July 5, 2023

Via FedEx
The Honorable Kathleen C. Hochul
Governor of New York State
NYS State Capitol Building
Albany, New York 12224

Re: Senate Bill S3100A (Assembly Bill AO1278B)
“An Act to amend the labor law, in relation to prohibiting non-compete agreements and certain restrictive covenants”

Dear Governor Hochul:

I am writing to provide information concerning the serious unintended consequences that the proposed ban on employee noncompetes in Senate Bill S3100A would likely have, and to identify a potential, more-carefully tailored approach.

To provide context for my input, I am a commercial litigation, trade secret, and restrictive covenant lawyer admitted to practice in New York, drafted most of the language in the Massachusetts noncompete statute, assisted the Obama Administration in connection with its consideration of noncompete reform, have been cited in much of the academic research on noncompetes, track noncompete legislation around the country, and teach the course Trade Secrets and Restrictive Covenants at Boston University School of Law.

KEY CONSIDERATIONS

For assistance in your consideration of Senate Bill S3100A, I have attached a letter (the “FTC Letter”) that I wrote and submitted (joined in by over 100 lawyers around the country) to the Federal Trade Commission concerning its consideration of a similar proposed noncompete ban. Most of the key points in that letter are directly relevant to Senate Bill S3100A. In particular, as detailed in that letter (which includes extensive supporting citations), the key points are as follows:
Noncompetition agreements provide an important prophylactic tool for the protection of trade secrets, other confidential business information, and hard-fought customer relationships. Neither trade secret law nor confidentiality agreements can provide the same level of protection as noncompetes, nor can customer nonsolicitation agreements. Even where an employee attempts to abide by these other restrictions, the subtle use of trade secrets or indirect solicitation of customers is frequently inevitable simply by dint of the knowledge the employee has or the contact that the employee will have with customers they used to work with. Unlike a breach of a noncompete, this conduct (whether intentional or inadvertent) frequently goes undiscovered until the harm has occurred and is likely irreversible. As a result, none of these alternatives provides the level of protection, deterrence, and clarity offered by noncompete agreements.

The elimination of noncompetes will lead to a significant increase in the likelihood that trade secrets will be unlawfully taken to a competitor.

Further, a noncompete ban will result in a substantial increase in trade secret litigation as a substitute for noncompete enforcement litigation (as occurs in California). Such litigation is more costly, more time-intensive (for employees, companies, courts, and lawyers), and less predictable. As a result, substituting trade secret litigation for noncompete litigation harms both workers and companies, and benefits primarily only the lawyers.

To the extent the proposed law would ban or narrow the permissible scope of noncompetes arising in the context of the sale of a business (or an interest in a business), it will likely erode the vibrant small-business merger and acquisition environment that is vital to sellers, buyers, estate planners, and the economy.

A ban on noncompetes for low-wage, low-skilled workers (such as Your Excellency has contemplated) would target the prohibition to those who

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1 Senate Bill S3100A adopts the language of the Field Code, which has also been adopted in California, North Dakota, and Oklahoma. The language has been interpreted differently in those states; in California, as of 2008, it has been read to ban customer nonsolicitation agreements, whereas in North Dakota and Oklahoma, it has not. Any law in New York using similar language should clarify its intended scope.

need the protection most.\(^3\) A way to achieve that effect is to use exempt status under the Fair Labor Standards Act (the “FLSA”), 29 U.S.C. § 201, \textit{et seq.}, as the standard. While not a perfect 1:1 alignment, this approach protects both low-wage workers (while avoiding the arbitrariness of a wage threshold) and workers in job functions where they typically do not have access to trade secrets or substantial customer goodwill. This standard was adopted first in Massachusetts,\(^4\) and has since been followed by Rhode Island\(^5\); Nevada adopted a similar-in-concept ban based on whether the employee is paid hourly.\(^6\)

- Requiring companies to provide advance notice that a noncompete will be required (a requirement recently adopted in a handful of states\(^7\)) should address many of the concerns underpinning a proposed ban. Research suggests that employees who receive advance notice “have 9.7\% . . . higher earnings . . . , are 5.5 percentage points more likely to have received training in the last year . . . , and are 4.5 percentage points more likely to be satisfied in their job . . . relative to those employees without a non-compete.”\(^8\)

Banning noncompetes would undo these significant benefits. Further in that regard, more than half of people presented with a noncompete chose to “forgo[] the opportunity to negotiate [because] the terms were reasonable,” while 41 percent assumed they were not negotiable, the latter of which could be addressed with advance notice.\(^9\)

- Small businesses and their employees will be disproportionately adversely impacted in multiple ways. For example, small businesses are frequently


\(^4\) M.G.L. c. 149, § 24L(c). Massachusetts added additional restrictions based on age, status as a student, and whether the employee’s employment had been terminated without cause. \textit{Id.}


\(^7\) \textit{See Updated chart of noncompete notice requirements}, available at https://faircompetitionlaw.com/2023/02/05/updated-chart-of-noncompete-notice-requirements/.

\(^8\) \textit{See Noncompete Agreements in the U.S. Labor Force} (supra n.3).

\(^9\) \textit{Id.}\n
formed with the personal life savings of the owner. Many of these small companies (as well as many thinly capitalized companies and start-ups) will be unable to survive the loss of the comparatively inexpensive protections provided by noncompetes.\(^\text{10}\)

- Similarly, many of these small businesses and thinly capitalized companies will be unlikely to provide new opportunities and detailed training if their businesses will be at risk. That could curtail investment and expansion of what has been the dominant engine of job growth over the last decade,\(^\text{11}\) or it could constrain recruitment and retention efforts to family members or others within the social network connections of such employees.\(^\text{12}\)

- Small businesses and start-ups will also be the most adversely impacted insofar as they often have few or only one trade secret that forms the basis of their value, but cannot afford costly litigation when their trusted employees leave for competitors or are lured away by larger companies that can easily misuse the trade secret(s) in ways that may not be detectable.

- While many academic studies concerning the theoretical impacts of a noncompete ban have been relied upon in support of a ban, this area of research is both nascent and flawed. For example, the research suffers from various inherent deficiencies (such as a general reliance on inherently unreliable, self-reported data and the inability to isolate a direct causal relationship between noncompetes and their purported effects), reflects multiple inconsistent results, and leaves many significant gaps in need of additional study. Indeed, as the body of research continues to expand, additional flaws and gaps continue to emerge.\(^\text{13}\) Moreover, even if none of

\(^{10}\) During the Massachusetts noncompete/trade secret law legislative process (and in response to the FTC’s proposed noncompete ban), many small companies emphasized this and similar concerns. In particular, some small business owners explained passionately that they had invested their entire life savings in the company, and if they cannot prevent a former employee from working (for a limited period) in a competitive role, it would threaten the existence of the company, their savings, their livelihood, and the remaining employees’ jobs will all be lost.


\(^{12}\) This not only limits employee opportunities generally, but could in fact have a greater deleterious effect on minority applicants unable to provide contractual assurances to new employers with whom they have no previous connection.

\(^{13}\) I note that while I have cited to the results of one of the studies above, I do so only to the extent that existing noncompete research is relied on by Your Excellency for your analysis of a noncompete ban.
the limitations in the existing research existed, the research still suffers from an overall deficiency from a policy-making standpoint: “none of the studies examine the wage effects of a full [noncompete] ban.”

Accordingly, a proposed ban would make a wholesale change without any research – flawed or not – to predict what the impact of such a substantial change will do to companies, workers, and the economy.

POSSIBLE BALANCED LEGISLATION

Given the above (as further detailed in the FTC Letter), if Your Excellency were to determine that noncompete agreements are an appropriate subject of new legislation, I have identified the following two broad categories of regulation that other states and the Obama Administration have found appropriate and sufficient:

A. Fairness and Transparency

• 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 typically outweighs it.

• A requirement that employers provide advance notice that a noncompete will be required.

• A requirement that employers provide the employee with a short “clear and conspicuous” summary of the restrictive covenants it is asking the employee

Reliance on the results of that study is primarily to highlight the potential consequences of a ban. While the study’s conclusions may be wrong, the point remains the same: There are significant theorized and unknown potential adverse impacts of a ban, whether the research is flawed or not.


To date, the studies have been limited to certain states, to certain industries, or certain types of workers. Further, as exemplified by the Noncompete Agreements in the U.S. Labor Force study (n.3 supra), which was initially posted in 2015, “written” in 2020, published in 2021, and revised in 2023 (years after it was first relied on), studies are sometimes revised over time, highlighting that the research is still in its early stages and over time we may see different or more nuanced conclusions.
to agree to.\textsuperscript{16}

- A \textbf{ban} on noncompetes in the limited circumstances where the relationship between the employee 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.\textsuperscript{17}

- \textbf{Penalties} for companies that willfully violate the law.

\textbf{B. Limitations on the Use of Noncompetes to Only What Is Necessary}

Recognizing that noncompetes are an important tool in the protection of trade secrets and other business interests, the following are considered worthy of consideration in attempting to provide for agreements that are used only where needed and only in a non-overreaching way.

- Adoption of the so-called \textbf{“purple pencil”} rule to address overly broad noncompetes. States take one of three general approaches to overly broad noncompetes: \textit{reformation} (sometimes called \textit{“judicial modification,”} in which a court essentially rewrites the language to conform the agreement to a permissible scope); \textit{blue pencil} (in which a court simply crosses out the offending language, leaving the remaining language enforceable or not); and \textit{red pencil} (also referred to as the “all or nothing” approach, which requires a court to void the entirety of any restriction that is overly broad, leaving nothing to enforce). An equitable, middle-ground approach (which a Massachusetts state senator dubbed the “purple pencil” approach) is a hybrid of the reformation and red pencil approaches, requiring courts to strike an overly broad 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.

- Provide for \textbf{“springing”} (or \textbf{“time-out”}) noncompetes. So-called springing noncompetes allow courts to prohibit an employee from engaging in certain work when, based on the employee’s breach of certain enforceable obligations, the court is convinced that the individual cannot be trusted to

\textsuperscript{16} This is similar to an approach implemented in Colorado last year. \textit{See} Colo. Rev. Stat. § 8-2-113(4)(b).

\textsuperscript{17} By way of example, attorneys typically may not be bound by noncompetes (or most other restrictive covenants) 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. Further, lawyers are also subject to alternative obligations to clients, far broader than those imposed by trade secret laws. 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.
perform the work without continuing to violate their other obligations. We colloquially refer to these as “springing noncompetes” (or sometimes “time out” noncompetes) because they are not required of the employee in the first instance, but are instead activated only if the employee engages in certain unlawful behavior. Expressly permitting springing noncompetes encourages employers to limit their reliance on noncompetes by providing a clear and viable remedy for when an employee violates other (less-restrictive) obligations (such as a nondisclosure and nonsolicitation obligations), misappropriates the employer’s trade secrets, or breaches their fiduciary duties to the employer. The recent noncompete laws adopted in Massachusetts and Rhode Island both expressly permit springing noncompetes.

I would be happy to provide any additional assistance that may be helpful, including providing additional real-world experience or assisting in the drafting of language for a revised bill.

Respectfully submitted,

Russell Beck

Enclosure
Enclosure
April 19, 2023

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Non-Compete Clause Rulemaking, Matter No. P201200:
Written Submission of Practicing Attorneys and Paralegals
Concerning Notice of Proposed Rulemaking

Dear Commissioners:

The signatories to this submission thank you for your consideration of the comments that follow and for all of the Commission’s hard work in connection with its Non-Compete Clause Rulemaking efforts.

In response to the Commission’s request for comments, we provide this submission in the hope of avoiding the potentially severe unintended consequences we foresee that may greatly overshadow any expected benefits of the proposed rule. We also identify an incremental path that we anticipate would accomplish most, if not all, of the Commission’s objectives, with far less risk to workers, companies, and the economy.

**Summary of Submission**

This submission is divided into four parts:

Part I. Background information concerning the signatories (offered solely for the purpose of enabling the Commission to evaluate and weigh the credibility and reliability of our submission). *See infra pages 4-5, and Appendix A.*

Part II. A summary of lingering confusion about the use, enforcement, and impact of noncompete agreements. We believe that essential to the Commission’s work is an understanding that many of the oft-repeated “facts” underlying the Commission’s analysis are incorrect. *See infra pages 5-9.*

Part III. Information provided in response to the Commission’s specific
requests for comments in the Notice of Proposed Rulemaking (“NPRM”) that are within our area of expertise. See infra pages 9-61.

Part IV. Elements of possible guidance or a rule that would achieve most of the Commission’s objectives, while balancing the competing interests at play (i.e., those of companies, workers, states, and the United States economy) and avoiding both significant unintended consequences that are likely to flow from the currently proposed rule and an over-reliance on academic literature, which has recently been called further into doubt by (among others) the very author of much of the research. See infra pages 61-68.

As to the latter, we pause to emphasize four of the most likely unintended consequences of the current proposed rule on matters that appear fundamental to the Commission’s analysis.1

First, noncompetition agreements are a key prophylactic tool in the protection of trade secrets and other interests protected by state and federal law, and their elimination will inevitably lead to a substantial increase in trade secret litigation as a substitute for noncompete enforcement litigation, which has already occurred in California.2 We view this as such a significant adverse consequence of the proposed rule that we emphasize it up front, even though it is against our own interests to do so. Specifically, for reasons explained below,3 substituting trade secret litigation for noncompete litigation harms both workers and companies, and benefits primarily the lawyers.

