an agreement or part of another 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 or a sale of a business is consummated. The term includes a confidentiality agreement, no-business agreement, noncompete agreement, nonsolicitation agreement, no-recruit agreement, payment-for-competition agreement, and training-repayment agreement." *Id.* § 2(11).

10. "'Noncompete agreement' means a restrictive employment agreement that prohibits a worker from working other than for the employer. The term does not include a no-business agreement." *Id.* § 2(5).

11. "'Nonsolicitation agreement' means a restrictive employment agreement that prohibits a worker from soliciting a client or customer of the employer." *Id.* § 2(6).

12. "'No-recruit agreement' means a restrictive employment agreement that prohibits a worker from hiring or recruiting another worker of the employer." *Id.* § 2(7).

13. "'No-business agreement' means a restrictive employment agreement that prohibits a worker from working for a client or customer of the employer." *Id.* § 2(4).

14. "'Confidentiality agreement' means a restrictive employment agreement that: (A) prohibits a worker from using or disclosing information; and (B) is not a condition of settlement or other resolution of a dispute." UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(1) (UNIF. L. COMM'N 2021).

15. "'Payment-for-competition agreement' means a restrictive employment agreement that imposes an adverse financial consequence on a worker for working other than for the employer but does not expressly prohibit the work." *Id.* § 2(8)

16. "'Training-repayment agreement' means a restrictive employment agreement that requires a worker to repay the employer for training costs incurred by the employer." *Id.* § 2(18)

C. *Low-Wage Worker Agreements Banned*

One of the Uniform Act's most important provisions protects low-wage workers. Recent research has found that noncompetes are increasingly used to restrain lesser-skilled, low-wage employees who are unlikely to have access to trade secrets or substantial customer relationships distinct from the employer.[17] The Uniform Act prohibits noncompetes and almost all other restrictive agreements[18] for workers making less than the state's average annual wage.[19] The only exception is confidentiality and training-reimbursement agreements, where there is no per se ban for low-wage workers.[20] The duty not to reveal confidential information (as restrictively defined by the Act) should apply to all workers, including low-wage workers. In a similar vein, employers should be encouraged to train low-wage workers, and the Uniform Act allows training-reimbursement agreements for narrowly defined special training.

D. *Notice Requirements*

The Uniform Act requires employers to give workers advance written notice that the job will have a noncompete or other restrictive agreement.[21] Notice provides the worker with an opportunity to evaluate the agreement and make an informed decision about whether to sign it. Empirical studies show that only workers with advance notice get a pay boost, while workers without this notice get no better pay than similar workers with no noncompete provision.[22] To create a more sensible labor market, the Act requires that an employee have at least fourteen days

17. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-103785, NONCOMPETE AGREEMENTS: USE IS WIDESPREAD TO PROTECT BUSINESS' STATED INTERESTS, RESTRICTS JOB MOBILITY, AND MAY AFFECT WAGES 1 (2023).

18. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 5 (UNIF. L. COMM'N 2021) ("A restrictive employment agreement, other than a confidentiality agreement or training-repayment agreement, is: (1) prohibited and unenforceable if, when the worker signs the agreement, the worker has a stated rate of pay less than the annual mean wage of employees in this state . . .; and (2) unenforceable if, at any time during the work relationship, the worker's compensation from the employer, calculated on an annualized basis, is less than the annual mean wage of employees in this state . . . .").

19. The U.S. Department of Labor Bureau of Labor Statistics tracks average annual wage on a state-by-state basis and updates its database yearly. *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/oes/current/oessrcst.htm [https://perma.cc/N4HD-P9AT] (last visited Mar. 10, 2024).

20. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 5(1) cmt. (UNIF. L. COMM'N 2021) ("Paragraph 5(1) applies at the time the restrictive employment agreement is entered into, and both prohibits and makes unenforceable a restrictive employment agreement (other than a confidentiality agreement or training-reimbursement agreement) against a worker whose stated rate of pay is below the annual mean wage.").

21. *Id.* at prefatory note.

22. *Id.* § 4 cmt.

before accepting a job to consider the potential agreement,[23] as well as a separate notice explaining the employee's rights.[24] Workers can waive the fourteen-day advance notice period but still have fourteen days to renounce the agreement after starting work.[25]

E. *Substantive Requirements of Restrictive Agreements*

Even if a restrictive agreement complies with the notice and high-wage requirements, the Uniform Act sets further substantive requirements for an enforceable agreement.[26] First, to be enforceable, the restrictive employment agreement must be reasonable.[27] This differs from general contract law, which rarely separately requires that a contract be reasonable to be enforceable.[28] The reasonableness inquiry generally weighs the employer's interest, the worker's interest, and the public interest.[29]

Second, the Uniform Act details specific requirements for each type of restrictive agreement.[30] For example, among other requirements, a noncompete is prohibited unless it protects the sale or creation of a

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23. *Id.* § 4(a)(1) ("[A] restrictive employment agreement is prohibited and unenforceable unless: (1) the employer provides a copy of the proposed agreement in a record to: (A) . . . a prospective worker, at least 14 days before the prospective worker accepts work or commences work, whichever is earlier; (B) a current worker who receives a material increase in compensation, at least 14 days before the increase or the worker accepts a change in job status or responsibilities, whichever is earlier; or (C) a departing worker who is given consideration in addition to anything of value to which the worker already is entitled, at least 14 days before the agreement is required to be signed.").

24. *Id.* § 4(a)(2) (explaining that the act requires an employer to provide every worker subject to a restrictive agreement a notice prescribed by the state department of labor). The notice "must inform the worker, in language an average reader can understand, of the requirements of this [act] . . . and state that this [act] establishes penalties against an employer that enters into a prohibited agreement." *Id.* § 4(d).

25. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4(b) (UNIF. L. COMM'N 2021) ("A [prospective] worker may waive the 14-day requirement . . . if the worker receives the signed agreement before beginning work. If the worker waives the requirement, the worker may rescind the entire employment agreement not later than 14 days after the worker receives the agreement.").

26. *See id.* § 4(d).

27. *Id.* § 7 ("A restrictive employment agreement is prohibited and unenforceable unless it is reasonable.").

28. *Id.* § 7 cmt. ("A core tenet of the act, articulated in Section 7, is that every restrictive employment agreement must be reasonable to be enforceable. The reasonableness requirement has long been recognized in the law of restrictive employment agreements, which distinguishes this area from general contract law, which rarely considers reasonableness as a factor in enforcing a contract.").

29. *See id.* § 7 cmt. ("The reasonableness inquiry considers all the facts, and generally requires a balancing of the employer's interest, the worker's interest, and the public interest. In cost-benefit terms, the reasonableness inquiry can be framed as asking whether the benefits of the agreement outweigh the harms.").

30. *Id.* § 7 cmt. ("Sections 8-14 of the act proscribe specific requirements for particular types of restrictive employment agreements.").

business, a trade secret, or an ongoing customer relationship.[31] It is understandable, but not a legitimate interest, for an employer to want simply to prevent a good worker from competing elsewhere. Similarly, the Uniform Act specifies that a nonsolicitation agreement cannot prevent a worker from soliciting a former employer's clients with whom the worker did not work personally.[32] The Act limits the duration of each restrictive agreement, ranging from a maximum of six months to five years, depending on the type of agreement.[33] In most cases, the maximum restriction is one year.[34] Finally, most restrictive employment agreements are unenforceable under this Act if the worker is laid off or fired without cause.[35]

F. *Red and Purple Pencil*

The Uniform Act gives state legislatures two alternatives for handling unenforceable agreements, both building on current state law. Under one alternative, sometimes called the red-pencil rule, if the restrictive employment agreement does not comply with the Uniform Act, the agreement is prohibited, and a court will not enforce it.[36] Under the other alternative, sometimes called a purple pencil, a court may modify the agreement if the employer entered it in good faith, thinking it was enforceable under the Uniform Act.[37]

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31. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8(1) (UNIF. L. COMM'N 2021) ("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; (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.").

32. *Id.* § 11(1) ("A nonsolicitation agreement is prohibited and unenforceable unless the agreement: (1) applies only to a prospective or ongoing client or customer of the employer with which the worker had worked personally.").

33. *Id.* § 10(2), § 8.

34. *See generally* UNIF. RESTRICTIVE EMP. AGREEMENT ACT (UNIF. L. COMM'N 2021).

35. *Id.* § 6 ("A restrictive employment agreement, other than a confidentiality agreement or training-repayment agreement, is unenforceable if: (1) the worker resigns for good cause attributable to the employer; or (2) the employer terminates the worker for a reason other than [substantial] [willful] [gross] misconduct or the completion of the agreed work or the term of the contract.").

36. *Id.* § 16(a) (Alternative A) ("The court may not modify a restrictive employment agreement to make the agreement enforceable.").

37. *Id.* § 16(a) (Alternative B) ("The court may not modify a restrictive employment agreement that restricts a worker beyond a period imposed under this [act] to make the agreement enforceable. The court may modify an agreement that otherwise violates this [act] only on a finding that the employer reasonably and in good faith believed the agreement was enforceable under this [act] and only to the extent necessary to protect the employer's interest and render the agreement enforceable.").

G. *Penalties*

The Uniform Act penalizes an employer who enters a prohibited agreement with a worker.[38] A major issue in this area is that some employers use restrictive employment agreements even when they are clearly unenforceable, because there is no penalty for doing so.[39] A court will not enforce the agreement, but the agreement still exists in the contract, often inhibiting the worker from seeking other jobs and discouraging other employers from hiring the worker.[40] The Uniform Act creates penalties for clearly unenforceable agreements and allows a state department of labor, workers, or other employers to sue to deter the use of prohibited agreements.[41]

H. *Choice of Law and Venue*

The Uniform Act requires that an agreement's choice of law[42] and venue[43] provisions provide that a dispute be decided under the laws of the state where the worker works and in the state where the worker primarily works or resides. In doing so, the Uniform Act only regulates choice-of-law and -venue provisions that the parties write. It does not alter the underlying choice-of-law and -venue rules that a state applies in the absence of a valid contract. Still, the Uniform Act comports with general choice-of-law jurisprudence in employment contracts, emphasizing that, in the absence of a valid contractual choice-of-law provision, applicable state law is presumptively provided by the state where most of the work is being done.[44]

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38. *Id.* § 16(e) ("An employer that enters a restrictive employment agreement that the employer knows or reasonably should know is prohibited by this [act] commits a civil violation. The [appropriate state official] may bring an action on behalf of the worker, or the worker may bring a private action, against the employer to enforce this subsection. The court may award statutory damages of not more than $[5,000] per worker per agreement for each violation of this subsection.").

39. *See id.* § 4 cmt.

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

41. *See Id.* at prefatory note.

42. "A choice of law provision that applies to a restrictive employment agreement is prohibited and unenforceable unless it requires that a dispute arising under the agreement be governed by the law of the jurisdiction where the worker primarily works for the employer or, if the work relationship has ended, the jurisdiction where the worker primarily worked when the relationship ended." *Id.* § 17(a).

43. "A choice of venue provision that applies to a restrictive employment agreement is prohibited and unenforceable unless it requires that a dispute arising under the agreement be decided in a jurisdiction where: (1) the worker primarily works or, if the work relationship has ended, a jurisdiction where the worker primarily worked when the relationship ended; or (2) the worker resides at the time of the dispute." *Id.* § 17(b).

44. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 196 (AM. L. INST. 1971) ("The validity of a contract for the rendition of services and the rights created thereby are determined,

The purpose of requiring the venue to be where the worker works or resides is to give the worker a realistic opportunity to challenge a restrictive employment agreement that violates the Uniform Act.[45] Many workers cannot litigate far across the country from where they work or reside, especially when the company's home office is in a distant state.

II. COMPARING THE FTC PROPOSED RULE ON NONCOMPETES

In January 2023, the FTC proposed a rule banning most noncompete agreements.[46] This proposal follows the policy of only three states—California, North Dakota, and Oklahoma.[47] The FTC has received over 26,000 comments, including one by the ULC.[48] As of this writing, the FTC is assessing the comments and is expected to issue a final rule in the spring of 2024.[49] In this section, I flag some fundamental differences between the proposed FTC rule and the Uniform Act.

A. *Banning All Versus Low-Wage Noncompetes*

A central policy choice is whether all or only some noncompetes should be categorically banned. The FTC's proposed rule starkly bans all noncompete agreements as an unfair restriction on competition.[50] Likewise, the Uniform Act categorically bans noncompetes for low-wage workers.[51] Thus, both schemes agree that noncompetes should be unenforceable for workers making less than their state's average wage. For low-wage workers, the policy balance favors a ban rather than case-

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in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which the event the local law of the other state will be applied.").

45. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 17 cmt. (UNIF. L. COMM'N 2021).

46. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3511 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

47. *Id.* at 3496. Later in 2023, Minnesota also enacted a ban. 2023 MINN. STAT. § 181.988.

48. 89 Fed. Reg. 38344.

49. As discussed in the Postscript to this article, the FTC published a final rule in the Federal Register on May 7, 2024, effective September 4, 2024.

50. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910). The FTC's only exception is for noncompetes connected to the sale of a business, an uncontroversial exception that California, North Dakota, and Oklahoma likewise recognize. *Id.* at 3496. The Uniform Act recognizes the sale or creation of a business as among the four legitimate interests for a noncompete clause. UNIF. RESTRICTIVE EMP. ACT § 8 cmt. (UNIF. L. COMM'N 2021).

51. Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIFORM LAWS (July 23, 2021, 10:55 AM), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer [https://perma.cc/S9ZJ-K89T].

by-case assessments of whether the gains in protecting trade secrets or customer relationships outweigh the harms in reducing worker mobility and competitiveness.

The two schemes differ, however, in the approach to high-wage workers. The FTC's total ban calls for a policy used only by California, North Dakota, and Oklahoma.[52] The Uniform Act calls for a more nuanced approach all other states take. The Uniform Act allows noncompetes for high-wage workers if they are used to protect trade secrets or customer relationships, are narrowly tailored to protect those legitimate interests, and restrict the worker for no more than one year.[53] For example, a company's CEO and other top corporate officers have access to strategic business plans and many other trade secrets that can be easily lost if a CEO is free to jump to a rival, which receive only feeble protection from non-disclosure clauses. CEOs can and do negotiate noncompete clauses,[54] so it seems that a robust market is possible in which, on balance, an enforceable noncompete agreement best protects the interests of workers, employers, and the public.

B. *Gaps in Industries Covered*

The FTC's domain has significant gaps. It has no authority over banks, savings and loan institutions, federal credit unions, common carriers, air carriers, stockyard companies, or most nonprofits including most hospitals and universities.[55] Thus, the FTC ban on noncompete agreements would have no effect on these industries. By contrast, the Uniform Act covers all private-sector employers, both business and nonprofit.[56]

On the other hand, the Uniform Act does not cover public-sector employees.[57] As the Uniform Act's comments explain, the policy considerations about noncompete agreements in the public sector are quite distinct.[58] For example, a high official in a government agency is often barred from working in the industry for a year or two because of ethical concerns that the official is not biased in regulating the industry to gain future employment. These concerns differ significantly from the

52. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3494 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

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

54. *See* Stewart J. Schwab & Randall Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 237–39 (2006).

55. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

56. *See* UNIF. RESTRICTIVE EMP. ACT § 2(9) (UNIF. L. COMM'N 2021).

57. *See id.*

58. *Id*. § 2 cmt.

private-sector balance between protecting trade secrets and customer relationships versus promoting competition.

The FTC rule purports to apply to state and local government entities. The FTC acknowledges, however, that under the state action doctrine, the FTC rule may not limit the autonomous authority that sovereign states have over their own officers and agents.[59] Therefore, it is unclear whether the FTC's ban on noncompetes applies in the public sector, and the ban may be an unwise policy regardless. The better rule may be for the noncompete statute to apply only to the private sector.

C. *Regulating All Restrictive Agreements or Just Noncompetes*

A major difference between the Uniform Act and the FTC rule is the type of agreements covered. The FTC rule only regulates noncompetes, while the Uniform Act regulates all restrictive employment agreements, including nonsolicitation and confidentiality agreements.[60]

The FTC has a two-part definition of a noncompete agreement.[61] The first part tracks the Uniform Act's definition, defining a noncompete as a contract that explicitly prevents workers from working elsewhere.[62] However, the second part of the FTC definition gives a fuzzier "de facto" definition.[63] It includes the term "noncompete," which is any agreement prohibiting a worker from seeking or accepting work elsewhere after employment ends.[64] The definition gives two "de facto" examples.[65] First, a non-disclosure agreement may be written so broadly that it de facto precludes workers from working in the same field.[66] Second, a training-reimbursement term that greatly exceeds the employer's actual training costs may de facto prevent the worker from leaving.[67]

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59. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

60. *Id.* at 3482; UNIF. RESTRICTIVE EMP. ACT § 11 (UNIF. L. COMM'N 2021).

61. *See* 16 CFR § 910.1(b) (proposed Jan. 5, 2023).

62. *Id.* § 910.1(b)(1) ("*Non-compete clause* means a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer.").

63. *Id.* § 910.1(b)(2) (proposed Jan. 5, 2023).

64. *Id.* ("The term non-compete clause includes a contractual term that is a *de facto* non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.").

65. *Id.*

66. *Id.* § 910.1(b)(2)(ii).

67. 16 CFR § 910.1(b)(2)(ii) (proposed Jan. 5, 2023) ("A contractual term between an employer and a worker that requires the worker to pay the employer or a third-party entity for training costs if the worker's employment terminates within a specified time period, where the required payment is not reasonably related to the costs the employer incurred for training the worker."). This example unfortunately doesn't track the basic de facto definition of prohibiting

The FTC's ambiguous definition means that some restrictive agreements, such as a comprehensive confidentiality clause or onerous training-repayment agreement, will be labeled as a noncompete and banned. Some commentators worry that this definitional uncertainty will provoke litigation.[68]

The greater problem is that the FTC rule does not regulate other restrictive agreements at all, even if they deter but do not prohibit a worker from working elsewhere.[69] For example, the FTC rule is unlikely to impact a nonsolicitation agreement that, say, forbids a departed worker from soliciting any clients of the former employer for three years. Such an agreement may make the worker less effective and will certainly inhibit competition. But it does not completely prohibit working elsewhere, even in a de facto sense. The worker must simply find other clients.

The Uniform Act does a better job of providing clear rules for other restrictive agreements. For example, it allows some nonsolicitation agreements but not others.[70] The justification for a nonsolicitation agreement is that it protects the employer's goodwill in customer relationships that the employer created.[71] Thus, the Uniform Act allows a nonsolicitation agreement that prevents the departed worker from soliciting customers with whom the worker worked personally but prohibits an agreement that prevents a worker from soliciting customers with whom the worker never had a personal relationship.[72] Even for the former group of customers, the solicitation ban must be reasonable and cannot last more than a year.[73]

D. *Penalties and Enforcement*

The Uniform Act's creation of penalties and public and private enforcement are distinctive features. The common law and most state statutes declare that many noncompete agreements are unenforceable, but the agreements nevertheless remain in employment contracts, often

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work elsewhere. A $5,000 training-reimbursement contract would not be reasonably related to a $100 training cost, but probably wouldn't prevent a worker from leaving. On the other hand, a $20,000 training-reimbursement contract would be reasonably related to a $20,000 employer cost but would functionally prohibit a worker from leaving. The FTC's fuzziness creates a lot of litigation opportunities to clarify what the regulation means.

68. Annie Villanueva et al., *The FTC's Plan to Limit Noncompetes Could Pose an Array of Practical Problems*, SKADDEN (2023), https://www.skadden.com/insights/publications/2023/05/the-informed-board/the-ftcs-plan-to-limit-noncompetes [https://perma.cc/HQR4-G5YK].

69. *See generally* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

70. *See* UNIF. RESTRICTIVE EMP. ACT § 11 (UNIF. L. COMM'N 2021).

71. *See id.* § 8 cmt.

72. *See id.* § 10 cmt.

73. *See id.* § 11.

chilling workers from departing and other employers from hiring.[74] The Uniform Act prohibits as well as makes unenforceable, unreasonable, and restrictive agreements.[75] It backs up this prohibition with statutory penalties of $5,000 in addition to actual damages.[76] The Uniform Act calls for civil actions by the state attorney general as well as private rights of action by workers or second employers.[77] These penalties and enforcement mechanisms should deter employers from putting overly broad noncompetes and other restrictive agreements in their employment contracts.

The FTC enforcement structure is weaker. The FTC can investigate violations of its rule and seek injunctive relief in federal court.[78] As a transitional measure, the FTC rule also requires employers to notify workers that an existing noncompete agreement is no longer enforceable.[79] But a worker cannot directly seek damages or injunctive relief when an employer violates these rules.[80] The fear, then, is that an overburdened agency will have trouble fully policing this rule.

III. THE QUESTIONABLE FTC POWER TO ISSUE THE NONCOMPETE RULE

The FTC commissioners are likely concerned about the lasting effect of its noncompete rule for at least two reasons. First, any agency rule is somewhat ephemeral. When a new president is elected and appoints new commissioners, a future FTC can alter or rescind the rule, a universal weakness of agency regulations.[81]

Second, and undoubtedly also worrisome to the FTC, the Supreme Court, using its "elephant-in-mousehole" or major-questions doctrines, may strike down the noncompete rule for going beyond the FTC's authority granted by Congress. The FTC claims the rule is appropriate, under the eponymous Federal Trade Commission Act, to prohibit unfair

74. *See id.* § 16 cmt.

75. *See id.* § 16 (addressing various restrictive agreements in the comments to the sections of the Act).

76. UNIF. RESTRICTIVE EMP. ACT § 16(e) (UNIF. L. COMM'N 2021).

77. *See id.* § 16 cmt.

78. *See* Matthew B. Collin et al., *FTC Proposes Broad Ban on Worker Noncompete Clauses*, SKADDEN (Jan. 9, 2023), https://www.skadden.com/insights/publications/2023/01/ftc-proposes-broad-ban [https://perma.cc/SE8Y-UY5D].

79. Non-Compete Clause Rule, 88 FR 3482, 3538 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

80. *See generally id.*

81. *See Commissioners*, FTC, https://www.ftc.gov/about-ftc/commissioners-staff/commissioners [https://perma.cc/QH2E-J5Q3] (last visited Mar. 10, 2024).

methods of competition.[82] But it's a novel application.[83] The FTC has two main grants of authority: investigating and preventing (1) unfair or deceptive acts and practices against consumers (UDAP) and (2) unfair methods of competition (UMC).[84] For the UDAP category, the statute (as amended in 1975 as part of the Magnuson-Moss Warranty Act) clearly gives the FTC power to recover civil penalties[85] and issue rules,[86] and the FTC has done so numerous times.[87] But workers are not consumers, so the FTC must rely on powers against unfair methods of competition to enforce its noncompete rule. It is unclear whether Congress authorized the FTC to recover penalties or issue rules here. The FTC has only issued one rule about unfair competition, some fifty years ago, which was later rescinded.[88]

The FTC's asserted authority to issue a rule combating unfair competition comes from § 46(g), which gives the Commission the power "from time to time classify [sic] corporations and . . . to make rules and regulations for the purpose of carrying out the provisions of this subchapter."[89] This is, perhaps, textual authority for the FTC to promulgate a substantive rule on unfair competition, such as its noncompete rule. However, subsection (g) is part of a procedural section describing the FTC's investigative powers, unlike § 57(a), which clearly authorizes the FTC to enact substantive rules to combat unfair or deceptive acts and practices against consumers.[90] Further, unlike § 45(m)'s penalties for rules protecting consumers, the FTC Act does not create penalties for violations of § 46(g) rules,[91] suggesting these rules are not substantive. Overall, the Supreme Court may think § 46(g) is an

82. Jay B. Sykes, *The FTC's Competition Rulemaking Authority*, CONG. RSCH. SERV. (Jan. 11, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10635 [https://perma.cc/ HY35-RLL6].

83. For a good rendition of the arguments whether the FTC can issue rules on unfair methods of competition, as distinct from unfair or deceptive acts and practices, see *id.*

84. *See id.*

85. 15 U.S.C. § 45(m)(1)(A) ("The Commission may commence a civil action to recover a civil penalty . . . against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices [and] such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.").

86. *See id.* § 57(a) (headlining "[u]nfair or deceptive acts or practices rulemaking proceedings," and declaring that "the Commission may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive . . . ").

87. *See, e.g.*, Telemarketing Sales Rule, 16 C.F.R. § 310.4 (2024) (limiting when telemarketers can call consumers); Used Car Rule, 16 C.F.R. § 455.2 (2024) (requiring car dealers to display window sticker on used cars for sale).

88. *See* Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. § 412 (1994); Notice of Rule Repeal, 59 Fed. Reg. 8522, 8527 (Feb. 23, 1994).

