

THE UNIFORM LAW COMMISSION AND THE RESTRICTIVE EMPLOYMENT AGREEMENT ACT

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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

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

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.

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.