Second, while a straight ban alone would lead inexorably to more litigation, the proposed “functional” test for other restrictive covenants will severely exacerbate that outcome. Specifically, the test threatens to invalidate the very alternative agreements to which, as the Commission recognizes, companies will necessarily turn4 to protect their state-recognized

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1 Each of these is discussed in more detail later in this submission.

2 Consistent with that, the Defend Trade Secrets Act (the “DTSA”), 130 Stat. 376 (enacted on May 11, 2016 to amend the Economic Espionage Act, 18 U.S.C. § 1831-1839), did not, and was not intended to, replace noncompete agreements; it was added as a complementary remedy. The proposed rule could therefore undermine the public policy embodied in the DTSA and furthered by enforcement efforts under it, policies that are key to both the domestic economy, international trade, and international relations, as reflected in the annual statements of the Intellectual Property Enforcement Coordinator (see, e.g., https://www.whitehouse.gov/wp-content/uploads/2023/04/FY22-IPEC-Annual-Report_Final.pdf), various Department of Justice reports (see, e.g., https://www.justice.gov/archives/iptf/pro-ip-act-reports), and the legislative history of the DTSA.

3 See infra at n.123, n.176, p. 44 & n.177.

legitimate business interests. This includes not just nonsolicitation agreements, but nondisclosure agreements, which are often a predicate to trade secret protection under trade secret laws. Accordingly, the result will be even more uncertainty and less protection, while driving even more traditional restrictive covenant litigation toward the only remaining tool: costly and unpredictable trade secret litigation.

Third, the extremely narrow exception to the noncompete ban for the sale of a business (or interest in a business) will likely erode the vibrant small-business merger and acquisition environment that is vital to sellers, buyers, estate planners, and the economy of many states, including, in particular, California.\(^5\)

Fourth, to the extent that the Commission relies on the available academic research, two things are important to note: First, the more research is conducted, the more we learn that prior research is actually flawed in ways that undermine its reliability, especially for making broad policy decisions. Second, to the extent that the Commission intends to rely on the economic literature, there are several studies that evidence how banning noncompetes will adversely impact consumers – the very people the Commission is attempting to protect.

In light of these concerns, we urge the Commission to consider what would happen if its assumptions are wrong. While the Commission’s objectives are laudable, we believe the proposed rule is the wrong means to accomplish those objectives. We believe that the outcome could be devastating to companies, workers, and the economy. Accordingly, we encourage the Commission (if it were to take any action) to proceed cautiously, incrementally, and do the minimum necessary to test its hypotheses about the impacts of a proposed ban.

We note in this regard that the Commission relies on a study establishing that 53 percent of all people bound by noncompetes are hourly workers.\(^6\) Based on this estimate alone, the Commission could address more than half of the impacted population and accomplish much of its objective by narrowing a proposed ban to apply only to hourly workers, i.e., the people who the Commission believes are most in need and likely to benefit most from it.\(^7\) Further, to deal with the risk that employers may ignore a rule that does not include a complete ban,\(^8\) the

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\(^5\) Even California’s ban on noncompetes allows for a much broader exception in the context of the sale of a business than the proposed rule would allow. See infra at 49 & n.191.

\(^6\) Non-Compete Clause Rule, 88 Fed. Reg. at 3485 (NPRM at p. 16).

\(^7\) Taking this tailored approach will also provide the type of “natural experiment” needed to enable direct research into the effects a ban would actually have in the workplace.

\(^8\) Non-Compete Clause Rule, 88 Fed. Reg. at 3485 (NPRM at p. 16). Indeed, as the Commission notes, certain studies indicate that noncompete agreements are used with equal frequency even in states that
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Commission can address another large swath of any perceived problem by proposing legislation making it unlawful (subject to monetary penalties) to employ a noncompete for such hourly workers.⁹

**DISCUSSION**¹⁰

I. **OUR BACKGROUND**

The 102 signatories to this submission are lawyers and paralegals from across the country with extensive relevant experience representing clients (from Fortune 50 companies to “mom and pop” shops to individual workers) in countless trade secret, noncompete, and other restrictive covenant matters on all sides of these disputes. Our work spans most, if not all, states in the country and, as a result, this submission incorporates a national perspective and scope.

Among the signatories are some of the country’s leading authorities in the inextricably-related laws of restrictive covenants and trade secrets. Through our work helping thousands of clients, we have each seen first-hand the varied approaches that companies take to protecting their information, customer relationships, and other lawfully protectable business interests; the relative difficulties courts at all levels have with administering trade secret and restrictive covenant claims; the benefits and detriments of noncompetition agreements and other restrictive covenants; and the practical, real-world impact such agreements have on companies and workers alike.

Further, this letter includes input from, and is signed by, some of the same people who have been involved in state legislative efforts around the country and who provided information relied upon by much of the academic scholarship, as well as by the U.S. Department of the Treasury and the White House in connection with President Obama’s 2016 investigation into

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¹⁰ To avoid burdening the Commission with needless repetition, we have omitted from this submission information provided in our prior submissions, unless it directly relates to matters raised by the Commission in the NPRM. However, much of the omitted information remains relevant to the Commission’s work, and we incorporate the prior submissions by reference. They are available at [https://www.regulations.gov/comment/FTC-2021-0057-0028](https://www.regulations.gov/comment/FTC-2021-0057-0028).
noncompetes, and one who was a participant in the small working group convened by President Obama’s Administration to develop the resulting Call to Action on Non-Compete Agreements.

A brief biography of each of the signatories (with a link to the individual’s full on-line biography) is provided as Appendix A.

The signatories believe that recognizing and addressing the issues raised by this submission is critical to reaching a positive and fair result, and one which would not trigger unexpected and unwanted consequences. We thank you for your consideration of the matters addressed in this submission.

II. LINGERING CONFUSION ABOUT THE USE, ENFORCEMENT, AND IMPACT OF NONCOMPETES

Although we previously identified many of the common misconceptions about noncompetes, some persist and new ones have surfaced. We address below the new and more pernicious ones that have been referenced by the Commission, President Biden, or members of Congress.


13 As with past submissions, we note that references in this letter to specific companies, individuals, cases, or matters are for illustrative purposes only. No signatory to this letter is endorsing any statement as to any such person, company, product, case, or matter outside the context of this letter, nor doing so as counsel for, or as an agent of, any such company or any company competitive thereto. Nothing in this submission is an admission by or on behalf of any person, company, or client, or any party with interests adverse thereto.

14 We discuss additional misunderstandings in three other places. First, we address some later in this submission, to the extent they are responsive to the Commission’s specific questions. Second, we address others in our July 14, 2021 letter (the “July 2021 Submission”) to the Commission and Mr. Zach Butterworth, Director of Private Sector Engagement Executive Office of the President, in response to the President’s July 9, 2021 Executive Order. The July Submission is attached as Appendix 1 to our December 20, 2021 submission to the Commission and Department of Justice (the
**Misconception: Noncompetes Prevent Employees from Working or Quitting**

Some commentators claim broadly that noncompetes prevent employees from working or even quitting a job. This is not correct. No state in the union currently allows an employer to use a noncompete agreement to be used simply to prevent an employee from quitting their job, working in their field, or using their general skills and knowledge. Rather, as applied by the courts, noncompetes restrict only competition that puts the protectable information or other recognized “legitimate” business interest of a former employer at risk.

Even when restricted by a noncompete, employees remain free to resign, to leave for higher-paying jobs, to leverage an offer to increase earnings at their current employer, and to work for a company where they will use their general skill and knowledge. What they cannot do is use or put at risk their former employer’s trade secrets or other recognized legitimate business interests on behalf of a new employer. Accordingly, when used properly, noncompetes prevent *unfair* competition.

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16 A noncompete prevents someone from working for a competitor in a role in which they would likely use trade secrets or otherwise engage in unfair competition. Such a restriction can, of course, have collateral effects, preventing what would otherwise be lawful competitive activities (depending on the nature of the planned role and extent of the noncompete restriction as applied). But a noncompete can never lawfully be used where it is not necessary to protect those other interests. To the extent some companies may use noncompetes for improper purposes, it is those uses that should be targeted and curbed, not the legitimate uses of noncompetes.


18 The signatories to this letter have represented individual clients involved in many such situations.

19 We address below in the “Recommendations for a Fair Approach” section below (at p. 61) an approach to prevent abuses of noncompetes.
Misconception: Noncompetes
Block Employment at a Competing Employer

The Commission states that “[a] non-compete clause is a contractual term between an employer and a worker that typically blocks the worker from working for a competing employer, or starting a competing business, within a certain geographic area and period of time after the worker’s employment ends.”^20 But most states prohibit noncompetes from operating that broadly.\(^{21}\) Instead, most states require noncompetes to be narrowly tailored to prevent a worker only from performing the type of work for a competitor (or startup) that would give rise to “unfair” competition, \(i.e.,\) roles in which the employee would threaten the former employer’s trade secrets, and depending on the state, confidential information, customer relationships, and other protectable business interests.\(^{22}\) Most everything else is “ordinary competition,” \(i.e.,\) which noncompetes, when used properly, cannot prevent.\(^{23}\) Accordingly, with limited exceptions, noncompetes must not preclude someone from working for a company simply because the company is a competitor.\(^{24}\)

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\(^{20}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3482 (NPRM at p. 2).

\(^{21}\) See, e.g., 820 I.L.C.S. §§ 90/1 et seq. (Illinois); M.G.L. c. 149, § 24L(b)(vi) (Massachusetts); see also Russell Beck, Employee Noncompetes, A State-by-State Survey (“50 State Noncompete Survey”), available at [https://www.beckreedriden.com/50-state-noncompete-chart-2/](https://www.beckreedriden.com/50-state-noncompete-chart-2/). Originally drafted in 2010, this chart is updated periodically; the most current version (February 11, 2023, as indicated on the chart) is attached for the Commission’s convenience as Appendix B. Having its origins in a 1974 case in Pennsylvania (Trilogy Associates, Inc. v. Famularo, 314 A.2d 287 (Pa. 1974)), this concept is sometimes referred to as the “janitor rule,” getting its name from the concept that a noncompete with an unlimited scope would impermissibly prevent an employee from accepting a job that poses no unlawful threat to the employer’s legitimate business interests, \(i.e.,\) a role such as a janitor. See Russell Beck, Cleaning up overly broad noncompetes: the “Janitor Rule,” available at [https://faircompetitionlaw.com/2018/07/04/cleaning-up-overly-broad-noncompetes-the-janitor-rule/](https://faircompetitionlaw.com/2018/07/04/cleaning-up-overly-broad-noncompetes-the-janitor-rule/).

\(^{22}\) 50 State Noncompete Survey (Appendix B).

\(^{23}\) See, e.g., Automile Holdings, LLC v. McGovern, 483 Mass. 797, 812 (2020) (“[P]rotection from ‘ordinary competition’ is not a legitimate business interest in any context, and a restrictive covenant ‘designed solely for that purpose will not be enforced.’”).

\(^{24}\) We recognize that noncompetes can sometimes have chilling effects, causing workers to believe that they are restricted, even when their noncompete cannot lawfully prevent the employee from engaging in the intended new employment. We suggest ways to mitigate those impacts with the “Recommendations for a Fair Approach” section below (at pp. 61-68).
Unsupported: Companies Use Noncompetes for Low-Wage Workers Primarily to Restrain Wages

There is an oft-repeated concern that companies use noncompetes for low-wage workers primarily to restrain wages. For example, in announcing his “Executive Order on Promoting Competition in the American Economy,” President Biden expressed that noncompetes are used “for ordinary people . . . for one reason: to keep wages low. Period.”25 There is, however, no data of which we are aware to support contentions of rampant misuse for unlawful reasons. It should be recognized in that regard that employers have been using noncompetes for low-wage workers for over a hundred years26 – well before any research existed suggesting that wage suppression might be effect of noncompetes.27

Oversimplification: Noncompetes Pit Employees Against Employers

People generally believe that one must fall on the side of employers or employees when it comes to noncompetes. This is an oversimplification.

25 Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/. Senator Chris Murphy made similar remarks on the Senate Floor on February 1, 2023; a video of Senator Murphy’s remarks is available at https://www.youtube.com/watch?v=m2q77hhPm0E (at 6:26). Senator Murphy went on to state that the use of noncompetes for higher-income workers is “about a company who doesn’t want competitors.” Id. (at 6:41). While these objectives (and other improper objectives) may sometimes be the goal, addressing the abuses can be accomplished with regulation targeted specifically to those issues, as opposed to a more blunt ban of all noncompetes that would eliminate even those used for legitimate business purposes, including (as identified by President Biden and President Obama before him) to protect trade secrets.

26 See, e.g., J. & J.G. Wallach Laundry System v. Fortcher, 191 N.Y.S. 409, 116 Misc. 712 (N.Y. Supr. Ct. 1921) (noncompete enforced against laundry delivery driver); Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N.W. 412 (Wisc. 1911) (same); Simms v. Patterson, 55 Fla. 707, 46 So. 91 (Fla. Sup. Ct. 1908) (noncompete used for a “salesman and shipping clerk”).