89. 15 U.S.C. § 46(g).

90. *See* 15 U.S.C. § 46(g); *but see* 15 U.S.C. § 57(a)(1).

91. *See* 15 U.S.C. § 45(m); *but see* 15 U.S.C. § 46.

obscure or ancillary "mousehole" in which Congress should not be presumed to have placed the FTC's elephantine power to create a substantive rule combatting unfair competition.

The major questions doctrine may also guide the FTC's noncompete rule. This doctrine is young and evolving, but the Supreme Court has now struck down several agency rules because they were "extraordinary cases" in which "the history and the breadth of the authority that [the agency] has asserted" and the rule's "vast economic and political significance," give reason to hesitate before concluding that Congress meant to provide the agency with such power.[92] Part of the inquiry is whether the agency has "strayed out of its lane"[93] and gone beyond its experience or expertise.

When applying the major questions factors, the FTC's noncompete rule seems to have "vast" economic effects. Noncompetes are used by nearly twenty percent of the workforce.[94] The FTC asserts that its ban involves big dollars: worker's earnings will increase by over $250 billion annually, and employers will suffer one-time costs of over $1 billion.[95] The FTC has little history of issuing rules on unfair competition; instead, it uses case-by-case enforcement actions primarily based on antitrust laws.[96] It never challenged an employment noncompete until three enforcement proceedings in December 2022, just a month before it gave notice of the proposed noncompete rule.[97] Before then, noncompetes were traditionally regulated by state law.[98] Thus, arguably, the FTC is straying out of its lane by turning its gaze to these employment contracts.

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92. West Virginia v. EPA, 142 S. Ct. 2587, 2605, 2608 (2022) (striking down EPA's greenhouse gas emission standard); *see* also NFIB v. OSHA, 142 S. Ct. 661, 667–68 (2022) (Gorsuch, J., concurring) (striking down OSHA's Covid-19 workplace vaccine emergency temporary standard).

93. *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting).

94. *See* Evan P. Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. ECON. 53, 60 (2021) ("Overall, our weighted estimates indicate that 38.1 percent of US labor force participants have agreed to a noncompete at some point in their lives and that 18.1 percent, or roughly 28 million individuals, currently work under one.").

95. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3508 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

96. *See* Richard J. Pierce Jr., *Can the Federal Trade Commission Use Rulemaking to Change Antitrust Law?*, GW L. FAC. PUBL'NS & OTHER WORKS 1–2 (2021), https://scholarship.law.gwu.edu/faculty_publications/1561 [https://perma.cc/2TMX-EKRY].

97. *See FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers*, FTC (Mar. 8, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions [https://perma.cc/8K6Z-L7T6]; *FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers*, FTC (Feb. 23, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-approves-final-orders-requiring-two-glass-container-manufacturers-drop-noncompete-restrictions [https://perma.cc/DP8A-M9BJ].

98. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 17.

IV. PREEMPTION AND REVERSE PREEMPTION

To counter both the "fickle-agency" problem and the major questions challenge outlined in the last section, the FTC could creatively promote the Uniform Act with a reverse-preemption section in its final noncompete rule.

Currently, the FTC's proposed noncompete rule preempts any state law (including common-law rules) that does not totally ban noncompete agreements.[99] This preemption would include any state adoption of the Uniform Act.[100] Presumably, the FTC does so because it believes its total ban on noncompetes (while leaving regulation of other restrictive agreements to state law without any FTC input) is its best policy choice. One can debate whether the country is better off with the FTC noncompete ban or with the enactment of the Uniform Act by a substantial number of states, but the options are not binary. Some hybrid solutions are possible.

The main distinctions between the Uniform Act and the FTC rule are reiterated here for good measure. The total FTC ban on noncompetes is clear and perhaps is the proper policy choice as far as it goes. However, the Uniform Act has several countervailing advantages, even for a policymaker who would prefer banning all noncompetes rather than banning only noncompetes for below-average-wage workers and systematically regulating but not banning noncompetes for high-wage workers. First, the Uniform Act systematically regulates other restrictive agreements, such as nonsolicitation and confidentiality agreements, while the FTC rule does not.[101] Second, the Uniform Act applies to the entire private sector, including banks, air carriers, and nonprofit hospitals, which the FTC rule cannot do.[102] Third, the Uniform Act creates penalties

99. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3536 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) ("This [rule] shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with this [rule].").

100. Of course, a state could still adopt the Uniform Act and the Act would apply to sectors of the economy not subject to FTC regulation and to restrictive agreements other than the noncompete clauses banned by the FTC.

101. *Compare* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 11 (UNIF. L. COMM'N 2021) (regulating non-solicitation agreements) *with* Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (stating that the definition of "non-compete" "would generally not include other types of restrictive employment covenants . . . such as non-disclosure agreements ('NDAs') and client or customer non-solicitation agreements" because such covenants "generally do not prevent a worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer.").

102. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2 cmt. (UNIF. L. COMM'N 2021).

and a private right of action to attack unenforceable restrictive agreements, which the FTC rule cannot do.[103]

Even if the FTC policymaker is convinced that its rule is the better of the two approaches, the choice is not bipolar. In particular, the FTC policymaker may well believe the Uniform Act, if adopted by a reasonable number of states, provides a better approach than the current hodge-podge of state laws. In other words, (1) the FTC total ban may be best, but (2) substantial state adoptions of the Uniform Act are better than (3) a failed FTC rule with no other changes to current law. The specter of the third scenario, in which a later administration or the courts strike down the FTC rule and the FTC has no lasting change to show for its efforts, should encourage the FTC to consider working with the ULC under the banner of cooperative federalism.

It is here that the FTC should consider reverse preemption.[104] Rather than the current preemption clause wiping out inconsistent state law, the FTC should declare that its total ban applies in any state that has not adopted the Uniform Act but does not apply in states that have adopted the Uniform Act. This rule would encourage states that prefer the Uniform Act to adopt it and avoid being subject to the FTC ban.

What's the advantage of the FTC of reverse preemption? First, the FTC will have induced a long-lasting set of state statutes that regulate in a modern way not only noncompetes but all other restrictive agreements—even if a later administration forces the FTC to rescind its federal rule. Second, this same benefit of modern state policies on restrictive agreements has occurred even if the Supreme Court strikes down the FTC rule. Third, reverse preemption reduces the chances that the Supreme Court will use the major-questions doctrine to strike down the FTC rule. Far from straying from its lane by preempting employment matters traditionally regulated by state law (inviting a smackdown by the Supreme Court), with reverse preemption the FTC would be incorporating and invigorating state legislatures to continue driving in their lanes as they have traditionally done.

Reverse preemption is not as strange as it first sounds. Indeed, Congress has already used reverse preemption for a Uniform Act.[105] In 1999, the ULC promulgated the Uniform Electronic Transactions Act

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103. *See id.* at prefatory note.

104. The Uniform Law Commission urged the FTC to consider reverse preemption in the ULC comments to the proposed FTC rule. *See* Letter from Tim Schnabel, Executive Director, Unif. L. Comm'n., to FTC re Non-Compete Rulemaking, Matter NO. P201200 (2023) (on file with author).

105. *See* 15 U.S.C. § 7002(a) ("A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of [E-Sign] with respect to State law only if such statute, regulation, or rule of law—(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999[.]").

(UETA), regulating electronic records and signatures.[106] Congress passed the federal Electronic Signatures in Global and National Commerce Act (E-Sign) a year later.[107] The two acts are not identical, yet Congress did not preempt inconsistent state law.[108] To the contrary, it allowed any state enactment of UETA to "modify, limit, or supersede" the federal law.[109] Nudged by the federal statute, fifty-one jurisdictions have adopted the Uniform Act.[110]

In a different context, Professor William Corbett made a similarly creative proposal that Congress should allow states to opt out of federal law if they passed a state law with minimum federal standards.[111] Specifically, with the goal of eradicating the doctrine of at-will employment, Professor Corbett proposed that Congress pass a law in which the federal antidiscrimination laws would not apply to any termination in a state that had passed wrongful discharge laws that met minimum federal standards in abrogating at-will employment.[112] With current state wrongful discharge laws generally requiring good cause for any termination, argues Professor Corbett, the antidiscrimination laws would be unnecessary, and the current "unhealthy symbiosis between employment at will and employment discrimination law could be ameliorated."[113]

More generally, reverse preemption is a tool of cooperative federalism, which strives to find the optimal balance between federal and state regulation.[114] Federal policymakers have cooperated with state officials toward a shared goal in many areas, including environmental[115]

106. *See* UNIF. ELEC. TRANSACTIONS ACT (UNIF. L. COMM'N 1999).

107. 15 U.S.C. § 7001.

108. *See* 15 U.S.C. § 7002(a).

109. *Id*.

110. *Enactment History*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034 [https://perma.cc/2KUJ-8UQA] (last visited Mar. 10, 2024).

111. *See* William R. Corbett, *Firing Employment at Will and Discharging Termination Claims from Employment Discrimination: A Cooperative Federalism Approach to Improve Employment Law*, 42 CARDOZO L. REV. 2281, 2288 (2021).

112. *See id.*

113. *Id.* at 2323.

114. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 116 (2015) (describing cooperative federalism as "a partnership between the States and the Federal Government, animated by a shared objective"); *see also* Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 919 (1998) (focusing on limits of federal government commandeering state officials to implement federal policy).

115. *See* Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T. L.J. 179, 184 (2005) (reviewing approaches to cooperative federalism in environmental law).

and health law.[116] Employment law has examples of federal-state partnerships, such as unemployment insurance[117] and workplace safety. But the fear is that, too often, federal policymakers ignore the role of state governments when enacting laws and regulations.[118] For some time, Republican and Democrat presidents from Reagan[119] to Clinton[120] to Obama[121] have called for federal policymakers to have greater concern for the roles of state law and agencies and avoid preemption where possible.

The ULC has a unique role in balancing the objectives of uniform laws and state power. Sometimes it's a tightrope. A decade ago, the ULC created the Federalism and State Law Committee to develop principles of cooperative federalism, working with the Council of State Governments, the Center for State Courts, the National Association of Attorneys General, the National Council of State Legislatures, and others.[122] It developed principles of federalism to reach a proper balance of state and federal responsibility that would protect individual liberties, respect diverse cultures, resources, and needs among the states, allow experimentation and innovation in developing policies and programs, and promote efficient administration.[123]

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116. For example, the Affordable Care Act creates state-run healthcare exchanges, if the state chooses to create one, subject to minimum federal standards. *See* Sara R. Collins & Jeanne M. Lambrew, *Federalism, the Affordable Care Act, and Health Reform in the 2020 Election* (July 29, 2019), https://www.commonwealthfund.org/publications/fund-reports/2019/jul/federalism-affordable-care-act-health-reform-2020-election [https://perma.cc/E2SZ-GA23].

117. *See* Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 359 (2001) (describing the merits and disadvantages of using unemployment insurance to redistribute wealth).

118. *See* David C. McBride & Raymond P. Pepe, *Federalism, Liberty and Preemption: The Patient Protection and Affordable Care Act*, 29 DEL. LAW. 22, 26 (2011) ("Unfortunately, far too often Federal action is taken without due regard to its impact upon State law and without a careful and deliberate allocation of Federal and State responsibilities.").

119. *See* Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (Oct. 26, 1987) (defining principles of federalism that federal agencies should abide by including that "[i]t is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them)" and that agencies "shall … Refrain, to the maximum extent possible, from establishing uniform, national standards for programs and, when possible, defer to the States to establish standards").

120. *See* Exec. Order No. 13,132, 64 Fed. Reg. 43,255 (Aug. 10, 1999) (articulating federalism principles for federal agencies to follow including that "[a[ny regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated").

121. *See* 74 Fed. Reg. 24963 (May 22, 2009) (ordering federal agencies to review and evaluate the preemptive impact of all federal regulations issued in the prior ten years).

122. McBride & Pepe, *supra* note 118, at 26.

123. *See* UNIF. L. COMM'N, PRINCIPLES OF FEDERALISM 4 (2013).

