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

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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.