27 It bears noting that, assuming that wage suppression may be a consequence of noncompetes, a number of states now require advance notice of a noncompete, which, according to the results of a well-regarded study, will (among other things) directly address the concerns of President Biden (as well as Senator Murphy and others) about the potential adverse impact of noncompetes on wages – as well as address the general unfairness issues associated with showing up to work on the first day to only then learn that a noncompete is required. See Evan Starr, J.J. Prescott, and Norman Bishara, Noncompete Agreements in the U.S. Labor Force (revised April 5, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.
In the experience of the signatories to this submission, it is very often the peers of the departed employee who are the most eager to enforce the noncompete against the departed employee. This is largely because noncompetes are designed to protect not just the company, but the company’s revenue-generating intellectual property assets and customer goodwill, and in so doing, they also protect the employees who remain behind. For example, if salespeople were permitted to compete and take clients, the administrative and service staff who support those roles would have no business to support. Without that business, those administrative and support personnel – typically, low- and middle-wage workers – would be the ones to suffer in the form of losing their jobs or receiving a reduction in compensation.

Further, because noncompetes provide the assurance that a company’s information, processes, and approaches foundational to its economic existence will not be used against it until a reasonable amount of time has passed in which to anticipate, prepare for, and avoid the consequences of such use, employers and employees have a greater incentive and ability to develop and share such learning with new coworkers. Accordingly, noncompetes help align the interests of employers and employees benefitting from a dynamic labor market with incentives to expand employee rosters, meaning that new positions of greater access and influence are more, not less, likely in a system that allows for reasonable noncompete agreements.

III. RESPONSES TO REQUESTS FOR SPECIFIC INPUT

The Commission has sought input on virtually every aspect of its NPRM. However, we have focused our responses on just those requests for which we have particular experience and expertise, and therefore can add the most value to the Commission’s work.

THE LAW OF NONCOMPETES

Request: The Commission seeks input on its description of noncompete clauses in Part II.A of the NPRM.29

Comment: While the term “noncompete” does not actually apply to all of the identified agreements (most, though still not all, are more properly called “restrictive covenants”), the Commission’s summary of the various types of agreements is correct. (Later portions of the


NPRM include mistakes about how the law applies to those agreements and how they work in practice. Those errors are addressed elsewhere in this submission.)

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Request: The Commission seeks comment on its summary in Part II.C of the law of noncompetes.  

Comment: The Commission’s summary of noncompete law is largely correct, although it does contain some errors and inaccuracies, including the following:

- “Massachusetts and Oregon have enacted ‘garden leave’ provisions, which require employers to compensate workers during the post-employment period in which the workers are bound by the non-compete clause.”

This is incorrect. Neither state requires garden leave.

30 Non-Compete Clause Rule, 88 Fed. Reg. at 3497 (NPRM at pp. 60-61).
31 We do not comment on the antitrust aspects, other than, as noted below, we are unaware of a single case that has invalidated a routine employee noncompete on the ground that it is an antitrust violation (or constituted an unfair or deceptive practice under Section 5 of the Federal Trade Commission Act). See, e.g., Cole v. Champion Enterprises, Inc., 496 F. Supp. 2d 613, 635 (M.D.N.C. 2007) (“[I]t appears that no . . . noncompetition agreement has ever been held to violate the Sherman Act. . . . Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on competition. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the competitors, as it were. The two standards are not directly related.”) (emphasis in original; citations omitted).
32 Earlier in the NPRM, the Commission identifies eight different cases, seemingly as examples of instances in which the use of noncompetes was somehow improper. Non-Compete Clause Rule, 88 Fed. Reg. at 3483-84 (NPRM at pp. 7-10). However, in some of those cases, the appellate courts did not find that the noncompetes were improper. For example, in AK Steel Corp. v. ArcelorMittal USA, LLC, 55 N.E.3d 1152, 1156-58 (Ohio Ct. App. 2016), a three-judge appellate panel found that the trial court erred by refusing to enforce the full duration of the noncompete. Similarly, in Intermountain Eye & Laser Ctrs. P.L.L.C. v. Miller, 127 P.3d 121, 123 (Idaho 2005), the Supreme Court of Idaho found that the trial court erred by finding the noncompete unenforceable. Accordingly, we identify this issue, to the extent that the Commission relies on the sampling as examples of impropriety.
33 Non-Compete Clause Rule, 88 Fed. Reg. at 3494 (NPRM at p. 51).
Despite widespread confusion, Massachusetts law does not require “garden leave,” nor does it require any compensation during the restricted period. Garden leave is merely an option, but parties are free to support a noncompete with “other mutually-agreed upon consideration.”

Similarly, with one limited exception, Oregon also does not require garden leave or other payment during the restricted period. The exception is that garden leave is required for a noncompete used with an employee “employed as an on-air talent by an employer in the business of broadcasting . . . .” Other than that, noncompetes may be used without garden leave.

Oregon does, however, permit the use of “garden leave” to avoid the prohibition on using noncompetes for low-wage workers and certain other otherwise-exempt employees. In this regard, Oregon’s law is like Illinois’s, Washington’s, and Nevada’s (and possibly Massachusetts’s),

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34 See M.G.L. c. 149, § 24L(b)(vii); Cynosure LLC v. Reveal Lasers LLC, 2022 WL 18033055, at *9 (D. Mass. Nov. 9, 2022) (“as required by the MNAA, the Equity Agreement is . . . supported by consideration distinct from continued employment, . . . and has ‘mutually-agreed upon consideration,’ that is, the stock options, in lieu of a ‘garden [leave] clause’ as permitted by the MNAA, id. at § 24L(b)(vii)”; Nuvasive, Inc. v. Day, 2019 WL2287709, at *4 (D. Mass. May 29, 2019) (approving in dicta the following: “In consideration of my engagement by the Company, the compensation I . . . receive from the Company (including for example monetary compensation, Company goodwill, confidential information, restricted stock units and/or specialized training”)”.


36 OR ST § 653.295.

37 OR ST § 653.295(2)(c).

38 OR ST § 653.295(7).
allowing “garden leave” to be used to avoid otherwise-applicable restrictions imposed by the state’s noncompete statute. 39

- “By their express terms, non-compete clauses restrict a worker’s ability to work for a competitor of the employer—for example, by accepting a job with a competitor or starting a business that would compete against the employer.” 40

This can be true, but it is not entirely accurate. As explained above, 41 in most states, the scope of a noncompete cannot be so broad as to prevent a worker from accepting a job at a competitor without qualification.

Perhaps more importantly, foundational to the Commission’s concern is its conclusion that “[n]on-compete clauses also restrict rivals from competing against the employer to attract their workers.” 42 While in theory this may be true, in practice it is not. Employers and employees regularly negotiate

39 Illinois: 820 ILCS 90/10(c) (“No employer shall enter into a covenant not to compete . . . with any employee who an employer terminates or furloughs or lays off as the result of business circumstances or governmental orders related to the COVID-19 pandemic or under circumstances that are similar to the COVID-19 pandemic, unless enforcement of the covenant not to compete includes compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.”) (emphasis added). Washington: RCW §§ 49.62.020(1)(c) (“A noncompetition covenant is void and unenforceable against an employee . . . [i]f the employee is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.”) (emphasis added). Nevada: Nev. Rev. Stat. § 613.195(5) (“If the termination of the employment of an employee is the result of a reduction of force, reorganization or similar restructuring of the employer, a noncompetition covenant is only enforceable during the period in which the employer is paying the employee’s salary, benefits or equivalent compensation, including, without limitation, severance pay.”). Massachusetts: Though not as clear in the Massachusetts statute, the law seems to provide a similar benefit of using “garden leave clauses.” See Russell Beck, Garden Leave Is Not a Noncompete under Massachusetts Law, available at https://faircompetitionlaw.com/2020/04/20/garden-leave-is-not-a-noncompete-under-massachusetts-law/.

40 Non-Compete Clause Rule, 88 Fed. Reg. at 3500 (NPRM at p. 73). As the Commission later qualifies, “the non-compete clause will prevent the worker from accepting a new job within the scope of the non-compete clause.” Id. at 3501 (NPRM at p. 75).

41 See supra at p. 7 (Misconception: Noncompetes Block Employment at a Competing Employer).

42 Non-Compete Clause Rule, 88 Fed. Reg. at 3500 (NPRM at p. 73).
at the time of the employee’s departure to narrow some or all aspects of the restrictions (duration, geographic reach, and scope of the prohibited job functions). In our collective experience, well over 90 percent of these matters are resolved quickly and reasonably amicably, without the need for judicial intervention. Instead, parties regularly agree to “guardrails” for employees and their new employers to follow during the restricted period.43

- “Section 5 reaches incipient violations of the antitrust laws—conduct that, if left unrestrained, would grow into an antitrust violation in the foreseeable future.”44

We are unaware of any cases finding that the use of employee noncompetes that comply with state law constitutes an antitrust violation or, if left unrestricted, would likely grow into one.45 And, while

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43 The distinction between theory and practice highlights some of the problems that prevail in the studies (discussed elsewhere in this submission) and calls into question the perceived need for federal regulation of noncompetes. Of course, it bears mention that low-wage workers are the ones who are likely not to avail themselves of this practical resolution, which is an issue currently being tackled by many states. To date, 11 states and Washington, D.C. have each rejected the concept of a full ban, and have instead imposed wage thresholds or related compensation criteria (as well as industry-specific exemptions) to prevent further use of noncompetes with low-wage and unskilled workers. See Russell Beck, New Noncompete Wage Thresholds for 2023, available at https://faircompetitionlaw.com/2023/02/06/new-noncompete-wage-thresholds-for-2023/. Idaho does not have a minimum threshold, but noncompetes can only be used with “key” employees or independent contractors. Although neither “key employee” nor “key independent contractor” is defined, there is a rebuttable presumption that an employee or independent contractor who is among the highest paid five percent of the employer’s employees or independent contractors is a “key employee” or a “key independent contractor.” See Idaho Code § 44-2704(5).


45 We are aware only of decisions that hold or suggest the opposite. See, e.g., Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir. 1977) (“In certain cases, postemployment restraints do serve legitimate business purposes: they prevent a departing employee from expropriating his employer’s secrets and clientele. Consequently, we have held that a per se ban on all such restrictive covenants would not be warranted.”) (citing Bradford v. New York Times Co., 501 F.2d 51, 59 (2d Cir. 1974) (“Not only has the appellant failed to supply us with any case holding an employee restrictive covenant to be a per se violation, but no court applying the rule of reason has ever held such a contract violative of section 1 of the Sherman act.”)); Alders v. Afa Corp. of Fla., 353 F. Supp. 654, 656 (S.D. Fla. 1973), aff’d, 490 F.2d 990 (5th Cir. 1974) (“The Plaintiff argues that, because the covenant not to compete on its face restrains him from competing with AFA, it is a contract in restraint of trade, and constitutes a per se violation of the Sherman Act, Section 1. This argument is
Commission has noted) “courts have condemned restrictive or exclusionary conduct under Section 5 based not on the facial unfairness of the conduct, but on the impact of the conduct on competition,” 46 courts have not and do not so condemn noncompetes.

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**Request:** The Commission also seeks in Part II.C “comment on the extent to which employers use choice-of-law provisions to evade the laws of states where non-compete clauses are relatively less enforceable.” 47

**Comment:** A complete answer to this inquiry requires empirical research. However, based on the collective experience of the undersigned, employers do consider choice of law in connection with noncompete agreements, just as they do (and should) with respect to any contract where more than one state’s law could apply. For an employer with employees in multiple states, identifying the applicable law up front provides certainty and predictability to

totally without merit. Ever since the decision in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), modified, 175 U.S. 211 (1899), it has been recognized that the validity of covenants not to compete turns upon the reasonableness of the restraint in each case.” (citations omitted); Audiology Dist., LLC v. Hawkins, 2014 WL 3548833, at *5 (N.D.W. Va. July 17, 2014) (“As ‘[i]t is axiomatic that an employee’s covenant not to compete with his employer is not a per se violation of antitrust law,’ the rule of reason must be applied in this case.”) (quoting Reddy v. Cnty. Health Found. of Man, 171 W. Va. 368, 372 (1982)); Consultants & Designers, Inc. v. Butler Serv. Group, 720 F.2d 1553, 1560 (11th Cir.1983) (calling the argument that non-compete agreements should be a per se antitrust violation “both bizarre and frivolous.”); Aydin Corp. v. Loral Corp., 718 F.2d 897, 900 (9th Cir. 1983) (“Employee covenants not to compete or interfere with the employer’s business after the end of the employment relationship should not be tested under the per se rule. Such covenants often serve legitimate business concerns such as preserving trade secrets and protecting investments in personnel.”); Haines v. VeriMed Healthcare Network, LLC, 613 F. Supp. 2d 1133, 1137 (E.D. Mo. 2009) (“Haines’ argument that this non-compete agreement should form the basis for a new per se violation of antitrust laws is completely without merit. ‘Legitimate reasons exist to uphold noncompete covenants even though by nature they necessarily restrain trade to some degree. The recognized benefits of reasonably enforced noncompetition covenants are now beyond question.’”) (quoting Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 (7th Cir.1982)); Snap-On Tools Corp. v. FTC, 321 F.2d 825, 837 (7th Cir. 1963) (“Restrictive clauses of this kind are legal unless they are unreasonable as to time or geographic scope; but even if this restriction is unreasonable as to geographic scope, we are not prepared to say that it is a per se violation of the antitrust laws.”).