The ULC developed a chart of factors weighing in favor of (1) federal preemptive law; (2) federal law that establishes minimum standards for the states; and (3) states retaining autonomy to act.[124] Reverse preemption is a type of minimum standard, in that the FTC noncompete ban would bind states unless they adopt the minimum standards of the Uniform Act.[125]

Many factors in the ULC chart suggest that reverse preemption is the optimal policy here. For example, one factor is whether minimum standards would satisfy federal objectives when individual states face unique problems from differences in environment, resources, or culture.[126] Another is whether there is room for local variation within a well-defined legal framework.[127] Both point towards reverse preemption. In his iconic article comparing differences in noncompete enforcement on Silicon Valley and Route 128 outside Boston, Professor Ron Gilson emphasizes that the explosive, high-tech culture enhanced by California's noncompete ban may not be replicable in other places with a different mix of industries.[128]

Yet another factor is whether there is a substantial lack of consensus about the best approaches, and minimal standards remain essential.[129] As applied here, there is significant agreement that noncompetes should not be enforced against low-wage workers, but there is less consensus on the best approach for high-wage workers.[130] Again, this factor points towards reverse preemption.

A final set of factors is perhaps the most critical. Federal preemption is most appropriate when federal law has primarily occupied the field, but a minimum-standards approach works better when state laws and regulations are well-developed and historically have mainly controlled the area. The latter seems to be the case here, giving a nod to reverse preemption.

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124. *Id*.

125. *See id.*

126. *Id.* at 4.

127. *Id.*

128. *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, 627–28 (1999) ("With respect to Silicon Valley and Route 128, the balance seems to have favored agglomeration economies over property rights protection. However, this balance may well be quite local, depending on the characteristics of particular industries. And because industries are not randomly distributed across jurisdictions, each state's particular industrial population may dictate a different balance.").

129. UNIF. L. COMM'N, PRINCIPLES OF FEDERALISM 4 (2013).

130. Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of non-Compete Agreements*, 68 MGMT. SCI. 143, 146 (2021).

CONCLUSION

The Uniform Restrictive Employment Agreement Act, promulgated in late 2021, provides a comprehensive regulation of noncompetes and all other restrictive employment agreements that inhibit competition and deter worker mobility in taking another job while preserving a role for protecting employer interests in trade secrets and customer relationships.[131] However, before many states could consider adopting the Act in January 2023, the FTC proposed a regulation that would ban all noncompete agreements but no other restrictive agreements.[132]

The FTC rule is admirably clear in its total ban on noncompete agreements (other than in connection with the sale of a business, a noncontroversial exception).[133] The Uniform Act bans noncompetes (and some other restrictive agreements) for all workers making below-average wages but takes a more nuanced approach to regulating restrictive agreements for high-wage workers.[134]

The choice between the two need not be all or nothing. The FTC proposed rule would preempt any state law that allows any noncompetes and thus would preempt (at least as applied to noncompetes for high-wage workers) any state law adopting the Uniform Act.[135] The FTC should consider, however, implementing reverse preemption, declaring that the FTC total noncompete ban applies to any state that has not adopted the Uniform Act. Still, the FTC rule does not apply in any state adopting the Uniform Act. This reverse-preemption approach would give each state the choice between the two approaches. An advantage for the current FTC commissioners is that reverse preemption may keep the Supreme Court from using the major-questions doctrine to strike down the entire FTC rule. Implementing cooperative federalism by engaging states would help the FTC stay in its lane.

POSTSCRIPT

After this Article was largely written and edited, the FTC published its final noncompete rule on May 7, 2024, with an effective date of September 4, 2024.[136] The final rule is broadly similar to the proposed rule. In particular, it bans all future noncompete agreements. One

131. *See* UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8 cmt. (UNIF. L. COMM'N 2021).

132. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

133. *Id.*

134. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 5(1), § 8(1) (UNIF. L. COMM'N 2021).

135. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3515 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) (noting that the proposed rule would contain an express preemption provision of "any state statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent with the Rule").

136. Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024).

modification is that, while the proposed rule would have also banned all current noncompete agreements, the final rule grandfathers current noncompete agreements for senior executives.

Most importantly for this Article, the final FTC rule clarifies and softens its preemption of state law. As described above, the proposed rule favored broad preemption. It would have "supercede[d]" any inconsistent state law[137] unless the state law provided "greater protection."[138] The final FTC rule, by contrast, explicitly recognizes a continuing role for states. An employer must continue to comply with state law, the final FTC rule declares, "except . . . to the extent, and only to the extent," that state law permits an agreement banned by the FTC rule.[139]

In explaining the preemption changes, the Commission recognized the continuing authority of states[140] and the "critical role" that states play in this area.[141] The Commission declared it will "share the field" and "partner" with the states.[142] Continuing regulation of noncompetes by the states is important, the Commission declared, even at the cost of lesser uniformity.[143]

Nevertheless, reverse preemption was a bridge too far for the FTC. As explained above, reverse preemption would declare that the FTC total ban on noncompetes would not apply to any state that adopted the Uniform Restrictive Employment Agreement Act. The Uniform Law Commission had submitted a comment during the notice-and-comment rulemaking emphasizing the traditional role of state law in regulating noncompete agreements and urging the FTC to incorporate reverse preemption into

137. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3515 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910) ("This [rule] shall supersede any State statute, regulation, order, or interpretation to the extent that [it] is inconsistent with this [rule]").

138. *Id.* ("A State statute, regulation, order, or interpretation is not inconsistent with the provisions of this [rule] if the protection [it] affords any worker is greater than the protection provided under this [rule].").

139. 89 Fed. Reg. at 38504 ("This part will not be construed to annul, or exempt any person fromcomplying with any State statute, regulation, order, or interpretation applicable to a non-compete clause, . . . except that this part supersedes such laws to the etent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under [this rule].").

140. *Id.* at 38454 ("In response to concerns raised by commenters and to further bolster the consistent use of State laws, the Commission expressly recognizes State authority and the existence of private rights of action arising under State laws that restrict non-competes.").

141. *Id.* ("Under the final rule, States may continue to play a critical role in restricting the use of non-competes.").

142. *Id.* at 38455 ("[T]he Commission will 'share the field' with States and patner with them in the battle against abusive non-competes.").

143. *Id.* at 38454 ("the Commission recognizes this [modification of the preemption rule] will leave some variation in the enforcement exposure covered persons face among States").

the final rule. The FTC explicitly considered the reverse preemption suggestion, but "decline[d] to adopt it."[144]

Especially because of the continuing role of state law, the bulk of this Article (and even the reverse preemption idea) continues to be relevant in comparing the approaches of the Uniform Act and the FTC rule.

First, Congress might consider a noncompete statute, which would moot the concerns that the FTC has exceeded its agency powers. In the statute, Congress could adopt reverse preemption to allow for continued experimentation in this area of traditional state regulation.

Second, assuming Congress does not act, individual states would do well to consider adopting the Uniform Act, whether or not the FTC noncompete rule remains in force.

A widespread consensus has formed that the current hodgepodge of regulation of noncompetes, with most states relying on the common law, is inadequate in the modern era. Indeed, the impetus behind the Uniform Act was to provide a modern, balanced, and uniform approach to the regulation of noncompetes and all other restrictive employment agreements. This is a bipartisan consensus. After all, businesses both want to keep their experienced workers with access to trade secrets or customers, but also want to hire experienced workers. In other words, businesses want a balanced approached to noncompete agreements that is neither too draconian (prohibiting all) nor too lax (permitting all).

As individual states consider the Uniform Act, they have short-run and long-run considerations. In the short-run, ongoing state legislation might bolster the argument that the states are actively continuing their traditional role of regulating noncompete agreeements and the FTC rule inappropriately interferes with this state regulation. The long-run considerations depend on the viability of the FTC rule. On the one hand, the FTC final rule might stick, surviving court challenges and subsequent administrations. In this case, states might still find it useful to adopt the Uniform Act. True, the FTC rule would preempt the parts of the act that allows some noncompetes. But the bulk of the Uniform Act remains viable and gives each state a modern approach to nonsolicitation and other restrictive agreements as well as penalties and private causes of action for improper noncompete agreements such as those for low-wage workers.

On the other hand, the FTC final rule might be struck down or rescinded. In that case, a state will do well to adopt a modern, considered approach to restrictive employment agreements and adopt the Uniform Restrictive Employment Agreement Act.

144. *Id.* at 38455.

WHOSE LANE IS IT ANYWAY: ANTICIPATING THE EFFECTS OF THE SUPREME COURT'S MAJOR QUESTION DOCTRINE ON THE DEPARTMENT OF LABOR

Daniel Woodruff[*]

Let's make some stuff up!
– Aiysha Tyler[1]

Abstract

The Major Question Doctrine has emerged as an apparently powerful new tool for courts when deciding issues involving federal agencies. In *West Virginia v. EPA*, the Supreme Court bolstered a major questions exception that had operated in the background of previous Court decisions, labeling it the Major Question Doctrine. Under the Major Question Doctrine, courts must ask if the question presented by an agency's rule is an economically or politically significant question. If the court decides that it is, the court must identify clear congressional authorization for the rule to uphold the rule. This Note briefly follows the development of the Major Question Doctrine through the Court's jurisprudence and attempts to explain how the Doctrine functions. This Note also identifies flaws, ambiguities, and confusion resulting from the Court's decision. Finally, this Note attempts to predict the effect that the Major Question Doctrine will have on present and future challenges to rules and regulations promulgated by the Department of Labor and other federal labor agencies.

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1. *Whose Line Is It Anyway?: Rob Gronkowski* (The CW television broadcast June 02, 2014).

INTRODUCTION

Over the last three decades, the Supreme Court decided several cases relying on principles from the major questions doctrine exception.[2] Although no majority opinion formally cited the doctrine as authority for the Court's conclusion, many hypothesized that these principles would cause a rebirth of the long-dead non-delegation doctrine.[3] For years, the Court used the major questions exception as merely another tool in its interpretative toolbox—akin to *Chevron* deference.[4] After several decisions in 2022, that is no longer the case. Enter *West Virginia v. EPA*[5] and company.

Three of the Court's decisions immediately preceding *West Virginia* foreshadowed the major question doctrine's arrival.[6] All three involved regulatory action related to the COVID-19 pandemic and merely laid the groundwork for the major question doctrine.[7] The Court cemented the major question doctrine in its jurisprudence in *West Virginia*.[8] Still, the Court left much to be desired. What is the extent of the major question doctrine? What constitutes a "major" question? What standard is "clear congressional authorization" measured by? Is that standard the same for grants of agency authority before and after the decision?

All these questions and more are important for the future of the administrative state. This Note attempts to resolve some of the questions and predict how the remaining uncertainties will affect both current and future Department of Labor (DOL) regulations.

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2. *See* MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014).

3. Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 264–65 (2022).

4. *Id.* at 269–70.

5. 142 S. Ct. 2587 (2022).

6. *See, e.g.*, NFIB v. OSHA, 142 S. Ct. 661 (2022) (per curiam).

7. *See id.*; Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485 (2021) (per curiam); Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam).

8. *See West Virginia*, 142 S. Ct. at 2610.

I. THE ORIGINS OF THE MAJOR QUESTION DOCTRINE

A. *The Non-Delegation Doctrine*

The non-delegation doctrine (NDD) was born from the belief that the Constitution limits Congress's ability to delegate power.[9] Specifically, the NDD restricted Congress from delegating its legislative power.[10] The NDD operated as "a sledgehammer" and appeared to be a hard check on the administrative state.[11] That is, the NDD enabled courts "to declare entire statutory provisions unconstitutional."[12] However, the Court swiftly crippled the NDD through the Intelligible Principle Test of *J.W. Hampton, Jr. & Co. v. United States*.[13] Under this test, courts were to look at whether a congressional delegation contained an "intelligible principle to which the [agency must] . . . conform."[14] So long as Congress's delegation included an intelligible principle, courts would allow the delegation of authority.

Predictably, the NDD has been "formally defunct since 1935."[15] The NDD has not been used to strike down a statute in nearly ninety years; repeatedly, the Court held that even the vaguest of regulatory provisions satisfied the intelligible principle test.[16] Still, scholars believed the doctrine would return in light of three cases before the Court in 2022.[17] The NDD, nevertheless, remains shunned.[18]

B. Chevron *Deference and Early Major Question Doctrine Principles*

The major question doctrine (MQD) landed its role in managing the administrative state largely as a result of *Chevron* deference.[19] Under the Court's holding in *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.*,[20] courts defer to an agency's interpretation of ambiguities

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9. RONALD M. LEVIN & JEFFREY S. LUBBERS, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 9, 12 (6th ed. 2017).

10. *See id.* at 12–13; *see also* Field v. Clark, 143 U.S. 649, 692 (1892) (explaining the non-delegation doctrine).