47 Non-Compete Clause Rule, 88 Fed. Reg. at 3497 (NPRM at pp. 60-61).
both the employer and its employees about the rules that will govern the noncompete. It is not just a corporate interest; clarity and predictability benefit everyone, including courts asked to enforce the agreements.

The choice is not absolute, however. Employers cannot, for example, simply select the law of a particular state because it is generally regarded as employer-friendly. Nor could they expect courts to defer to such a choice. Rather, applicable law in most states typically requires that the chosen law have a significant connection to the matter. That means that employers generally have only three options: the state in which the company is headquartered (or has its principal place of business), the state in which it is incorporated, or the state in which the employee (and likely the business) is located. Accordingly, choice of law is more about whether a single standard will apply, as opposed to which standard or standards will apply. As to the single standard, there is a significant benefit to knowing that the same agreement (and the interests it protects) will be governed by the same standards regardless of what state one of the parties happens to reside in. For this reason, employers often choose a law that may be less favorable to them than the law that would otherwise apply in the states in which some of their employees happen to live.

Nevertheless, just because the parties selects a particular state’s law, does not mean that a court will accept it. Most states apply the Restatement (Second) of Conflict of Laws, sections 187 and 188, to choice of law provisions. This standard accounts for the “fundamental public policy” of a state that may have a “materially greater interest” in the dispute. As a result, choice of law provisions are often rejected under this analysis when states with strict noncompete laws have a “materially greater interest” than the chosen state.48

In addition, a growing number of states have begun to further limit choice of law options. Specifically, some states now expressly require that, regardless of what law may be chosen by the parties in their contract, employees are still entitled to receive the protections afforded by the noncompete law of the state in which they work or reside.49

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48 See, e.g., Hightower Holding, LLC v. Gibson, C.A. No. 2022-0086-LWW (Del. Ch. Feb. 9, 2023) (refusing to enforce Delaware choice of law provisions that would conflict with Alabama’s fundamental public policy against enforcing noncompete agreements against “professionals”).

49 See Cal. Lab. Code § 925 (California); C.R.S. § 8-2-113(6) (Colorado); M.G.L. c. 149, § 24L(e) (Massachusetts); RCW § 49.62.090 (Washington). Louisiana has had such a requirement since 1999. See R.S. 23:921.
Request: The Commission also seeks input in Part II.C about “the extent to which a uniform federal standard for non-compete clauses would promote certainty for employers and workers.”

Comment: There is no doubt that a single, unified standard could achieve a kind of certainty. A wholesale ban would certainly accomplish that objective. But anything short of a complete ban would not. California, North Dakota, Oklahoma, and (to some extent) Nebraska will remain the outliers that they are currently. Accordingly, given the obviousness of the answer, we take the Commission’s question to be seeking deeper input about whether any federal overlay would be justified by its promotion of increased uniformity and certainty over the patchwork of state laws currently in place and continuing to evolve.

As a threshold matter, if the Commission (as opposed to Congress) were to set a standard, it could never achieve complete uniformity or certainty, as the Commission’s regulatory reach does not include all entities that use noncompetes. This asymmetry of application, i.e., application of the standard to one group of entities (for-profit companies) and not to another (not-for-profit companies), could create a significant imbalance leading to severe adverse unforeseen consequences.

Nevertheless, even as to the subset of entities over which the Commission has regulatory authority, the advisability of a uniform standard depends on what standard is imposed. But

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50 Non-Compete Clause Rule, 88 Fed. Reg. at 3497 (NPRM at p. 61).
51 As noted above, a single standard is part of the reason that companies often select a single state’s law to govern noncompetes with employees in multiple states. However, as discussed above, the imposition of a nationwide ban would result in much more trade secret litigation, which is inherently uncertain.
52 As noted elsewhere in this submission, the signatories are aware that a significant legal issue has been raised concerning whether the Commission has authority to issue the proposed rule; we express no opinion on that issue in this submission.
53 As discussed during the Commission’s February 16, 2023 public forum, this issue is particularly acute in the healthcare industry, where there are both for profit and not-for-profit hospital and healthcare systems, many of which compete for talent in the same markets, that would be subject to different rules. See the American Hospital Association’s comments addressing this issue in detail, available at https://www.aha.org/system/files/media/file/2023/02/aha-comments-on-ftc-proposed-non-compete-clause-rule-letter-2-22-23.pdf.
54 Possible standards are discussed below in the “Possible Balanced Guidance or Regulations” section, at pp. 62-68. We note that some signatories may view any federal intervention as misplaced. We note too that this submission addresses neither whether the Commission or Congress has authority to intervene, nor (if both do) which of the two should exercise such authority.
whatever the standard, unless it either adopts the most restrictive aspects of the laws in each of the 47 states (and Washington, D.C.) or preempts all state regulation, it still will not provide complete uniformity and the certainty that would come with uniformity. This is because, absent preemption of state law, any rule will provide uniformity and certainty somewhere along the continuum from total uniformity and certainty (as would arise with a ban) to none (adopting the least restrictive standard).

In addition, achieving the objective of certainty through promulgation of a uniform standard (whatever that standard might be) would take years. First, there is no available private right of action or delegation of enforcement to state Attorneys General. Second, interpretation of federal law can vary significantly from one circuit to another, and the identification of so-called “circuit splits” for resolution by the Supreme Court often takes many years to mature. As a consequence, any “certainty” benefits would not arise for many years, i.e., after the Commission’s enforcement program has developed a broad baseline of acceptable conduct cutting across all industries and the Supreme Court has resolved all materially different interpretations and rulings.

**ACADEMIC LITERATURE**

**Request:** The Commission seeks input on its “description of the empirical evidence relating to non-compete clauses and their effects on competition” in Part II.B.55 The Commission also requests “additional data that could inform the Commission’s understanding of these effects.”56

**Comment:** We understand that the Commission is concerned that “the existing legal frameworks governing non-compete clauses—formed decades ago, without the benefit of [the academic literature]57—allow serious anticompetitive harm to labor, product, and service

57 This premise is not entirely accurate. While many of the laws were indeed formed decades ago, many others were passed within just the past decade – and therefore had the benefit of the emerging research. For example, last year alone, five states plus Washington, D.C. made nine changes to their noncompete laws, including three (in Colorado, Illinois, and Washington, D.C.) that completely overhauled existing laws. In just the last eight years, there have been 42 legislative changes in 27 states (more than half of all states) plus another in D.C., as well as other changes through the courts. See Almost 60 percent of states updated their noncompete laws in the last decade, available at https://faircompetitionlaw.com/2023/02/12/noncompete-law-changes-in-the-last-decade-updated-february-12-2023/. Similarly, the common law has evolved as well, and that is part of its strength. For example, in New York, the dominant rules regarding noncompetes have been substantially revised by the courts over the course of the past 25 years. Other states, like Montana, South Carolina,
markets to go unchecked.  

Accordingly, the “Commission seeks to ensure competition policy is aligned with the current economic evidence about the consequences of non-compete clauses.”

We recognize that others with academic research expertise, such as Professors Evan Starr, Jonathan Barnett, Ted Sichelman, and Matt Marx, have identified many of the overarching limitations of the literature in general, as well as specific problems with many of the studies. We also recognize that much of the research that has been conducted was the best available work on the subject at the time it was undertaken. Accordingly, we identify below only certain of the limitations to highlight the need for caution in relying on the literature in ways that can cause severe unforeseen, unintended, adverse consequences to companies, workers, and the economy.

and Texas, have done likewise. And, just last year, the Supreme Courts of Wyoming and Hawaii both also made substantial changes.

58 Non-Compete Clause Rule, 88 Fed. Reg. at 3482 (NPRM at p. 3).
59 Non-Compete Clause Rule, 88 Fed. Reg. at 3482 (NPRM at p. 3).
60 https://www.rhsmith.umd.edu/directory/evan-starr.
61 https://gould.usc.edu/faculty/?id=397.
63 https://dyson.cornell.edu/faculty-research/faculty/mmtm83/.

65 Much of the empirical research in this area has been undertaken by leading researchers such as Evan Starr, Matt Marx, Michael Lipsitz (https://www.ftc.gov/about-ftc/commissioners-staff/michael-lipsitz), Matthew Johnson (https://sanford.duke.edu/news/matthew-johnson-non-compete-clause-rulemaking/), Kurt Lavetti (http://kurtlavetti.com), Lee Fleming (https://haas.berkeley.edu/faculty/fleming-lee/), and Olav Sorenson (https://www.anderson.ucla.edu/faculty-and-research/strategy/faculty/sorenson), among others.
Limitations Common to Most of the Literature

In a prior submission, we observed that “[w]hile a number of helpful studies have been conducted, this area of research is still in many respects nascent.” Further, we identified that “the existing research suffers from certain inherent difficulties (including that it can be hard to isolate direct causal connections to noncompetes), reflects areas of (seeming) inconsistencies, and leaves open many areas in need of additional study.” These observations were later highlighted in a short video played during the “Making Competition Work: Promoting Competition in Labor Markets Workshop,” conducted by the Commission in conjunction with the Department of Justice.

Our concerns have been validated and further substantiated by recent additional research, information, and analysis, as set forth below. As is becoming increasingly apparent, the more the field 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 guide the Commission’s strategy to achieve its objectives. Stated differently, although the research is sufficient to identify concerns, it does not provide reliable support for the proposed rule.

Further, even if none of the limitations in the existing research existed, the research suffers from an overall deficiency from a policy-making standpoint: “none of the studies examine the wage effects of a full [noncompete] ban.” Accordingly, the Commission’s proposed rule would make a wholesale change without any research to predict what the impact of such a substantial change will do to companies, workers, and the economy. If the

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66 The July 2021 Submission (see n.14 supra).
67 Id. at 29 (footnote omitted).
68 Id. Some of the inconsistencies may be the result of the fact that the results were limited to one industry, one type of employee, one geographic region, one timeframe, or other limiting factors, and the results may not be generalizable to others. See n.73 infra.
71 To date, the studies have been limited to certain states, to certain industries, or certain types of workers. Further, as exemplified by the Noncompete Agreements in the U.S. Labor Force study (n.27 supra), which was initially posted in 2015, “written” in 2020, published in 2021, and revised in 2023
Commission is correct that suddenly lifting noncompete restrictions would open the floodgates to job changes, one must wonder why simple economic supply-and-demand theory would not prove out: An increase in supply (of available workers) will operate to reduce the price (wages) companies need to pay for workers. Alternatively, if, as the Commission surmises, the result would be increased wages, one must wonder why there would not also be a concomitant increase in the already-elevated inflation rate.

The Studies Suffer from a Critical Lack of Information

As one of the leading researchers in the field, Evan Starr, together with Bureau of Labor Statistics economist Donna Rothstein, identified a little over a year ago, there are “critical” deficiencies with most of the research – the very research understandably relied upon by the Commission in its search for the impacts of noncompetes. Specifically, the study warns 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 NCAs . . . . 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 . . . .

(Citations omitted, emphasis added.)73 They highlight that (just as with prior studies), drawing

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73 Id. at 1-2. The study goes on to explain, “More 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.
causal inferences (as opposed to correlational inferences) is unwise.\(^{74}\) Part of the difficulty with studying the impact of noncompetes and noncompete policy is that there are too many variables to reliably isolate the effects attributable to noncompete agreements.

These conclusions can be highlighted with an example that involves one of the studies\(^ {75}\) the Commission relies on in the in NPRM,\(^ {76}\) but which has multiple limitations that call its results into question. In 2015, Hawaii banned the use of noncompetes – and no-recruit agreements – in the tech sector. This “policy shock” provided a “natural experiment” that was examined in the *Hawaii Study*, initially issued in 2017, and later updated in 2019 and published in 2022. The study concluded that the elimination of noncompetes in the tech industry resulted in, among other things, an 11 percent increase in employee mobility and a 4 percent increase in new-hire wages.\(^ {77}\) It also anticipated 4.6 percent higher cumulative earnings over an 8-year period.\(^ {78}\) But there are many potentially unobserved and unobservable factors that may have impacted the conclusions that can be drawn by this research (and other research in this field). As a threshold matter, it is impossible to distinguish between the impact that the ban on noncompetes may have had, as compared to the impact that the ban on no-recruit agreements may have had or how the combination is different from a single change.\(^ {79}\) As a separate issue, at the time that Hawaii enacted this ban, the state was simultaneously making significant efforts to attract tech talent, with the goal of implementing steps to increase the number of tech jobs and

\(^{74}\) *Id.* at 19 (“As a result, we recommend interpreting the main correlations with due caution.”).

\(^{75}\) *Hawaii Study* (*see n.70 supra*).

\(^{76}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3487-88 (NPRM at pp. 21-23) (finding this study, and similar ones, “sufficiently probative” to be relied upon), at 3490 (NPRM at p. 32) (describing the study as extrapolating a 4.8 percent increase in earnings – though missing that the increase is cumulative after 8 years).

\(^{77}\) *Hawaii Study* at 349.

\(^{78}\) *Id.* (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).