11. Clinton T. Summers, *Nondelegation of Major Questions*, 74 ARK. L. REV. 83, 83 (2021).

12. *Id.*

13. 276 U.S. 394 (1928).

14. *Id.* at 409.

15. Sohoni, *supra* note 3, at 292.

16. *See id.*; *see also* Summers, *supra* note 11, at 88 (noting the limitless delegation of the intelligible principle test).

17. *See* Sohoni, *supra* note 3, at 293–94 (noting that the litigants in the CDC, OSHA, and EPA cases raised non-delegation arguments, some of which had won the support of the lower courts).

18. *See id*. at 294 (noting that the Court used the major question doctrine to avoid reaching the issue of unconstitutional delegation).

19. *See id.* at 275.

20. 467 U.S. 837 (1984).

in a statute granting agency authority so long as the agency's interpretation is reasonable.[21] Just as they did when the NDD was introduced, scholars predicted radical changes in the treatment of agencies after *Chevron*.[22] And, just as with the NDD, the prediction was incorrect; since *Chevron*, the Supreme Court has relied on agency deference, as opposed to other interpretive tools, roughly as much as it did before *Chevron*.[23]

One reason—though certainly not the only reason—agency deference did not soar was the introduction of the major questions exception. In *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*,[24] ten years after the Supreme Court decided *Chevron*, the Court began digging out an exception to *Chevron* deference for cases that present a "major" question.[25] This exception effectively allowed courts to ignore the agency's reasonable interpretation and proceed with ordinary interpretative techniques.[26] When determining whether a case presented a major question, the Court considered factors such as the national significance of the question,[27] the regulation's relation to the agency's purpose,[28] and the historical use of the statute.[29]

For years, the major questions exception served a similar function as the NDD—reserving the legislative power for the legislative branch—but

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21. *Id.* at 844. Chief Justice Roberts argues that this deference is only due when Congress has also delegated interpretive authority to the agency. City of Arlington v. FCC, 569 U.S. 290, 316–17 (2013) (Roberts, C.J., dissenting).

22. *See* Peter M. Shane & Christopher J. Walker, Chevron *at 30: Looking Back and Forward*, 83 FORDHAM L. REV. 475, 483 (2014).

23. *See id.* at 483 (including Professor Jack Beermann's discussion on the confusion surrounding *Chevron*); *see, e.g.*, James J. Brudney, Chevron *and* Skidmore *in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 506–09 (analyzing deference to workplace law agencies before and after *Chevron*).

24. 512 U.S. 218 (1994).

25. *Id.* at 231. *See also* Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'").

26. *See* Sohoni, *supra* note 3, at 271 ("Yet the common thread connecting these cases is that if the Court regarded a major question to be implicated, the agency's interpretation of the statute would not receive Chevron deference. Instead, the Court reclaimed the 'law-interpreting function' from the agency and itself supplied the best reading of the statute.").

27. *See* Gonzales v. Oregon, 546 U.S. 243, 267 (2006) ("[T]he issue of physician-assisted suicide . . . has been the subject of an 'earnest and profound debate' across the country . . . mak[ing] the oblique form of claimed delegation all the more suspect.").

28. *See Brown & Williamson*, 529 U.S. at 126, 159 ("The FDCA grants the FDA . . . the authority to regulate . . . 'drugs' and 'devices.' . . . Thus, . . . the FDCA gives the agency no authority to regulate tobacco products as customarily marketed.").

29. *See MCI Telecommunications*, 512 U.S. at 234 (stating that the FCC's claimed modification authority "is effectively the introduction of a whole new regime of regulation . . . [which] is not the one that Congress established").

it operated much differently. Whereas the NDD struck down whole sections of statutes, the major questions exception merely limited the statute's breadth.[30] Additionally, unlike the modern MQD, the major questions exception allowed a court to conclude that a question was "major" and determine that "clear congressional authorization" was absent yet still find in favor of the agency.[31]

II. THE MODERN MAJOR QUESTION DOCTRINE

A. *The Early Cases*

The modern MQD developed in the wake of the COVID-19 pandemic. Three cases, most notably *National Federation of Independent Business v. OSHA*,[32] laid the foundation for the Court's decision in *West Virginia*.[33] In *Alabama Ass'n of Realtors v. Department of Health & Human Services*,[34] the Court struck down the Center for Disease Control and Prevention's (CDC) eviction moratorium.[35] In *Biden v. Missouri*,[36] the Court held that the Secretary of Health and Human Services did not exceed their statutory authority by requiring staff at healthcare facilities participating in Medicare and Medicaid to receive a COVID-19 vaccination.[37]

In *OSHA*, the Court struck down the agency's emergency workplace vaccine mandate.[38] The Court emphasized that the temporary regulation veered outside the lane of workplace safety and encroached into the lane of general public health.[39] For example, the Court highlighted that the vaccine could not be undone after an employee left the office.[40] The Court

30. *See* Summers, *supra* note 11, at 95 ("While the nondelegation doctrine would strike down the statute itself, the major questions doctrine would strike down an agency's rule interpreting the statute.").

31. *See, e.g.*, King v. Burwell, 576 U.S. 473, 485–86, 498 (2015).

32. 142 S. Ct. 661 (2022) (per curiam).

33. *See id.* at 665–66. Like the major questions exception cases, the Court did not explicitly rest its holding on the doctrine. *Id.* Rather, the Court included the doctrine's general principles amongst its reasoning. *Id.*

34. 141 S. Ct. 2485 (2021) (per curiam).

35. *Id.* at 2490 ("If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it.").

36. 142 S. Ct. 647 (2022).

37. *See id*. at 654 ("The challenges posed by a global pandemic do not allow a federal agency to exercise power that Congress has not conferred upon it. At the same time, such unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have.").

38. *OSHA*, 142 S. Ct. at 666.

39. *See id.* at 665–66 ("[I]mposing a vaccine mandate on 84 million Americans in response to a worldwide pandemic is simply not 'part of what the agency was built for[]' … the mandate takes on the character of a general public health measure, rather than an '*occupational* safety or health standard.'").

40. *Id.* at 665.

also stressed that Occupational Safety and Health Administration (OSHA) had never used this claimed statutory authority to issue any similarly far-reaching regulations.[41] Throughout the opinion, the Court emphasized the major nature of the mandate, and although the majority did not explicitly cite the MQD, the Court's reasoning is littered with its early principles.[42] The MQD was coming soon.

B. West Virginia v. EPA

Sure enough, six months after *OSHA*, the Court announced the MQD in *West Virginia v. EPA*.[43] In *West Virginia*, the central issue was the authority of the EPA to implement the Clean Power Plan (CPP)—which the agency had abandoned far before the Court's decision.[44] Specifically, the Court analyzed whether section 111(d) of the Clean Air Act (CAA)[45] granted the EPA the authority to implement the generation-shifting method of reducing greenhouse gas emissions imagined in the CPP.[46] The Court did not begin its analysis by determining whether the CAA was ambiguous.[47] The Court did not discuss whether the EPA's interpretation of the CAA was reasonable.[48] The Court did not cite *Chevron* at all.[49] Rather, it explained that ordinary statutory interpretation methods were inappropriate.[50]

Ordinary statutory interpretive methods were inappropriate because the "EPA 'claim[ed] to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory

41. *See id.* at 666 ("It is telling that OSHA, in its half century of existence, has never before adopted a broad public health regulation of this kind. . . .").

42. *See id.* at 665–66. Ilya Somin argued that no grave danger existed which would allow OSHA to pass the emergency temporary standard, and therefore, the Court could have struck the mandate down without the MQD principles. *See* Ilya Somin, *A Major Question of Power: The Vaccine Mandate Cases and the Limits of Executive Authority*, 2022 CATO SUP. CT. REV. 69, 78–79. Instead, the Court chose to support its holding almost exclusively on MQD principles. *See OSHA*, 142 S. Ct. at 665–66.

43. 142 S. Ct. 2587 (2022).

44. *See id.* at 2604. *See generally* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) [hereinafter Clean Power Plan] (to be codified at 40 C.F.R. pt. 60) (establishing carbon dioxide emission performance rates representing the best system of emission reduction for fossil fuel-fired electric utility steam generating units and stationary combustion turbines).

45. 42 U.S.C. §§ 7401–675.

46. 42 U.S.C. § 7411(d); *West Virginia*, 142 S. Ct. at 2610.

47. *See West Virginia*, 142 S. Ct. at 2607.

48. *See id.*

49. *See id.* At 2587–616.

50. *See id.* At 2609 ("The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of 'clear congressional authorization,' confirms that the approach under the major questions doctrine is distinct.") (internal citation omitted).

authority.'"[51] Under the EPA's interpretation of the CAA, Congress tasked it with "deciding how Americans will get their energy."[52] The economic and political ramifications of this policy would be significant.[53] For all these reasons, the Court held that whether the CAA authorized the EPA's CPP was a major question and required "clear congressional authorization."[54] Thus, the MQD was finally born.

C. *The Doctrine and Its Flaws*

The Court described the general framework for the MQD but failed to provide much guidance for future MQD cases.[55] Presumably, the lower federal courts will struggle with the precise application of the doctrine for the foreseeable future. Nevertheless, the MQD analysis will proceed in two parts.[56] First, courts will ask if the question is a "major" one.[57] Second, if it is, courts will ask if there is "clear congressional authorization" for the claimed authority.[58]

West Virginia and the cases that preceded it suggest that whether a question is major hinges on the "history and breadth" as well as the "economic and political significance" of the agency authority asserted.[59] Thus, future courts will likely ask three questions: (1) how has the agency used the section of the statute in the past; (2) how substantial is the authority the agency claims; and (3) how significant are the political and economic effects of the policy?

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51. *Id.* At 2610.

52. *Id.* At 2612.

53. *See id.* At 2604 ("The rule would entail billions of dollars in compliance costs . . . , require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."); *id.* At 2621 (Gorsuch, J., concurring) ("Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important."); *see also* Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32520, 32529 (July 8, 2019) [hereinafter Repeal of Clean Power Plan] (to be codified at 40 C.F.R. pt. 60) ("At the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy. . . .").

54. *West Virginia*, 142 S. Ct. at 2616 (Gorsuch, J., concurring).

55. Jonathan H. Adler, West Virginia v. EPA*: Some Answers About Major Questions*, 2022 CATO SUP. CT. REV. 37, 38–39. Although the majority chose not to offer significant guidance, Justice Gorsuch explained how he believes the lower federal courts should handle potential MQD cases. *See West Virginia*, 142 S. Ct. at 2620–23 (Gorsuch, J., concurring).

56. *See West Virginia*, 142 S. Ct. at 2610, 2614 (majority opinion); *see also* NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam) (identifying OSHA's exercise of authority as significant before determining whether Congress plainly authorized the exercise of authority).

57. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring).

58. *Id.* at 2621.

59. *Id.* at 2608 (majority opinion).

Nevertheless, more questions linger for the lower courts to answer. Courts are left to define economic and political significance precisely. Justice Gorsuch categorized economic significance as "regulat[ing] 'a significant portion of the American economy,'"[60] but that hardly narrows the phrase's meaning. Almost any DOL regulation could be considered economically significant under this definition. The DOL's role is "[t]o foster, promote, and develop the welfare of wage earners, job seekers, and retirees of the United States."[61] Thus, a rule regulating when an employer can pay tipped workers the lower $2.13 minimum wage under the Fair Labor Standards Act (FLSA)[62] may qualify as economically significant under Justice Gorsuch's broad definition.[63] Moreover, Justice Gorsuch defined political significance as "end[ing] an 'earnest and profound debate across the country.'"[64] A DOL regulation raising the federal minimum wage would surely fit within this definition.[65] But maybe not if the wage requirement only applies to federal contractors.[66]

Further, courts must also determine what qualifies as clear congressional authorization. This determination may be less challenging to lower federal courts, as "[c]ourts have long experience applying clear-statement rules."[67] Still, agencies evolve, society progresses, and needs

60. *Id.* at 2622 (Gorsuch, J., concurring) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)). Justice Gorsuch alternatively adds that a regulation "requir[ing] 'billions of dollars in spending' by private persons or entities" qualifies as economically significant. *Id.* (quoting King v. Burwell, 576 U.S. 473, 485 (2015)).

61. *About Us*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/general/aboutdol [https://perma.cc/FB2B-QDRP] (last visited Feb. 19, 2023).