\(^{79}\) The study acknowledges that the existence of the coincident ban of nonsolicits might impact the results. *Id.* at 366 & n.18. 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 (“‘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. *Hawaii Study*, at 367-88.
raise wages for tech workers.\textsuperscript{80} This is something that, if any steps were in fact undertaken at the time, could have had a significant impact on the perceived increase in wages paid in Hawaii’s tech industry following the legislative change. But they were not (and presumably could not have been) 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 that impact.\textsuperscript{81}

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 necessary to establish noncompetition agreements as the cause of negative outcomes.\textsuperscript{82}

\textit{Bundling Study Reveals a Fundamental Limitation of Other Studies}

As identified in our prior submissions, recent scholarship by Professors Natarajan Balasubramanian,\textsuperscript{83} Evan Starr, and Shotaro Yamaguchi\textsuperscript{84} further calls into question the prior research. Specifically, the professors observe that because companies “bundle” multiple

\begin{itemize}
  \item 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.” \textit{Living Hawaii: Can We Overcome the Problem of Low Salaries?}, (Honolulu Civil Beat (March 9, 2015), available at \url{https://www.civilbeat.org/2015/03/living-hawaii-can-we-overcome-the-problem-of-low-salaries/}.
  \item In addition, like similar problems with other studies (see pp. 32-33 \textit{infra}), 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, \textit{FTC Evidence That Non-Competes Reduce Earnings Is Inconclusive}, Bloomberg Law (Opinion, March 7, 2023), available at \url{https://news.bloomberglaw.com/us-law-week/ftc-evidence-that-non-competes-reduce-earnings-is-inconclusive}.
  \item Professor Starr explained, “[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 . . . .” Final Transcript of January 9, 2020 FTC Workshop – “Non-competes in the Workplace: Examining Antitrust and Consumer Protection Issues” (“FTC 2020 Workshop Tr.”), pp. 158-59, available at \url{https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf}.
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  \item \url{https://www.rhsmith.umd.edu/directory/shotaro-yamaguchi}.
\end{itemize}
restrictive covenants, the results of the prior studies, which focus on just noncompetes, turn out to be unreliable.\textsuperscript{85} In other words, it is impossible to distill the impacts of noncompetes because they are typically co-adopted with other restrictions; when firms omit noncompetes they often refrain from using some or all of the otherwise co-adopted provisions.

It is important to note that it is not just the failure to consider the bundled agreements identified in that paper (\textit{i.e.}, nondisclosure agreements, nonsolicitation agreements, and no-recruit agreements) that undermines so many of the studies. Also concerning is the absence from most of the research of any information concerning the impact of other agreements and approaches, much less the separation of those impacts from the impacts of noncompetes. For example, not all employees are at-will. The most direct restriction on employee mobility is a contract for a term of employment lasting a specific duration. But these relationships are understudied and do not appear to be addressed in the available research. Similarly, 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.\textsuperscript{86} It is similarly impossible to know (based on existing 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.”\textsuperscript{87} Likewise, it is impossible to know how much the results are influenced by the use of no-poach agreements, which the Commission views as having “proliferat[ed].”\textsuperscript{88}

\textsuperscript{85} \textit{Employment Restrictions on Resource Transferability and Value Appropriation from Employees (“Bundling Study”) (January 31, 2023), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403}. As the professors explain, “[i]solated analyses of earnings and a single restriction (\textit{e.g.}, only noncompetes) yields different results from those that consider joint adoption, likely because of selection.” Previously, the researchers explained more bluntly that, because the earlier research did not isolate out the effects of noncompetes as opposed to other covenants used in conjunction with them, those earlier studies were potentially “misleading” and “need to [be] carefully reconsider[ed].”

\textsuperscript{86} 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. 2021 Workshop Tr., Day 1, p. 67. A similar perspective was also expressed by LMU Loyola Law School Professor Jonathan Harris in his recent paper, \textit{Unconscionability in Contracting for Worker Training}, 72 Alabama Law Review 723, 726, 749 (2021), available at https://ssrn.com/abstract=3642017.

\textsuperscript{87} Non-Compete Clause Rule, 88 Fed. Reg. at 3503 (NPRM at p. 83).

\textsuperscript{88} Non-Compete Clause Rule, 88 Fed. Reg. at 3503 n.269 (NPRM at p. 83 n.269) (citing \textit{e.g.}, Alan
As to that last point, a recent study found that “58 percent of franchise companies have a no-poaching clause that prevents or restricts the ability of one franchisee in a chain from hiring workers employed by other franchisees. This is up from 36 percent in 1996. The practice is particularly common in fast food chains. We find that 80 percent of the 40 largest Quick Service Restaurant franchise chains have a no-poaching requirement. Since the human capital would remain within the chain, there is little business justification for such a clause other than to restrict worker mobility and opportunities.” 89

While the increased use of business-to-business no-poach agreements may have had a significant impact on the results of the noncompete research (especially given that states do not take a uniform approach to no-poach agreements), 90 the extent of the impact is unknown at this point.

The Studies Suffer from Errors Inherent to Self-Reporting

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.

A major source of confusion that permeates existing research is that people often conflate or confuse noncompete agreements with nondisclosure agreements and nonsolicitation covenants. It is the universal experience of the lawyers signing onto this submission that individuals and companies alike make this mistake often – even after the differences are explained. 91 This confusion is a potential foundational problem in the data used in many of

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90 For example, the Wisconsin Supreme Court effectively banned the use of B2B no-poach agreements in 2002 through its decision in Heyde Companies, Inc. v. Dove Healthcare, LLC, 258 Wis.2d 28, 44 (2002) (“A no-hire provision that restricts the employment opportunities of employees without their knowledge and consent is harsh and oppressive to the employees, in violation of Wis. Stat. § 103.465 and the public policy of the state.”). In contrast, Maine had not banned such agreements until 2019. See Me. Rev. Stat. Ti. 26, c. 7, § 599-B (effective September 18, 2019).

91 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 resources professionals or sophisticated in-house counsel.
studies assessing the effects of noncompetes, as the agreements being compared are not necessarily all noncompetes, much less noncompetes with the same time, scope, or geographic restrictions.

Indeed, the problem was highlighted by one of the members of the public who provided comments during the Commission’s February 16, 2023 public forum. The gentleman described what sounded like a terrible abuse: a ten-year noncompete for a short-term employee who seemed to pose no material threat to the employer. The individual was an Army veteran and indicated that, after he left his short stint working for a company, he discovered that he had signed a ten-year noncompete. He then said that he had been sued for disclosing confidential information to assist someone else who was starting a company. Given his description and that none of the signatories to this letter has ever encountered an employee noncompete even approaching ten years, it is much more likely that the gentleman was accused of violating a nondisclosure agreement — not a noncompete.

In our experience, this type of confusion is quite common. Accordingly, any research that relies on individual recollections and understanding of their agreements is bound to be fraught with error.

An example is the oft-cited study relied upon by the Commission and many others, which may be vastly overstated as a result of this limitation. Specifically, the study finds that 18 percent of the population has a noncompete, 46 percent of which are two years or less. The percentage, if correct, means that 82% of workers are not subject to noncompetes — a percentage that is even higher if California (with 18 percent of its workers subject to noncompetes that are entirely invalid) is removed from the calculation.

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93 Self-reporting errors may also explain some of the lack of precision in the research identified by the Commission suggesting that “between 33% and 57% of U.S. workers are subject to at least one NDA.” Non-Compete Clause Rule, 88 Fed. Reg. at 3507 (NPRM at p. 98).
95 It has been cited not just by the Commission, but also by President Biden in his State of the Union (and elsewhere). See, e.g., President Biden’s State of the Union, https://www.youtube.com/watch?v=zGOo1Nuh6VQ: Biden executive order to target noncompete agreements (Reuters, July 7, 2021), available at https://www.reuters.com/business/biden-executive-order-target-noncompete-agreements-white-house-2021-07-07/.
96 Noncompete Agreements in the U.S. Labor Force (n.27 supra).
97 Of course, it bears mention that this percentage, if correct, means that 82% of workers are not subject to noncompetes — a percentage that is even higher if California (with 18 percent of its workers subject to noncompetes that are entirely invalid) is removed from the calculation.
problem, however, is that the study’s conclusion is based in part on employee-reported data that at least 33.8 percent of the respondents with noncompetes, i.e., more than a third, report that they have noncompetes that are longer than two years. But, perhaps with extremely rare exceptions, noncompetes of that duration are almost certain not to be employee noncompetes, but rather noncompetes arising from the sale of a business. Accordingly, the conclusion that 18 percent of employees (outside the sale-of-business context) are subject to noncompetes is likely based on faulty input by as much as 33.8 percent.

Although the authors of the study attempted to avoid this result, the study (like all others that depend on self-reporting) relies on individuals who frequently do not understand the different types of agreements, much less the nuances between, for example, restrictions preventing working at a company and those preventing servicing customers or even using or disclosing information at another company.

Studies, Though Inconsistent, Suggest Noncompetes Help Consumers

Although the Commission has identified several ways in which the existing research is in conflict, rather than address the many other inconsistencies, we focus on only a specific concern raised by the Commission in the NPRM about the hypothesized indirect impact of noncompetes on consumers. We address three comments made by the Commission in this regard.

First, the Commission concludes that the “research has also shown that, by suppressing labor mobility, non-compete clauses have negatively affected competition in product and service markets in several ways.”

While some of the research may suggest this result (presumably the healthcare sector research), other studies suggest that the result is precisely the opposite. For example, there is

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98 Other inherent limitations are discussed below.

99 For example, the Commission observed that studies using patents as a proxy for innovation seem to be inconsistent and therefore the Commission is unable to extrapolate from them. Non-Compete Clause Rule, 88 Fed. Reg. at 3527 (NPRM at pp. 179-80).

100 Non-Compete Clause Rule, 88 Fed. Reg. at 3527 (NPRM at pp. 179-80).


102 The Commission later stated that the “only empirical study of the effects of non-compete clauses on consumer prices—in the health care sector—finds increased final goods prices as the enforceability of non-compete clauses increases.” Non-Compete Clause Rule, 88 Fed. Reg. at 3505 (NPRM at p. 104). But both of these conclusions are theoretical, and may be incorrect. Indeed, the healthcare study
evidence that “relaxing the enforceability of non-competes [meaning making noncompetes less enforceable] actually makes firms less willing to fire their workers and leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees.”

Similarly, when noncompete enforceability increased in the mutual fund industry, employees “tended to be more productive [and] take fewer risks,” resulting in “more secure, predictable investments,” to the obvious benefit of consumers.

Second, the Commission also expressed concern that “non-compete clauses for senior executives may harm competition in product markets in unique ways, to the extent that senior executives may be likely to start competing businesses, be hired by potential entrants or competitors or lead the development of innovative products and services. Non-compete clauses for senior executives may also block potential entrants, or raise their costs, to a high degree, because such workers are likely to be in high demand by potential entrants.”

As a threshold matter, how senior executive noncompetes impact startups has, to our knowledge, not been studied. However, a study issued by the Federal Reserve Bank of

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103 See FTC 2020 Workshop Tr. (see n.82 supra), at p. 148 (comments of Professor Kurt Lavetti, The Ohio State University).

104 Study Finds Noncompete Clauses Affect How Employees Behave, To Benefit Of Employers (April 9, 2019), available at https://news.ku.edu/2019/03/25/study-finds-non-compete-clauses-affect-how-employees-behave-benefit-employers; also, Gjergji Cici, Mario Hendriock, & Alexander Kempf, The impact of Labor Mobility Restrictions on Managerial Actions: Evidence from the mutual fund industry (University of Cologne) at 2, 5 (March 28, 2018) (“Our first set of results shows unambiguously that increased enforceability of NCCs [i.e., noncompetes] leads to better fund performance. . . . Our empirical results show that fund managers increase effort even more in large fund families after NCC enforceability becomes stricter.”), available at https://www.econstor.eu/bitstream/10419/177385/1/1017934355.pdf.

105 Non-Compete Clause Rule, 88 Fed. Reg. at 3502 (NPRM at p. 80). Similarly, the Commission states, “Non-compete clauses for highly paid or highly skilled workers such as senior executives may be contributing more to these harms than non-compete clauses for some other workers, to the extent such workers may be likely to start competing businesses, be hired by potential entrants or competitors, or develop innovative products and services.” Non-Compete Clause Rule, 88 Fed. Reg. at 3513 (NPRM at p. 123).
Philadelphia calls into question “the widely held view that enforcement of non-compete agreements negatively affects the entry rate of new firms or the rate of jobs created by new firms.” Like a seminal noncompete study from 2009, the Federal Reserve Bank of Philadelphia study uses Michigan’s 1985 elimination of a ban on noncompetes as a “natural experiment.” Based on that change, the study found:

[I]ncreased enforcement [of noncompetes] had no effect on the entry rate of startups, but a positive effect on jobs created by these startups in Michigan relative to a counterfactual of states that did not enforce such covenants pre- and post-treatment. Specifically, we find that a doubling of enforcement led to an increase of about 8 percent in the startup job creation rate in Michigan. We also find evidence that enforcing non-competes positively affected the number of high-tech establishments and the level of high-tech employment in Michigan.

Id. at 1 (emphasis added).


107 Id. at 1.

108 Matt Marx, Deborah Strumsky & Lee Fleming, Mobility, Skills, and the Michigan Noncompete Experiment (the “Michigan Experiment Study”), 55(6) MANAGEMENT SCIENCE 875-889, at 6 (April 15, 2009), available at https://doi.org/10.1287/mnsc.1080.0985.