62. Fair Labor Standards Act, 29 U.S.C. §§ 201–219.

63. *See* Rebecca Rainey, *Labor Department Challenges Test Limits of* West Virginia v. EPA, BLOOMBERG L. (July 29, 2022), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X3DTA1VK000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/9FQ6-8YXC] (discussing a pending suit against the DOL for this rule); Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60114 (Oct. 29, 2021) [hereinafter Tipping Rule] (to be codified at 29 C.F.R. pt. 10, 531); *see generally* Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed Dec. 03, 2021) (challenging the DOL's authority to regulate when an employer can pay tipped workers the lower $2.13 minimum wage).

64. *West Virginia*, 142 S. Ct. at 2620 (Gorsuch, J., concurring) (quoting Gonzales v. Oregon, 546 U.S. 243, 267–69 (2006)).

65. *See* Amina Dunn, *Most Americans Support a $15 Federal Minimum Wage*, PEW RSCH. CTR. (Apr. 22, 2021), https://www.pewresearch.org/fact-tank/2021/04/22/most-americans-support-a-15-federal-minimum-wage/ [https://perma.cc/T3A4-SY6N] (acknowledging that about sixty percent of Americans support raising the minimum wage and about forty percent oppose raising it).

66. *See, e.g.*, Bradford v. DOL, 582 F. Supp. 3d 819, 840–41 (D. Colo. 2022) (rejecting plaintiffs' MQD attack on a DOL rule that increases the minimum wage for federal contractors). It is worth mentioning that *Bradford* was decided before the Court's decision in *West Virginia*, and the decision is currently being appealed to the Tenth Circuit. Bradford v. DOL, No. 21-cv-03283-PAB-STV, 2022 WL 266805, at *1 (D. Colo. Jan. 28, 2022).

67. *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

change. "Pragmatically, Congress is not going to be able to provide the clear statement [that] the Court is requiring."[68] Congress cannot write clear statements that capture situations Congress cannot envision.[69] Must the legislature continuously amend statutes to add a clear statement as these situations arise? Such a requirement seems impractical.

Regulations currently in place will not be exempt from this explicit authorization. Yet, Justice Kavanaugh previously suggested that they should be exempt.[70] A major reason is that "when the Court applies a new canon retroactively to an old statute, it imposes a cost rather than a benefit on the unsuspecting legislature."[71] The level of deference that lower courts give to current agency rules when applying the MQD will be something to follow.

D. *Agencies' Authoritative Lanes*

Finally, the Supreme Court advanced arguments in both *National Federation of Independent Business v. OSHA* and *West Virginia v. EPA* that the agencies' asserted powers fell outside their lane of authority.[72] In *West Virginia*, the Court offered up the following example:

> We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.[73]

But disputed administrative rules and regulations are unlikely to belong to one agency over another as clearly as in the Court's illustration. Thus, lower courts will be left to determine whether an agency veered from its lane in promulgating the challenged regulation. If vaccine and testing requirements for workplaces are not within OSHA's lane of authority, then whose lane is it? The Court noted in *OSHA* that the agency was

68. Mark B. Seidenfeld, Professor of Law, Florida State University, Remarks at the University of Florida Law Review Allen L. Poucher Lecture: The Major Question: The Implications of West Virginia v. EPA on the Administrative State (Oct. 20, 2022) [hereinafter Poucher Lecture].

69. *Id.*

70. *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2156 n.188 (2016).

71. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142–43 (2002).

72. *See* NFIB v. OSHA, 142 S. Ct. 661, 665 (2022) (per curiam); *West Virginia*, 142 S. Ct. at 2612–13.

73. *West Virginia*, 142 S. Ct. at 2613.

encroaching on general public health rather than staying in its lane of workplace safety.[74]

When one agency's regulation merges into another agency's lane, which of the two agencies (if either) can proceed? Take the example the Court used in *West Virginia*. Under the EPA's reading of the CAA, it had the authority to regulate the transition from coal to natural gas.[75] This reading would require "projecting system-wide . . . trends in areas such as electricity transmission, distribution, and storage."[76] Of course, this is not within the EPA's traditional area of expertise.[77] But it would likely be within the Department of Energy's (DOE) area of expertise.[78] Could the DOE have required generation-shifting then? The answer is probably not.

With the above uncertainties in mind, the DOL (and other agencies) must now defend the authority that it currently wields and any future authority it claims to have in the lower federal courts.

III. THE MQD'S LIKELY EFFECT ON DOL AUTHORITY

Much was made of the NDD and *Chevron* deference when the Court announced each, but neither had the monumental effect on agency deference that scholars predicted.[79] The NDD was immediately crippled by the intelligible principle test—a test that even the vaguest of regulatory provisions satisfies.[80] Although *Chevron* deference was not immediately curbed the way the NDD was, deference to agencies did not significantly increase after *Chevron* was decided.[81] In fact, agency deference under the Roberts Court is lower than under both the Burger and Rehnquist Courts.[82] Moreover, the Supreme Court has begun to ignore *Chevron*.[83]

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74. *OSHA*, 142 S. Ct. at 665.

75. *West Virginia*, 142 S. Ct. at 2606.

76. *Id.* at 2612.

77. *See id.* at 2612–13 ("EPA itself admitted when requesting special funding, 'Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage' requires 'technical and policy expertise not traditionally needed in EPA regulatory development.'") (internal citation omitted).

78. *See About Us*, U.S. DEP'T OF ENERGY, https://www.energy.gov/about-us [https://perma.cc/3SXY-PXRB] (last visited Feb. 19, 2023) ("The mission of the Energy Department is to ensure America's security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.").

79. *See* Summers, *supra* note 11; Shane & Walker, *supra* note 22.

80. *See* J.W. Hampton, Jr. & Co. v. U.S., 276 U.S. 394, 409 (1928).

81. *See* Brudney, *supra* note 23, at 503.

82. *See id.* (stating that agency deference was 17.1% under the Burger Court, 17.4% under the Rehnquist Court, and 15.9% under the Roberts Court).

83. *See* Richard J. Pierce, Jr., *Is* Chevron *Deference Still Alive?*, THE REGUL. REV. (July 14, 2022), https://www.theregreview.org/2022/07/14/pierce-chevron-deference/ [https://perma.cc/

A. *Deference to the DOL Before the MQD*

The Supreme Court, specifically the current Court, is increasingly skeptical of the administrative state.[84] "It is no secret that the [Court] has particular disdain for certain agencies and the EPA [is] pretty high on [this Court's] list."[85] The DOL is lower on this imagined hierarchy of agency disdain.[86]

Prior to *Chevron*, Court deference to the DOL was a mixed bag. Because Congress gives the DOL broad authority to regulate, the Court often deferred to this congressional delegation.[87] However, the Court was less deferential when the DOL used informal mechanisms to interpret its authorizing statutes.[88] Since *Chevron*, the Court has continued to take a similar approach.[89] The Court applies *Chevron* to the DOL's interpretations when the "interpretation is conveyed through some form of regulation."[90]

Deference to workplace law agencies has actually declined since *Chevron* was decided.[91] The Court supported the DOL's interpretations eighty-three percent of the time before *Chevron* but only sixty-seven percent since *Chevron*.[92] Nevertheless, the Court still defers to the DOL in two out of every three cases.[93] And the Court is even more deferential to the DOL when the regulation favors employers rather than employees.[94]

It is worth noting that the Supreme Court and circuit courts treat *Chevron* deference differently. While the Court has seemingly abandoned *Chevron*, agencies succeed at roughly the same rate under *Chevron*

PWL9-XLQC]; Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 4 (2017) (explaining that from 1984 to 2006, the Supreme Court did not apply *Chevron* deference in three quarters of cases that it would have seemed to apply").

84. Adam Liptak & Ephrat Livni, *Supreme Court Seems Poised to Streamline Challenges to Agency Power*, N.Y. TIMES (Nov. 7, 2022), https://www.nytimes.com/2022/11/07/us/supreme-court-agencies-sec-ftc.html [https://perma.cc/ZZE2-RSDF].

85. Jessica Owley, Professor of Law and Faculty Director for the Environmental Law Program, University of Miami, Poucher Lecture, *supra* note 68.

86. *See id.*; *see also* Brudney, *supra* note 23, at 498 (discussing judicial deference to various agencies, including the DOL).

87. Brudney, *supra* note 23, at 505–06.

88. *Id.* at 506.

89. *Id.* at 508.

90. *Id.*

91. *See id.* at 508–09 ("When invoking agency deference as a probative resource, the Court is less likely to support agency interpretations since Chevron than it was in the prior fifteen years.").

92. *Id.* at 509.

93. Brudney, *supra* note 23, at 509.

94. *See id.* at 512 (stating that the Supreme Court approved agency determinations fifty-three percent of the time for employees and seventy-two percent of the time for employers).

deference as under other standards of review in the Supreme Court.[95] In contrast, agencies in circuit courts are significantly more likely to prevail under *Chevron* deference than under other standards.[96] Circuit courts also give agencies *Chevron* deference at a higher rate than the Supreme Court.[97] The circuit courts will play a key role in the size of the MQD's effect.

It remains to be seen whether the lower federal courts will continue to defer to agencies in the aftermath of *West Virginia*. As discussed, the Court did the lower courts no favors when it described the standard for a major question. Therefore, the lower court will probably remain conservative in the number of rules and regulations they strike down—at least until the MQD is more developed. And challengers will give the courts plenty of opportunities to develop the MQD.

B. *Current Challenges to the DOL*

In the aftermath of *West Virginia*, it is "open season on final rules."[98] Challenges in the lower federal courts are already underway. There are currently three significant challenges to DOL rules and regulations. Some challenges preceded the Court's holding in *West Virginia*, and the challengers' have since submitted notices of supplemental authority to bolster their MQD arguments.[99] Lower courts decided on other challenges years before the Court formally announced the MQD in *West Virginia*.[100] Nevertheless, more challenges are certainly coming.

The first challenge attacks a regulation that further defines tipped workers.[101] Specifically, the rule defines work "in a tipped occupation" as work that produces tips and work that directly supports tip-producing work so long as the directly supporting work does not exceed twenty percent of the work week or thirty consecutive minutes.[102] In *Restaurant*

95. Barnett & Walker, *supra* note 83, at 4.

96. *See id.* at 6 ("First, agency interpretations were significantly more likely to prevail under Chevron deference (77.4%) than Skidmore deference (56.0%) or, especially, de novo review (38.5%)").

97. Pierce, Jr., *supra* note 83.

98. Andrew Hammond, Associate Professor of Law, University of Florida, Poucher Lecture, *supra* note 68.

99. *See, e.g.*, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed Dec. 3, 2021).

100. *See, e.g.*, N.Y. State Bar Ass'n v. FTC, 276 F. Supp. 2d 110, 118 (D.D.C. 2003), *aff'd*, ABA v. FTC, 430 F.3d 457, 470–71 (D.C. Cir. 2005) (holding that the FTC's interpretation of an ancillary provision in the Financial Services Modernization Act fundamentally alters the regulatory scheme established by the legislature because it essentially allows the FTC to police the ethical conduct of attorneys).

101. *See* Complaint for Declaratory and Injunctive Relief at 2, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. Dec. 3, 2021) ("Specifically, the statute speaks in terms of a 'tipped employee.' 29 U.S.C. § 203(m)(2)(a).").

102. 29 C.F.R. § 531.56(f)(1); 29 C.F.R. § 531.56(f)(4).

Law Center v. DOL,[103] the plaintiffs contended that whether the DOL has the authority to issue this rule is a major question and that Congress has not given the DOL clear authorization.[104] The plaintiffs pointed out that the regulation "assert[s] the authority to regulate at a task level the work of all tipped employees in the United States" because of the statutory language of "engaged in an occupation."[105] According to the plaintiffs, the regulation raises a major question because it "affects close to 500,000 different workplaces across the country and imposes on businesses more than two billion dollars in familiarization and compliance costs."[106]

However, nearly all DOL regulations will affect a significant number of workplaces and impose high cumulative costs on the affected business—the DOL is the federal agency tasked with regulating the workplace. The plaintiffs' attempt to elevate the significance of standard DOL duties by asserting that the new rule regulates at the task level and carries high monetary costs,[107] but the plaintiffs' argument on its own is unlikely to sway a court. Economic significance is only a single factor used to determine whether a question is major.

For example, this new rule does not stem from discovering unheralded power in a long-extant statute section representing some transformative expansion of the DOL's regulatory authority. Instead, the DOL merely offers clarification to a phrase in the FLSA as the workplace evolves and employers attempt to take advantage of ambiguity. Moreover, there is no evidence that this regulation silences intense debate throughout the United States. Climate change and COVID-19 vaccinations are hotly contested political issues, and the Court rejected administrative agencies' attempts to take these major questions away from the legislative branch.[108] Tipped employee compensation—specifically what tasks qualify—is not a comparable political issue.