109 That study looked at patent filings as a proxy for invention, but a decrease in the number of patents can reflect an increase in reliance on protecting inventions through trade secret law instead.

110 It bears noting that because noncompetes are limited in duration, the noncompete may delay the timing of the startup, but not necessarily its creation. See, e.g., JetBlue’s Founder is Starting a New US Airline With $100 Million and 60 Planes (Dave Neeleman, founder of JetBlue, started another U.S. airline after his noncompete expired), available at https://viewfromthewing.com/jetblues-founder-is-starting-a-new-us-airline-with-100-million-and-60oplanes/). This point is implicitly noted by University of Alabama School of Law Professor Mirit Eyal-Cohen, insofar as she explains that “[a] balance can be struck by limiting the ability of . . . employees to work on projects (not firms) with similar technology for a reasonable period of time.” Innovation Agents, 76 Wash. & Lee L. Rev. 163 (2019), available at https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss1/6/. This is what most noncompetes are designed to do. In that way, this is no different from time constraints that are placed on certain government officials leaving office to preclude them from immediately engaging in certain activities (such as lobbying or publication) so they cannot take undue advantage in a new position of that learned in a former one. Indeed, on the day that President Biden took office, he effectively created a two-year restriction on post-government employment of certain types. See Executive Order on Ethics Commitments by Executive Branch Personnel (especially sections 1.2 through 1.6),
The study thus supports the serious concern that a ban on noncompetes intended to help startups will in practice do precisely the opposite. To the extent that senior executives are, as the Commission suspects, “likely to start competing businesses,” the Federal Reserve Bank of Philadelphia’s study may suggest that the Commission is mistaken, or that the noncompete can on balance be beneficial to startups. And, of course, as previously discussed, even if the Federal Reserve Bank of Philadelphia’s study is incorrect and it turns out that stronger enforcement of noncompete agreements correlates with fewer startups, that may not necessarily be an undesirable outcome, as noncompetes are also associated with better startups, *i.e.*, higher-quality ideas and startups that are more likely to survive.\(^{111}\)

Finally, the Commission notes that it “is also not aware of evidence that, in the three states in which non-compete clauses are generally void, the inability to enforce non-compete clauses has materially harmed workers or consumers in those states.”\(^{112}\) Indeed, no one is aware of reliable evidence on this issue. That is why research is required – to inform a proper conclusion whether the absence of noncompetes helps or, in fact, harms workers and consumers in those states.\(^{113}\) Absence of evidence is not evidence of absence.

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\(^{112}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3508 (NPRM at pp. 104-05).

\(^{113}\) We have identified reasons to question the lack of harm on consumers, in light of the studies referenced above.
There are good reasons to question the assumption that workers and consumers\textsuperscript{114} are in fact unharmed by the absence of noncompetes. For example, if the absence of noncompetes helped workers, one would think that California (as well as North Dakota and Oklahoma) would have the highest median income (all things being equal). But it does not. California is not even in the top five. It is seventh – well-below six other states and Washington, D.C., all of which enforce noncompetes.\textsuperscript{115} Moreover, California has the third highest cost of living.\textsuperscript{116} California also had a higher unemployment rate in 2022, at 4.2 percent, than the national average, at 3.6 percent.\textsuperscript{117} If any of this is attributable to the absence of noncompetes, the proposed rule could risk exposing the rest of the country to suffer the same increased cost of living, without actually seeing the anticipated benefits in increased wages.

Some of these contrasts may be explained by the fact that while Silicon Valley is often regarded as the paradigm of free flow of workers and ideas, the reality is not that simple. As the Commission noted, the research suggests that noncompetes are used in California at the same rate that they are used in other states.\textsuperscript{118} Further, no-poach agreements were long deployed as a substitute for noncompete agreements in California. California also has more trade secret litigation than any other state. Given all of this, it is hard to attribute the theoretical absence of noncompetes (as opposed to the reality of their existence and the offsetting use of no-poach agreements and trade secret litigation) as the cause of much of anything.\textsuperscript{119}

\textsuperscript{114} Workers and consumers are, of course, not distinct categories. All workers are consumers, and many, but not all, consumers are workers.


\textsuperscript{117} See Regional and State Unemployment, 2022 Annual Average Summary, available at https://www.bls.gov/news.release/srgune.nr0.htm.

\textsuperscript{118} Non-Compete Clause Rule, 88 Fed. Reg. at 3485 (NPRM at p. 16); see also Noncompete Agreements in the U.S. Labor Force (see n.27 supra).

\textsuperscript{119} It is a curious development, in this regard, that workers have been leaving California in favor of tech sectors in other states that enforce noncompetes strictly. See, e.g., Danielle Abril, Where are all those tech workers going? A Silicon Valley exodus is shaking up the landscape., Washington Post (April 14, 2023), available at https://www.washingtonpost.com/technology/2023/04/12/silicon-valley-bay-area-tech/.
California’s Experience Does Not Necessarily Demonstrate Anything About Noncompetes

The fact that the research indicates that employees in California are bound by noncompetes at the same rate as employees in other states suggests the existence of unexposed errors in the studies. For example, it is possible that the research is simply wrong, and noncompetes are not used at the same rate in California. This could be a result of the self-reporting problem noted above. Another possibility is that there is no actual causal connection between California’s ban of noncompetes and the success of its tech industry.

This use-rate anomaly also calls into question what can be inferred from the Commission’s observation that “California is a state where large companies have succeeded—it is home to four of the world’s ten largest companies by market capitalization—and it also maintains a vibrant startup culture.” As noted above, the use of noncompetes at the same rate as other states, at the bare minimum, muddies the waters about the effects of California’s ban. Similarly, the use of no-poach agreements may also have had a significant impact in Silicon Valley’s early development (assuming noncompetes and no-poach agreements are a factor at all). Even absent these issues, however, there are many reasons California’s tech industry could thrive despite the ban on noncompetes, as opposed to because of it. If the ban on noncompetes contributed materially to the development of the tech industry, one might wonder why North Dakota and Oklahoma never experienced similar economic development. Indeed, if Massachusetts’s dominance in life sciences is any indication, California might have fared even better if noncompetes were enforced; the state certainly would have experienced less trade secret litigation and the attendant impacts that such litigation has on all those involved.

In short, the fact that California’s tech industry has managed to thrive in the absence of

120 Id.
121 Non-Compete Clause Rule, 88 Fed. Reg. at 3507 (NPRM at pp. 100-01).
122 California’s risk-taking culture is but one example. Other reasons are discussed below.
123 The Commission’s observation that North Dakota and Oklahoma have thriving energy industries (see Non-Compete Clause Rule, 88 Fed. Reg. at 3507 (NPRM at p. 101)) reflects only that that energy resources are located in those states. Research would be needed to know what role if any the noncompete ban played (positive or negative) on that industry.
124 California’s reliance on trade secret litigation is not a new phenomenon. It has been historically used in California, where a noncompete would have sufficed, since at least 1913. See Russell Beck, California was an early adopter of employee restrictions — just not noncompetes (Aug. 17, 2022), available at https://faircompetitionlaw.com/2022/08/17/california-was-an-early-adopter-of-employee-restrictions-just-not-noncompetes/.
noncompetes says little about the benefits or detriments of using noncompetes.

Research Is Not Sufficiently Granular

Even assuming any of the studies could demonstrate an actual causal connection between noncompetes and wages, innovation, or other perceived impacts, as the Commission observed, one cannot simply extrapolate “from one sector within one state,” as it “may not necessarily inform outcomes that would occur in the rest of the country.”125 This is precisely the point that a 2019 paper, Innovation Agents,126 reinforced, i.e., the notion that existing research suffers from a lack of granularity, as innovation in different industries responds differently to varying restrictions.127 This paper is consistent with the views expressed by Professor Kurt Lavetti128 (among others) during the 2020 Workshop about the “oversimplification” of certain conclusions in existing research concerning the wage effects of noncompetes.129

The Commission has itself observed this lack of granularity: “The available data do not allow the Commission to estimate earnings effects for every occupation. However, the evidentiary record indicates non-compete clauses depress wages for a wide range of subgroups of workers across the spectrum of income and job function—from hourly workers to highly paid, highly skilled workers such as executives.”130 However, there are subgroups of workers,


127 It may therefore be worthwhile for future research to look more closely at the duration of the noncompete restrictions at issue, the industry in which they are used, the positions for which they are used, and the geography in which they are used and to which they apply. For example, a research scientist may be more likely to create a startup, as opposed to a salesperson, depending on the industry.


129 See FTC 2020 Workshop Tr. (see n.82 supra), p. 152.

specifically, CEOs and physicians, for whom the evidentiary record (subject to all the same concerns about reliability) indicates that noncompetes increase wages.

**Correlation Does Not Necessarily Imply Causation**

One of the most fraught aspects of the noncompete debate remains that much of the analysis supporting potential regulation mistakes correlation for causation. This correlation-implies-causation fallacy was specifically noted by Professors Balasubramanian, Starr, and Yamaguchi in their *Bundling Study*, in which they caution that researchers cannot assess all of the variables at play in the analysis of the impacts of noncompetes, and therefore they determined to “refrain from making any strong causal claims” even in their paper.

**Conclusions to be Drawn**

As the above reflects, the body of research and analysis continues to expand, and, as it does, significant flaws and gaps in the prior research continue to emerge. Given this evolving understanding, the presence of conflicting studies and information and the high stakes of regulation (including the potential for a significant adverse impact on the U.S. economy), any federal regulation should proceed with extreme caution. These issues are plainly more complicated than they might appear, and there seems to be general agreement (including among some of the leading researchers themselves) that much of the research is no longer considered reliable, and that additional research is required. Given the Commission’s observation that “conflicting evidence exists in the academic literature,” we urge the Commission to review the

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**Footnotes**

131 See FTC 2020 Workshop Tr. p 175-79 (comments of Professor Ryan Williams, University of Arizona).

132 See FTC 2020 Workshop Tr. p 147-51 (comments of Professor Kurt Lavetti).

133 The reliability concerns are less severe for CEOs, where contracts were available.

134 This was initially discussed in our July 2021 Submission, at 31 n.88 (and cited scholarship). For additional information, see Beck, *Please Stop Using California as the Poster Child to Ban Noncompetes – Time for an Honest Policy Discussion* (“Time for an Honest Discussion”) (Nov. 2, 2021) (available at https://faircompetitionlaw.com/2021/11/02/please-stop-using-california-as-the-poster-child-to-ban-noncompetes-time-for-an-honest-policy-discussion/). Further, we note that the correlation-implies-causation fallacy applies to much of the existing research, including some of the scholarship cited in this submission. We nevertheless cite to it primarily to highlight areas of conflict and gaps, and to demonstrate that if it is to be relied upon to support further regulation, it would be unprincipled to ignore conflicting scholarship that supports refraining from further regulation.

135 *Bundling Study* (see n.85 supra), at 22, 30.

literature that not only reflects the conflicts, but also explains that part of the reason for the conflicts is that so much of the literature suffers from the limitations discussed above, as well as others. Importantly, these limitations apply not just to studies finding one type of result; they apply widely, calling into question much of the literature presently in the field.

COMMENTS CONCERNING EXCLUSIONS FROM THE COMMISSION’S PRELIMINARY UNFAIR COMPETITION FINDING

Request: The Commission seeks comment on all aspects of its preliminary finding that noncompete clauses for all but senior executives (however defined) are exploitative and coercive at the time of the worker’s potential departure from the employer. Specifically, the Commission summarizes its findings as, “There is considerable evidence employers are exploiting this imbalance of bargaining power through the use of non-compete clauses. Non-compete clauses are typically standard-form contracts, which, as noted above, workers are not likely to read. The evidence shows workers rarely bargain over non-compete clauses and rarely seek the assistance of counsel in reviewing non-compete clauses.”

Comment: Each of the Commission’s concerns can be – and is being – addressed by the states (to the extent they conclude it is appropriate).

To address the concern that workers may not read the noncompete, states have begun requiring companies to provide notice to the employees that they will be subject to a

139 For purposes of this submission, we adopt, arguendo, the Commission’s assumption that noncompetes can, in some instances, be coercive. However, recent scholarship challenges the assumption that they are generally coercive. Indeed, it suggests that the basis for that assumption may be wrong as much as 75 percent of the time, requiring additional research. See Alan J. Meese, Don’t Abolish Employee Noncompete Agreements, 57 WAKE FOREST L. REV. 631, 669 (2022) (“While the study concludes that millions of Americans sell their labor in highly concentrated or moderately concentrated markets, it also concludes that most do not. Instead, nearly three-quarters of employees work in labor markets that are unconcentrated, that is, have an HHI below 1500. It appears that most American employees sell their labor in markets that would be considered competitive in other contexts.”) (footnotes omitted)). As the author explains, “These data do not establish that a significant proportion of employee noncompete agreements arise in competitive markets. It is theoretically possible that noncompete agreements only arise in concentrated labor markets, perhaps implying that employers use bargaining power to impose them. However, any rule premised upon such an assumption must find some empirical support in the administrative record.” Id. (noting its absence).
Different states have taken different approaches. For example, in Maine, the employer must provide a new employee with notice that a noncompete will be required before making the offer. Massachusetts has a somewhat different requirement: the noncompete “must be provided to the [new] employee by the earlier of a formal offer of employment or 10 business days before the commencement of the employee’s employment.” Other states have different or similar requirements, and some states have also required similar advance notice for existing employees. Indeed, Colorado has gone so far as to require employers to provide a separate document in “clear and conspicuous terms” identifying the noncompete by name, “[d]irect[ing] the worker to the specific sections or paragraphs of the agreement that contain the covenant not to compete,” and “stat[ing] that the agreement contains a covenant not to compete that could restrict the workers’ options for subsequent employment following their separation from the employer.”

To address the concern that workers rarely seek advice of counsel and rarely negotiate, states have begun requiring employers to provide notice to employees that they have the right to consult with counsel. And California has even opened the door to permitting enforcement of certain noncompetes (through choice of non-California law and forum) if the employee was in fact represented by counsel. And, of course, if the employee consults counsel, counsel can advise the employee about negotiating the agreement. As Professor Matt Marx (one of the

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140 The Commission raises the related concern that “there is evidence employers often provide workers with non-compete clauses after they have accepted the job offer—in some cases, on or after their first day of work—when the worker’s negotiating power is at its weakest, since the worker may have turned down other job offers or left their previous job.” Non-Compete Clause Rule, 88 Fed. Reg. at 3503 (NPRM at 85). This issue is both the cause of many of the other problems raised by the Commission, and is, as noted above, already being addressed in the states.


142 M.G.L. c. 149, § 24L(b)(i).

143 See Russell Beck, Updated chart of noncompete notice requirements, available at https://faircompetitionlaw.com/2023/02/05/updated-chart-of-noncompete-notice-requirements/. It also bears noting that, even without a legislative mandate, courts have rejected noncompetes when—based on the facts of the particular case—the court determines that the employee was unfairly uninformed. See, e.g., Flexcon Co. v. McSherry, 123 F. Supp. 2d 42, 44 (D. Mass. 2000) (rejecting a noncompete that was “presented to [the employee] as routine paperwork” and not mentioned in or a condition of his offer letter or subsequent promotions).


pioneering researchers in this field) has observed, “[i]f it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so, these agreements could be valuable for both workers and firms.”¹⁴⁷

The Commission also raises the concern that “research indicates that, in states where non-compete clauses are unenforceable, workers are covered by non-compete clauses at roughly the same rate as workers in other states, suggesting that employers may believe workers are unaware of their legal rights, or that employers may be seeking to take advantage of workers’ lack of knowledge of their legal rights.”¹⁴⁸ These concerns can easily be addressed (and are being addressed) with the approaches identified above, as well as rules being tried in Washington, D.C. and Virginia, requiring that employers provide the employees with notice of the law.¹⁴⁹

In short, the types of notice requirements being adopted in the states should address many of the concerns – and the research results – identified by the Commission. Indeed, with these changes, research suggests that employees should find that they “have 9.7% . . . higher earnings, are 4.3 percentage points more likely to have information shared with them (a 7.8% increase relative to the sample average), are 5.5 percentage points more likely to have received training in the last year (an 11% increase), and are 4.5 percentage points more likely to be satisfied in their job (a 6.6% increase) relative to those employees without a non-compete.”¹⁵₀

¹⁴⁷ The Chilling Effect of Non-Compete Agreements, by Matt Marx and Ryan Nunn (May 20, 2018) (emphasis added), available at https://econofact.org/the-chilling-effect-of-non-compete-agreements. Professor Marx continued with his observation, “However, the actual conditions under which non-competes are used provides reason to doubt that non-competes are indeed mutually beneficial in all or most cases.” Id. This observation is consistent with the findings in Noncompete Agreements in the U.S. Labor Force (see n.27 supra), identifying various positive effects of noncompetes when advance notice is provided, including higher earnings, more access to information, more training, and more job satisfaction. Instructively, according to that study, more than half (52 percent) of people presented with a noncompete chose to “forgo[] the opportunity to negotiate [because] the terms were reasonable,” while 41 percent assumed they were not negotiable, id. at p. 9, the latter of which could be addressed with advance notice. Indeed, 55 percent of people presented with a noncompete before they accepted the offer thought it was reasonable and 48 percent thought they could negotiate it. Id. Accordingly, the recommendations in this letter are intended to address these issues holistically.


¹⁴⁹ D.C. Code § 32-581.04; Virginia code § 40.1-28.7:8(G).

¹⁵₀ Noncompete Agreements in the U.S. Labor Force (see n.27 supra) (emphasis added). While the Commission noted that “the empirical economic literature shows workers generally have lower, not higher, earnings when non-compete clause enforceability increases,” Non-Compete Clause Rule, 88 Fed. Reg. at 3508 (NPRM at 104), the other benefits identified in the study do not diminish. But regardless, the additional recommendations in this submission should assist in preserving the positive
The final concern the Commission raises concerning the potentially exploitive effect is at the end of employment, “because [noncompetes] force a worker to either stay in a job they want to leave or choose an alternative that likely impacts their livelihood.”\(^{151}\) This, of course, would only be true if the employee was exploited on the way in, or if circumstances have changed as to render the previously non-exploitive agreement exploitive. That latter change in circumstances can be addressed through rules concerning what changes would constitute exploitation, and addressing the cause. For example, many states prohibit enforcement if the employee’s employment was terminated without cause.\(^{152}\)

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**Request:** The Commission seeks comment on whether there are other categories of highly paid or highly skilled workers (i.e., other than senior executives) to whom the preliminary finding that noncompetes are exploitive should not apply.\(^{153}\)

**Comment:** For the reasons explained above, the Commission’s finding should be suspended at least until the impact of the various states’ efforts can be assessed. At a minimum, the finding should not apply to anyone who received notice and was given an opportunity to negotiate the noncompete.

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**Request:** The Commission seeks comment on its dual findings that “employers have alternatives to non-compete clauses that reasonably achieve the same purposes while burdening competition to a less significant degree” and that “the asserted benefits from these commonly cited justifications do not outweigh the considerable harm from non-compete clauses.”\(^{154}\)

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\(^{151}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3504 (NPRM at p. 86).

\(^{152}\) See 50 State Noncompete Survey (Appendix B).


\(^{154}\) NPRM at p. 89. We note that the existence of competing interests and economic studies supporting benefits and detriments of noncompetes (which may or may prove incorrect, overstated, or offset by unstudied impacts) may suggest that this balancing of interests belongs to the legislative branch of government. Accordingly, this submission only incidentally addresses the Commission’s request (at page 159) for input on the pros and cons of noncompetes.
Comment: The findings presume both that noncompetes harm competition and that the harm is considerable. Those findings are based on studies, some of which we address elsewhere in this submission. Accordingly, we address here only the effectiveness of the alternatives to noncompetes. Those alternatives are trade secret law, nondisclosure agreements, and other restrictive covenants. None of these alternatives provides the same level of clarity and predictability of outcome to the parties and complete protection afforded by noncompete agreements.

Trade Secret Law Is Insufficient

As we explained in our prior submission, a although trade secret law has a broad scope, information failing to qualify as a trade secret is not protectable under trade secret laws – state or federal. But just because the information may not qualify as a trade secret does not mean that it is unimportant to the business or does not provide the business with a discernable competitive advantage. For example, as previously identified, a significant source of disagreement in trade secret lawsuits can be customer information (often complete or partial customer lists). Some states include customer information or customer lists in the definition of trade secrets. Others do not. In the states that do not, the threshold battle typically involves whether the customer information can even be a trade secret. And, even when it can be a trade secret, parties often still spar over (among other things) whether the particular customer information in fact qualifies as a trade secret.

Further, one of the most nuanced issues in trade secret law is how to handle the fact that trade secrets can often be retained in a person’s memory. As a general matter, the mere fact that information is lodged in someone’s head does not strip it of its trade secret qualities or the available protections.

155 July 2021 Submission at pp. 9-11.
157 Id.
158 The DTSA did “not preempt existing state trade-secret laws”; it gave trade secret owners “the powerful option of filing suit in federal court, thus adding an important additional tool for American companies.” Explaining the Defend Trade Secrets Act (American Bar association, September 2016), available at https://www.americanbar.org/groups/business_law/publications/blt/2016/09/03_cohen/.
An example, identified in our prior submission, of how this issue can present a significant threat to a company (in a context in which the company is unable to use a noncompete) is a Chief Marketing Officer (CMO) who worked on the company’s strategic plan and then leaves for a competitor to be its CMO, developing its strategic plan. The information the CMO knows about the former employer’s plans may influence decisions about the new employer’s strategic plan. How can the CMO avoid taking advantage of the weaknesses in the prior employer’s strategy, or avoid getting tripped up by the strengths of that plan, as he or she maps out the course for the new company?

Another type of information presenting the same problem is the so-called “blind alley” (or “negative information”), i.e., information that was considered and rejected on the path to finding the right solution. Anyone who knows the failed efforts to develop a formula for a product (such as a chemist who worked on its development) would be unlikely to sit by watching the same mistakes being made (knowing they will fail) on the way to making their own similar product. Instead, they would be tempted to reject those failed formulas at the outset, thereby saving substantial research and development efforts, cost, and time.

Despite all of this, some states’ trade secret laws do not fully address the risks surrounding these circumstances. And even where the law provides protection in the abstract, in most cases the details of a departing employee’s potential misconduct remain unknown and unknowable to the former employer (this is particularly true of “negative information”). In this sense, litigation over potential misappropriation of a trade secret – which can be expensive and disruptive for all parties involved – is inherently imperfect as a means of preventing the use or disclosure of that secret.

The Commission implicitly recognizes this in its comment that identifies that “[a]nother possible benefit of the proposed rule related to markets for products and services is that worker flows across employers contribute to knowledge sharing, resulting in increased levels of innovation.” But the supposed increased innovation would be at the expense of the companies that invested time, money, and effort to develop the information and then imparted that information to their workers. The ability of one employer to obtain for free (paying only the cost of hiring an employee) that which the other has invested significant resources (paying not only the cost of hiring the employee, but for the development of the information and the training of the employee) is not a positive outcome. It reflects the free-rider problem. In the short term, it is essentially theft of intellectual capital and the type of commercial immorality universally

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159 July 2021 Submission at pp. 10-11.

condemned by federal and state trade secret law. In the long term, it would prevent investment\textsuperscript{161} and discourage innovation, harming everyone.

While trade secret law protects from this in theory, in practice it has severe limitations. It cannot (absent an injunction obtained in time) prevent disclosure or use – intentional or otherwise – at a new employer. Further, there is no realistic way for former employers to monitor for use or disclosure that occurs behind closed doors at a new employer. And even when the use or disclosure is later discovered, the harm has already occurred and can rarely be fully remedied. This is precisely the problem that trade secret law tries to – but cannot fully – prevent.\textsuperscript{162}

\textit{Nondisclosure Agreements Are Insufficient}

As we also explained in our prior submission,\textsuperscript{163} nondisclosure agreements ("NDAs") serve multiple important purposes, including putting employees on notice that the company has information that may be confidential in general, and identifying for the employee particular types of information that the company considers confidential. Also, nondisclosure agreements are an important building block in a company’s efforts to take (and ability to demonstrate that it has taken) reasonable measures to protect its information – both a practical imperative and a threshold requirement in most states (and under the federal DTSA) to being able to rely on trade secret law. They may also provide a breach of contract remedy for the taking of company information (to the extent not preempted by applicable state trade secret laws).

However, like trade secret laws, NDAs also do not prevent an employee from working for a competitor, even in the situations described above, where the employee’s knowledge of the trade secrets is likely to be used to give the competitor an unfair competitive advantage. While courts enforcing NDAs will typically order the return of information, they will rarely prevent employees from working for the competitor, thereby leaving the former employer to attempt to police the former employee’s conduct (\textit{i.e.}, use or disclosure of its trade secrets) remotely and without all the tools that may be necessary to prevent irreparable harm.\textsuperscript{164}

\textsuperscript{161} See Innovation Study (n.28 supra).

\textsuperscript{162} The risks to company trade secrets are not static. With increased reliance on trade secrets, increased value of those secrets, increased mobility of information, and a less-supervised remote workforce, trade secrets are at increasing risk.

\textsuperscript{163} July 2021 Submission at pp. 11-12.

\textsuperscript{164} Because “a secret once lost is . . . lost forever,” \textit{FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.}, 730 F.2d 61, 63 (2nd Cir. 1984), and policing a former employee’s (and their new employer’s)
Other Restrictive Covenants Are Insufficient

While other restrictive covenants identified by the Commission (such as nonsolicitation and no-recruit agreements\textsuperscript{165}) prohibit certain conduct that relies on the use of a company’s trade secrets or goodwill, they do not act as a barrier to such conduct. First, employees often ignore the prohibition, which (unlike a breach of a noncompete) frequently goes undiscovered until the harm has occurred.\textsuperscript{166} But even where the employee attempts to abide by the restrictions, subtle solicitation is frequently inevitable simply by dint of the contact that the employee will have with the customers they used to work with. And regardless of an employee’s conduct, “the former employee’s close association with . . . customers may cause those customers to associate the former employee, and not the employer, with products of the type sold to the customer through the efforts of the former employee. That association in the client’s mind tends to overlook, among other things, the institutional training, support, and synergy that enable the employee to provide services of the quality the client values so highly.”\textsuperscript{167} In each of these instances, the former employer will not find out about the employee’s violation until after the harm has occurred and is incapable of being fully remedied.