The FLSA allows employers to pay employees a wage below the federal minimum wage if the employee is "engaged in an occupation in which he [or she] customarily and regularly receives" tips so long as the sum of the paid wages and tips are greater than or equal to the federal minimum wage.[109] However, the FLSA does not define what it means to be engaged in an occupation where workers are ordinarily tipped. Thus, a gap exists in the statute, and the DOL merely fills in this gap by defining

103. *Rest. L.* Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. Dec. 3, 2021).

104. *See* Notice of Supplemental Authority in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment at 2, Rest. L. Ctr. v. DOL, No. 1:21-cv-01106 (W.D. Tex. filed July 11, 2022).

105. *Id.*

106. *Id.* (citations omitted).

107. *See id.*

108. *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2486, 2486 (2021) (per curiam); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

109. 29 U.S.C. § 203(m)(2); 29 U.S.C. § 203(t).

the phrase. The regulation of compensation for tipped workers falls clearly within the DOL's lane, is not a major question, and does not require clear congressional authorization.

A second court challenge to DOL authority is *Bradford v. DOL*.[110] In *Bradford*, the plaintiffs sought a preliminary injunction to enjoin the enforcement of a DOL rule—86 Fed. Reg. 67,126—that raised the minimum wage for federal contractors through authority granted by the Federal Property and Administrative Services Act.[111] Among other things, the regulation raised the minimum wage for federal contractors from $10.10 per hour to $15.00 per hour.[112] The increase is estimated to total "$1.7 billion per year over ten years" and "affect 327,300 employees."[113]

In support of their challenge to the DOL rule, the plaintiffs cited the MQD.[114] The district court rejected this argument.[115] The plaintiffs appealed to the Tenth Circuit and now have *West Virginia*—which had not been decided before the district court's ruling—to bolster their position.[116] Despite the Court's formal recognition of the MQD, the likelihood that the plaintiffs' claim will be successful on appeal remains bleak. *West Virginia* was not a sudden, massive transformation of court-made law; it was rooted (at least to some degree) in the major questions exception principles.[117] In fact, Chief Judge Philip A. Brimmer used many of these principles to conclude that the MQD did not apply in *Bradford*.[118]

Moreover, unlike the CPP or the OSHA vaccine mandate, this rule affects a significantly more limited portion of the United States economy. Whereas OSHA's vaccine mandate implicated massive amounts of employees, this DOL rule only raises the minimum wage for federal contractors.[119] The plaintiffs in *Bradford* contended that the increase was economically significant.[120] However, the regulation's economic effect is

110. 582 F. Supp. 3d 819 (D. Colo. 2022), *appeal docketed*, No. 22-1023 (10th Cir. Jan. 28, 2022).

111. *Id.* at 826–27; 29 C.F.R. § 23.10.

112. *Bradford*, 582 F. Supp. 3d at 826. The $10.10 per hour minimum wage was a regulation promulgated by the DOL under the Obama administration. *Compare* 48 C.F.R. § 22.1902(a), *with* 29 C.F.R. § 23.10.

113. *Bradford*, 582 F. Supp. 3d at 840.

114. *Id.* at 839.

115. *See id.* at 840–41.

116. Bradford v. DOL, No. 21-cv-03283-PAB-STV, 2022 WL 266805, at *1 (D. Colo. Jan. 28, 2022).

117. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2610 (2022).

118. *See Bradford*, 582 F. Supp. 3d at 839–41.

119. *Compare* NFIB v. OSHA, 142 S. Ct. 661, 662 (2022) (per curiam) ("The mandate . . . applies to roughly 84 million workers . . . ."), *with Bradford*, 582 F. Supp. 3d at 840 ("[T]he rule will affect 327,300 employees . . . .").

120. *Bradford*, 582 F. Supp. 3d at 840.

below the range that will have a "measurable effect" "in macroeconomic terms, on the gross domestic product."[121] Not only is the economic impact comparably insignificant, but the regulation is also neither politically significant nor a discovery of unheralded power. No great debate exists throughout the country as to how federal contractors should be compensated. Further, this is not an entirely new regulation. The DOL utilized the same statutory authority the agency used to promulgate a $10.10 per hour minimum wage under the Obama administration.[122]

The Court in *OSHA* rejected the agency's contention that the agency could issue the broad vaccine mandate and testing requirement, but the Court had no doubts that "OSHA [could] regulate risks associated with working in particularly crowded or cramped environments."[123] The narrower mandate and requirement would avoid veering outside of OSHA's regulatory lane. Similarly, it is unlikely that the DOL could unilaterally set the federal minimum wage for all workers across the United States. Such a regulation would likely exceed the agency's delegated authority and would undoubtedly be both economically and politically significant.[124] However, raising the minimum wage for federal contractors is more appropriate within the agency's authoritative lane.

The third challenge to DOL authority is the least compelling from an MQD perspective. In *Sun Valley Orchards, LLC v. DOL*,[125] the plaintiff challenged the DOL's H-2A enforcement procedures.[126] The plaintiff is a family-run vegetable farm that relied primarily on seasonal workers until 2015.[127] In 2015, the plaintiff joined the H-2A visa program to

121. *Id.* (citing Increasing the Minimum Wage for Contractors, 86 Fed. Reg. 67,224 (Nov. 24, 2021) (to be codified as 29 C.F.R. pts. 10, 23)). Appellants (Bradford) argue in their brief, which was submitted after the COVID-19 MQD cases but before *West Virginia*, that economic significance does not require a measurable economic effect. Appellants Brief in Chief at 34, Bradford v. DOL, 582 F. Supp. 3d 819 (D. Colo. 2022), *appeal docketed*, No. 22-1023 (10th Cir. Mar. 14, 2022). Appellants assert that the MQD is applicable "whenever a court cannot say with certainty that Congress meant for the outcome implicated by the rule." *Id.* But this is not the test. Although the Appellants are correct that a lack of a measurable economic impact is not dispositive, courts need not always be certain that the outcome of a rule is exactly as Congress intended either. Rather, once a court determines that a rule implicates a major question, then the agency must point to clear congressional authorization. *See West Virginia*, 142 S. Ct. at 2610, 2614.

122. *See Bradford*, 582 F. Supp. 3d at 841 (noting that the Obama, Trump, and Biden administrations all used authority from the Procurement Act to regulate the minimum wage of federal contractors).

123. *OSHA*, 142 S. Ct. at 666.

124. Looking outside of the MQD context, the DOL could not increase the minimum wage for employees covered by the FLSA's minimum wage section because Congress explicitly enumerated the minimum wage. *See* 29 U.S.C. § 206(a).

125. No. 1:21-cv-16625 (D.N.J. Sept. 8, 2021).

126. *See* Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 20, 24–25, *Sun Valley Orchards*, No. 1:21-cv-16625.

127. *Id.* at 8–9.

maintain sufficient workers for the farm.[128] The following year, DOL officials assessed the plaintiff a fine of "over $550,000 for alleged H-2A violations—including a civil monetary penalty of over $200,000 and over $350,000 in back wages."[129] The plaintiff challenged the assessment before a DOL administrative law judge (ALJ), and the ALJ affirmed the fine.[130] The plaintiff then appealed the decision from the ALJ to the DOL's Administrative Review Board (ARB), which affirmed the ALJ's decision.[131] The plaintiff subsequently filed an action in the United States District Court of New Jersey.[132]

In the complaint, the plaintiff alleged (among other things) that the enforcement procedures are not within the DOL's statutory authority under 8 U.S.C. § 1188.[133] After the Court decided *West Virginia*, the plaintiff urged the district court to invalidate the enforcement procedures under the MQD.[134] Yet, the procedures are neither economically nor politically significant. In 2019, the DOL identified a record number of violations of the H-2A program—a mere 12,000.[135] These violations resulted in only $2.4 million in back wages to workers and $2.8 million in civil penalties.[136] Moreover, this, again, is not a hot-button political issue throughout the country. It simply does not rise to the level of an employer vaccine mandate or a national eviction moratorium. Not only are the DOL's enforcement procedures not economically or politically significant, but the procedures are not new. The agency did not seize on a previously ignored section of the statute to wield extraordinary power; the DOL has implemented these procedures for nearly thirty-five years.[137]

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128. *Id.* at 9–10.

129. *Id.* at 10.

130. *Id.* at 15–16.

131. *Id.* at 18.

132. Complaint for Declaratory and Injunctive Relief and Demand for Jury Trial at 1, *Sun Valley Orchards*, No. 1:21-cv-16625.

133. *See id.* at 25 ("But [§ 1188] does not say that that [sic] the Secretary may assess penalties or secure such other relief in proceedings before agency judges.").

134. *See* Defendant's Response to Plaintiff's Additional Notice of Supplemental Authority at 1, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. July 22, 2022).

135. Daniel Costa et al., *Federal Labor Standards Enforcement in Agriculture*, ECON. POL'Y INST. (Dec. 15, 2020), https://www.epi.org/publication/federal-labor-standards-enforcement-in-agriculture-data-reveal-the-biggest-violators-and-raise-new-questions-about-how-to-improve-and-target-efforts-to-protect-farmworkers/ [https://perma.cc/X43B-UUYR].

136. *Id.* Both back wages owed and civil money penalties assessed for H-2A violations peaked in fiscal year 2013, at $4.9 and $6.6 million, respectively (all in constant 2019 dollars). *Id.*

137. *See id.*; Plaintiff's Combined Reply in Support of Its Partial Motion for Summary Judgment and Opposition to Defendants' Motion to Dismiss and Cross-Motion for Summary Judgment at 15, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. May 18, 2022); Defendants' Response to Plaintiff's Additional Notice of Supplemental Authority at 2, Sun Valley Orchards, LLC v. DOL, No. 1:21-cv-16625 (D.N.J. July 22, 2022).

Interestingly—and unlike the previous two challenges—there is also a solid argument that Congress clearly authorized the DOL's enforcement procedures in this case. The FLSA does not clearly authorize the DOL to regulate when workers are tipped employees;[138] the Procurement Act[139] does not clearly authorize the DOL to set the minimum wage for federal contractors.[140] But 8 U.S.C. § 1188(g)(2) specifically authorizes the Secretary of Labor to take actions that "may be necessary to assure employer compliance with terms and conditions of employment under this section," such as "imposing appropriate penalties."[141] Although what will qualify as clear congressional authorization remains to be seen, § 1188(g)(2) seems to explicitly empower the DOL to implement its own H-2A enforcement procedures. Thus, the DOL's enforcement procedures fall within the DOL's authoritative lane delegated by Congress.

None of the current three challenges described above appear to be major questions. The MQD is a doctrine reserved for extraordinary cases. These challenges do not meet that criterion. The challenge in *Restaurant Law Center* comes the closest because the rule is economically significant to a degree, but the rule does not rise to levels of economic and political significance as the rules and regulations at issue in *West Virginia* and *OSHA*. Still, challenges will continue to be thrown at the DOL, and some will eventually be successful. Therefore, the DOL must be careful in drafting new rules and regulations—paying particular attention to where the agency garners the authority for such rules and regulations.

C. *Potential Future Challenges to the DOL*

The most effective challenges to DOL rules and regulations will fall into one or both of two categories: (1) novel rules that veer outside of the Department's ordinary lane and (2) far-reaching regulations that have substantial effects the courts expect Congress to authorize clearly. Although both cases have characteristics of both categories, *OSHA* offers

138. *See* Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–262.

139. Federal Property and Administrative Services Act, 40 U.S.C. §§ 101–1315.

140. *See id.*

141. 8 U.S.C. § 1188(g)(2). The language of § 1188(g)(2) does not explicitly authorize adjudication by ALJs for fines, and 28 U.S.C. § 2461(a) provides that "[w]henever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it *may* be recovered in a civil action." (emphasis added). Thus, some doubt lingers as to whether the use of ALJs is clearly authorized in the eyes of the adjudicating federal court.

lower courts an example of what the first category may look like,[142] while *West Virginia* provides guidance for the second category.[143]

One potential future challenge to DOL efforts could be to define independent contractors.[144] Like the rule in *Restaurant Law Center*, this proposed rule for independent contractors seizes on an undefined phrase in the FLSA. The FLSA defines an employee, employer, and employ, but the FLSA does not define an independent contractor.[145] Although the FLSA does not define an independent contractor, the Internal Revenue Service (IRS) distinguishes independent contractors from employees,[146] and courts have well-developed case law distinguishing the two types of workers under the FLSA.[147]

In 2021, the DOL introduced the Independent Contractor Status Under the Fair Labor Standards Act Rule (IC Rule).[148] This introduction was the Agency's first attempt at defining independent contractors. The rule was similar to the economic realities test used (with some variation) by courts nationwide.[149] However, unlike the economic realities test, the IC Rule elevated two factors—"core factors"—that are unlikely to be outweighed by the other three factors.[150] Subsequently, in 2022, the DOL proposed a

142. *See* NFIB v. OSHA, 142 S. Ct. 661, 663, 666 (2022) (per curiam) (finding that the challenged rule, which was temporary and intended for emergencies, trespassed into the sphere of public health).

143. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022) (emphasizing the billion-dollar impact of the CPP).

144. *See* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795).

145. *See* 29 U.S.C. § 203.

146. *Independent Contractor Defined*, INTERNAL REVENUE SERV., https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined [https://perma.cc/R8FQ-WREL] (last visited Apr. 9, 2023) ("The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. . . . What matters is that the employer has the legal right to control the details of how the services are performed.").

147. *See, e.g.*, Heath v. Perdue Farms, Inc., 87 F. Supp. 2d 452, 457 (D. Md. 2000) (describing the economic realities test, which is used to determine whether a worker is an employee or an independent contractor for FLSA claims).

148. *See* Bassam Kaado, *The Definition of Independent Contractor Is About to Change*, BUS. NEWS DAILY (Nov. 8, 2023), https://www.businessnewsdaily.com/what-is-an-independent-contractor [https://perma.cc/9PTQ-Z2PE].

149. *Compare* Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,219 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795) (identifying two core factors and three less-probative factors to consider when determining the economic reality of the worker), *with Heath*, 87 F. Supp. 2d at 457 (identifying six factors to consider when determining the economic reality of the worker).

150. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218, 62,219 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795). There are six factors to the economic realities test: opportunity to profit or lose depending on managerial skill; investments by the worker and the employer; permanence of the

new rule that would rescind the 2021 rule and essentially codify the economic realities test.[151]

The DOL's attempts to define an independent contractor will likely be challenged, and the MQD will certainly be cited in the challenge. Although the IRS and the courts have definitions and tests for independent contractors, the proposed rule is not novel or clearly outside the DOL's lane of authority. Instead, the DOL seeks to clarify ambiguity within the FLSA by adopting the common law definition. A successful challenge to this proposed rule would hinge on its significant effect across the country.

The proposed rule is expected to result in millions of workers attaining employment status.[152] With employment status, the new employees will be entitled to healthcare, retirement benefits, and more.[153] Unfortunately, many companies may choose to reduce their workforce rather than accept the increased costs. Companies like Uber and Lyft, which rely on gig workers, may struggle to find success under the new definition.[154] Small businesses may suffer as well. Furthermore, there is a ripe debate throughout the country over the definition of an independent contractor.[155] Nevertheless, the ultimate outcome of any potential challenge to the DOL's authority to define independent contractors will turn on how broadly courts read economic and political significance. This proposed rule is not as expensive and polarizing as the generation-shifting method of reducing greenhouse gas emissions imagined in the CPP or the workplace vaccine and testing requirement ordered by OSHA. Still, it is unclear whether lower courts will read *West Virginia* and *OSHA* as floors or examples.[156]

Another potential challenge to future rules and regulations could come in the artificial intelligence (AI) landscape. Jobs across the United States

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work relationship; nature and degree of control; whether the work performed is integral to the employer's business; and skill and initiative. *Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB. WAGE & HOUR DIV. (Mar. 2024), https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship [https://perma.cc/HZZ2-AWP8].

151. Employee or Independent Contractor Classification Under the Fair Labor Standards Act, 87 Fed. Reg. 62, 218, 62,219–20 (proposed Oct. 13, 2022) (to be codified at 29 C.F.R. pts. 780, 788, 795).

152. Kaado, *supra* note 148.

153. *Id.*

154. *Id.*

155. Marianna Curtis, *Employee or Independent Contractor? The Debate Continues*, BERGER SINGERMAN (June 21, 2023), https://www.bergersingerman.com/news-insights/employee-or-independent-contractor-the-debate-continues [https://perma.cc/L3LS-X9L6].

156. At least one lower court has read economic significance narrowly, noting that the challenged regulation was less than $52.3 billion—the amount that the Office of Management and Budget quantifies as a measurable economic effect. Bradford v. DOL, 582 F. Supp. 3d 819, 840 (D. Colo. 2022).

are being automated. It started with assembly line workers and is expected to impact truck drivers next, but AI will continue to improve.[157] Stores and restaurants across the country utilize self-checkout and ordering machines. Some believe that AI will eventually be able to perform the work of surgeons.[158] These changes would significantly impact the labor market, but is there room (outside of future statutes offering clear congressional authorization) for the DOL to regulate AI? Any promulgated rule would likely fall into the novel rule category.[159] Such a rule would likely seize onto a long-extant statute to increase the DOL's authority. Additionally, the rule could easily drift out of the DOL's defined lane.

One way the DOL could approach some AI regulation would be through OSHA—both the agency and the Act. The Occupation Safety and Health Act (OSH Act)[160] charges OSHA, a part of the DOL, with "ensur[ing] safe and healthful working conditions for workers by setting and enforcing standards."[161] OSHA can use the OSH Act to regulate AI to the extent that it harms working conditions. Although this is unlikely to be particularly useful in the form of AI that is replacing workers, it may help regulate productivity monitoring tools that negatively affect working conditions, such as by deleteriously affecting mental health.[162] Still, these regulations could incidentally restrict AI meant to replace workers.

Future challenges to the DOL's authority and its promulgated rules will continue to occur. Many challenges will cite the MQD. Nevertheless, it is only the exceptional and extraordinary cases that the DOL will struggle to defend, and these cases are few and far between. For every promulgated vaccine mandate rule, there will be many more rules, like the increase in the minimum wage for federal contractors. Eventually, another monumental and highly polarizing event will overtake the country. Maybe it's the rise of AI in the workforce. Perhaps it is

157. Sean Flemming, *A Short History of Jobs and Automation*, WORLD ECON. F. (Sept. 3, 2020), https://www.weforum.org/agenda/2020/09/short-history-jobs-automation/ [https://perma.cc/9H6C-V53C]; ANDREW YANG, THE WAR ON NORMAL PEOPLE 43–44 (2018).

158. YANG, *supra* note 157, at 58.

159. The rule could also be economically and politically significant, but that determination would be highly dependent on the specifics of the rule.

160. 29 U.S.C. §§ 651–678.

161. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/aboutosha [https://perma.cc/6E9U-Y43T] (last visited Apr. 10, 2023).

162. *See* Tanya Goldman, *What the Blueprint for an AI Bill of Rights Means for Workers*, U.S. DEP'T OF LAB. BLOG (Oct. 4, 2022), https://blog.dol.gov/2022/10/04/what-the-blueprint-for-an-ai-bill-of-rights-means-for-workers [https://perma.cc/TUU8-BL4L] ("For instance, call center agents, who are often electronically monitored and held to similarly intensive productivity standards as warehouse workers, report high levels of stress, difficulties sleeping, and repetitive stress injuries.").

something completely different. Regardless, it is with regard to these events that the DOL will struggle the most to adapt to the MQD.

D. *Other Potential Future Challenges in the Labor Field*

Although the DOL is the primary federal agency in labor and employment, other agencies also affect the field.[163] These agencies include the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), and the Federal Trade Commission (FTC).[164] Each agency will also have to weather numerous MQD challenges to rules and regulations.

A prime example of a future employment regulation from a non-DOL agency ripe for challenge is the FTC's proposed rule that bans non-compete agreements.[165] The Non-Compete Clause Rule (NCCR) prohibits not only standard non-compete agreements but also any "contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."[166] The NCCR asserts that the Federal Trade Commission Act (FTC Act)[167] directs the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce" and "'make rules and regulations for the purpose of carrying out the provisions of' the FTC Act."[168] Under the FTC's interpretation of the FTC Act, non-compete clauses are an unfair method of competition.[169]

The NCCR is ripe for an MQD challenge. Roughly thirty million workers across the country are bound by a non-compete agreement, and the NCCR would immediately void all of them.[170] Moreover, the NCCR is expected to increase worker earnings by almost $300 billion annually.[171] This growth sounds economically significant and far surpasses the $52.3 billion standard noted by the district court in

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163. *See Related Agencies*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/resources/related-agencies [https://perma.cc/Y3YC-5FZN] (last visited Feb. 5, 2024).

164. *U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights*, EEOC (Jan. 10, 2021), https://www.eeoc.gov/newsroom/us-department-labor-national-labor-relations-board-us-equal-employment-opportunity [https://perma.cc/7R77-7F9B].

165. *See* Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

166. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3509 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

167. 15 U.S.C. §§ 41–58.

168. Non-Compete Clause Rule, 88 Fed. Reg. at 3482; 15 U.S.C. §§ 45(a)(2), 46(g).

169. Non-Compete Clause Rule, 88 Fed. Reg. at 3482.

170. Non-Compete Clause Rule, 88 Fed. Reg. at 3485, 3513.

171. Non-Compete Clause Rule, 88 Fed. Reg. at 3537.

Bradford.[172] Further, there is a politically considerable edge as well. Congress has rejected multiple bills that would curb or limit non-compete agreements.[173] A primary purpose of the MQD is to prevent federal agencies from acting where Congress has chosen not to act.[174]

Although Congress has tasked the FTC with policing unfair methods of competition, this regulation likely goes too far. The similarities between this rule and those at issue in *West Virginia* and *OSHA* are immense. This kind of rule will have a massive effect on employers across the nation, just like OSHA's vaccine mandate. The primary difference, and what the FTC will probably cling to when the rule is challenged, is that NCCR is more clearly authorized by statute. Nevertheless, a challenge to the NCCR is one in many cases that squarely fits into the "extraordinary case"[175] category that the Supreme Court calls major questions.

CONCLUSION

Ultimately, the effect of the MQD on DOL authority will be, ironically, minor. The DOL will face (and currently is facing) a barrage of court challenges on MQD grounds, but little change in deference to the DOL will likely result—especially at the Supreme Court level. The Supreme Court created the power to strike down administrative policies that it feels are too big for an agency to decide outside of some clear congressional authorization. Nevertheless, the MQD is another tool for the Court to play with while announcing its decision.[176] The Court did not need *Chevron* to defer to an agency's interpretation; the Court does not need the MQD to ignore an agency's interpretation.

The most prominent effect of the MQD will be on challenges to DOL at the circuit court level. All challenges are unlikely to make it to the Supreme Court; thus, how the circuit courts handle those challenges will be of utmost importance. Still, the lower courts will be more cautious than the Supreme Court in deciding that a federal agency's regulation is major and not clearly authorized by Congress. After all, the United States Court of Appeals for the District of Columbia Circuit determined that the CPP did not implicate the MQD before the Supreme Court reversed in *West*

172. Bradford v. DOL, 582 F. Supp. 3d 819, 840 (D. Colo. 2022).

173. Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ [https://perma.cc/2EGX-CWN3].

174. *See* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. 693, 694 (2022).

175. West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).

176. *Id.* at 2641 (Kagan, J., dissenting) ("The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards.").

Virginia.[177] The MQD is for unusual and significant agency action. Therefore, standard DOL rules and regulations will be more or less left alone by the courts applying the MQD.

The novel, unusual, and groundbreaking rules will be the most vulnerable to MQD challenges. Thus, the DOL's rulemaking process must work harder and more creatively to sneak these regulations past MQD challenges. As most of the DOL's rules will be economically and politically significant, the DOL must root its new rules in previously recognized authority to avoid any claims that it is seeking to expand its regulatory authority. Yet, this is not enough. The DOL must also avoid using previous authority in new and controversial contexts to expand its power. Ultimately, some goals of the DOL, such as attempts to regulate AI in the labor force, may be impractical in the face of the MQD and will require Congress to act. For example, as AI continues to take over the workplace, Congress can amend or enact legislation that authorizes the DOL to regulate AI in the workforce.[178] Therefore, the MQD is unlikely to noticeably curb the DOL's power to issue rules and regulations.

177. Am. Lung Ass'n v. EPA, 985 F.3d 914, 959 (D.C. Cir. 2021), *rev'd*, West Virginia v. EPA, 142 S. Ct. 2587 (2022).

178. Yes, easier said than done.