Thus, while these less-restrictive agreements are often reasonably effective at achieving their purpose, in some circumstances, these “lesser” restrictions prove to be insufficient. This is precisely why the new Massachusetts and Rhode Island noncompete laws expressly authorize conduct is generally quite difficult, noncompetes can provide much more reliable protection for the integrity of a company’s trade secrets than litigation claiming misappropriation.

\textsuperscript{165} No-recruit agreements are often called “nonsolicitation agreements,” see, e.g., Haw. Rev. Stat. § 480-4 (“‘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.”). In fact, this confusion is even reflected in the Hawaii Study discussed above.

\textsuperscript{166} Oftentimes the discovery is serendipitous, for example, it is discovered because an email is misdirected by a client to the employee’s former work email address. Other times, customers or former colleagues who have been solicited may inform the former employer. Or worse, the trade secret is found published in the new employer’s patents. Remaining employees are frequently the ones most impacted by a former colleague’s breach of these agreements, as it can, for example, directly impact the remaining employee’s sales efforts or competitive advantage in the market.

\textsuperscript{167} McFarland v. Schneider, No. 96-7097, 1998 WL 136133, at *42–43 (Mass. Super. Ct. Feb. 17, 1998) (internal quotations and citations omitted). This is referred to as goodwill, and it is frequently the primary concern in certain sectors (notably, the staffing industry) and for companies managing departing salespersons. It is developed by the company (in part through the work it pays its employees to perform) and is necessary to maintain the employer’s continued relationship with its customers.
courts to impose a “springing noncompete” (or a “time out noncompete,” as one commentator described them) when an employee violates these other contractual obligations, or certain other obligations.\footnote{M.G.L. c. 149, § 24L(c) (Massachusetts); R.I. Gen. Laws § 28-59-3(b) (Rhode Island). Georgia introduced legislation to adopt a similar rule in the last legislative session. See Georgia House Bill 332 (“Notwithstanding the absence of a covenant that restricts competition after the term of employment, a court is authorized to grant relief in the form of an injunction preventing the employee from working for a competitor for a limited period of time in a reasonable geographic area and with respect to a reasonable scope of activities if the court finds that such relief is necessary and appropriate to remEDIATE the employee’s violations of other covenants or legal obligations, such as a customer nonsolicitation covenant or a nondisclosure covenant, and the contract expressly authorizes such judicial relief.”), available at \url{https://legiscan.com/GA/bill/HB332/2021}.}

Companies face these types of issues every day, and the courts are filled with such cases.\footnote{Though much of the noncompete research has been focused on the “holdup” problem – specifically, whether noncompetes allow companies to more readily share information because they believe the employee is less likely to leave, see Noncompete Agreements in the U.S. Labor Force (see n.27 supra) – they do not look at the other interests, including the protection of goodwill and that companies would no longer be able to trust employees to have single-threaded access to their customers, if the employee could work with those customers elsewhere.}

But, as difficult as it would be to protect these interests without noncompetes, it would be even more difficult when coupled with the Commission’s simultaneous narrowing – under the “functional test” – of the use of nondisclosure agreements and lesser-restrictive (lesser-protective) restrictive covenants.

Noncompetes Deter and Prevent Misconduct

Because of the limitations of these other tools (trade secret law, nondisclosure agreements, or other restrictive covenants), none can provide the level of protection, deterrence, and clarity offered by noncompetes. Only noncompetes serve as a prophylactic to prevent the very circumstances in which trade secrets and customer goodwill are most likely to be put at risk, thereby preventing the harm before it happens.\footnote{One of the criticisms of trade secret law that the Commission identifies is that the inevitable disclosure doctrine can be too harsh. Non-Compete Clause Rule, 88 Fed. Reg. at 3506 (NPRM at pp. 95-96). Noncompetes solve this harshness by permitting agreement upfront, rather than surprising the employee with a court-created noncompete. Indeed, the Maryland case cited by the Commission, LeJeune v. Coin Acceptors, Inc., 849 A.2d 451, 471 (Md. 2004), makes this exact point: “The chief ill in the covenant not to compete imposed by the inevitable disclosure doctrine is in its after-the-fact nature: The covenant is imposed after the employment contract is made and therefore alters the employment relationship without the employee’s consent.” Id. (quoting Whyte v. Schlage Lock Co., 101 Cal.App.4th 1443, 125 Cal.Rptr.2d 277 (2002)). The other case cited by the Commission, Bayer
critical tool to prevent the harm caused by this type of information exfiltration, as well as the correlative inbound contamination of a new employer’s existing information and work product, and to help employees avoid new employment relationships that will tempt, or create the very real prospect of, their breach of confidentiality and other lawful obligations. Rather than putting the parties and the court to the expense and uncertainty of litigation, noncompetes operate to temporarily prevent an employee from taking a role with a competitor that would put the former employer’s trade secrets, other confidential business information, and customer goodwill at risk of being used.\textsuperscript{171}

The Commission discounts these benefits, finding that “the considerable harms to workers and consumers are not outweighed because an employer has some marginally greater ability to protect trade secrets, customer lists, and other firm investments, or because the worker is receiving increased training, or because the firm has increased capital investments.”\textsuperscript{172} However, the Commission acknowledges that it has no data demonstrating that the protections are only “marginally” greater, rather than significantly greater. Accordingly, the Commission states, it “is not aware of any evidence non-compete clauses reduce trade secret misappropriation or the loss of other types of confidential information.”\textsuperscript{173} But, as noted above, absence of evidence is not evidence of absence, and making a decision of this magnitude without reliable evidence could be devastating to companies, employees, and the economy.

Further, the Commission relies for its finding this in part on its observation that trade secret law “provides employers with a viable means of protecting their investments in trade secrets.”\textsuperscript{174} The Commission reaches this conclusion in significant part because the filing of new

\textit{Corp. v. Roche Molecular Sys., Inc.}, 72 F. Supp. 2d 1111, 1120 (N.D. Cal. 1999), is a case applying California law making the point that, “[t]o the extent that the theory of inevitable disclosure creates a de facto covenant not to compete without a nontrivial showing of actual or threatened use or disclosure, it is inconsistent with California policy and case law.” Thus, if noncompetes are not banned, this issue is eliminated.

\textsuperscript{171} For companies for which customer contacts are the key to the business, noncompetes can prevent the subtle customer solicitation that otherwise frequently occurs (whether intentional or unintentional).

\textsuperscript{172} Non-Compete Clause Rule, 88 Fed. Reg. at 3508 (NPRM at p. 104). The Commission also concludes that “If they were, workers would have higher earnings when non-compete clauses are more readily available to firms (i.e., when legal enforceability of non-compete clauses increases) or prices for consumers would be lower.” Id. These issues are addressed elsewhere in this submission.

\textsuperscript{173} Non-Compete Clause Rule, 88 Fed. Reg. at 3505 (NPRM at p. 92).

\textsuperscript{174} Non-Compete Clause Rule, 88 Fed. Reg. at 3506 (NPRM at p. 98).
trade secret cases appears to have remained roughly static for several years. The conclusion is potentially misplaced for several reasons.

    As a threshold matter, a significant limitation of the conclusion is that it is based on a survey that is opaque and may not reflect what is actually happening.\textsuperscript{175} But, even if the data were fully known and reliable, it is hard to draw any conclusive findings just from the number of court filings. For example, during that same period, companies were not relying exclusively on trade secret law; they were also relying on noncompetes (and other rights) for the protection of their trade secrets. Without knowing what would happen if noncompete protections were removed from the equation, it is impossible to conclude that trade secret law would be adequate. For example, a datapoint is provided by comparing California’s incidence of trade secret litigation with that of the other states. Far more trade secret litigation occurs in California than any other state,\textsuperscript{176} suggesting (based on the numbers and the experience of the signatories) that litigation is being used as a substitute for the unavailable tool of a noncompete. Another related, plausible explanation is that trade secret misappropriation is far more common in California (resulting in more litigation) because employees have more opportunities to misappropriate on behalf of a competitor due to the noncompete ban. To the extent that such a conclusion can be properly drawn, it stands to reason that a national ban on the use of noncompetes would have similar results nationally.\textsuperscript{177}

\textsuperscript{175} Surveys like the one relied on can vary significantly for many reasons, including based on how the data is obtained, coded, and searched. Accordingly, these studies should be used with caution. In that regard, the trend (a static level of new case filings) for the first half of that period (2015-2017 relied on) is consistent with the trend during the same period seen in number of decisions involving trade secrets reported in Westlaw. \textit{See New Trade Secret and Noncompete Case Growth Graph (Updated January 18, 2023)}, available at \url{https://faircompetitionlaw.com/2023/01/18/new-trade-secret-and-noncompete-case-growth-graph-updated-january-18-2023/}. However, the number of decisions involving trade secrets reported on Westlaw diverges from the other data for the second half of the timeframe looked at (2018-2020). \textit{Id.} There, contrary to the purported continued roughly static number of new cases, the data suggests that there was actually an increase of approximately 15 percent in the number of decisions from the prior period. \textit{Id.}

\textsuperscript{176} \textit{See California Trade Secrets Litigation Supplants Noncompete Litigation}, available at \url{https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/}.

\textsuperscript{177} It bears noting that trade secret litigation is far more involved, more costly, longer lived, and less predictable than noncompete litigation. \textit{See generally} Christina L. Wu, \textit{Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State’s Law?}, 51 UCLA L. Rev. 593, 610-11 (2003) (“Noncompete agreements can also reduce the cost of trade secret litigation. . . . Instead of claiming misappropriation of trade secrets, an employer can simply bring a contract action for breach of the covenant not to compete, which would be less costly
The Commission also dismisses the need for noncompetes in part because it concludes that “there is little reliable empirical data on trade secret theft and firm investment in trade secrets in general, and no reliable data on how non-compete clauses affect these practices.”\textsuperscript{178} As to the former, the self-reported data (more likely under-reported than over-reported) is that 59 percent of “employees who lost or left a job . . . admit[ed] to stealing confidential company information, such as customer contact lists.”\textsuperscript{179} This is consistent with the results of a highly-regarded research paper, that “in over 85% of cases, the alleged misappropriator was either an employee or business partner,” with employees representing an increasing share (up to 59 percent) of the misappropriation over the course of the period reviewed by the study.\textsuperscript{180} Whether such data is conclusive or not, there is no evidence that it is wrong or that noncompetes do not help to prevent the harm that would be created if those employees could put that information to use at a competitor. Accordingly, the Commission should exercise extreme caution in making changes, as the consequences of a mistake can, as explained elsewhere in this submission, be devastating to companies whose information and customers are wrongfully taken, to the employees that remain at those companies, and to the economy more broadly.\textsuperscript{181}

\textsuperscript{178} Non-Compete Clause Rule, 88 Fed. Reg. at 3505 (NPRM at p. 93).

\textsuperscript{179} See, e.g., More Than Half Of Ex-Employees Admit To Stealing Company Data According To New Study, Ponemon Institute and Symantec Corporation (Feb. 23, 2009) (finding that 59 percent of “employees who lost or left a job in 2008 . . . admit to stealing confidential company information, such as customer contact lists”), available at https://cisp.cachefly.net/assets/articles/attachments/19634_symantec.pdf; What’s Yours Is Mine: How Employees are Putting Your Intellectual Property at Risk,” Symantec Corporation (Feb. 6, 2013) (finding that “[h]alf of the survey respondents say they have taken information, and 40 percent say they will use it in their new jobs.”), available at https://www.ciosummits.com/media/solution_spotlight/OnlineAssett_Symantec_WhatsYoursIsMine.pdf. These conclusions are also consistent with the combined anecdotal experience of the 102 undersigned signatories, suggesting that, whether through intentional misconduct or otherwise, employees pose the greatest threat to companies’ trade secrets and customer relationships – each the lifeblood of large and small companies alike.


\textsuperscript{181} It may be an obvious point, but it bears noting that while the use of noncompetes may not prevent the wrongful acquisition of the information, they necessarily prevent the use of it. Removing the protections afforded by noncompetes exposes companies to the misuse of their information by those
**Request:** The Commission seeks input on the proposed functional test for determining whether a nondisclosure agreement, nonsolicitation agreement, training repayment agreement, or other contract term should be considered a *de facto* noncompete.\(^\text{182}\)

**Comment:** The proposed functional test should be omitted. Its inclusion would insert a level of uncertainty and unpredictability\(^\text{183}\) that would stymie the drafting of and reliance on NDAs and other agreements at a time when such agreements will become even more necessary.

As a threshold matter, to accomplish its purpose, the standard is impossibly vague. What amount of interference on the employee’s subsequent employment would be necessary to trigger the rule? For salespeople, for example, restricting their ability to solicit customers with whom they worked could be interpreted as preventing their employment for any company that expects them to bring a “book” of business with them. Are stock forfeiture provisions in long-term incentive compensation plans – *i.e.*, covenants that do not prevent a former employee from moving to a competitor, but instead simply result in forfeiture of unvested equity if a departed employee were to join a competitor prior to vesting of the equity – covered by the functional test (or otherwise subject to the ban)? What about “retirement” benefits (for example, accelerated vesting of unvested equity) to which a departing employee (who had reached a certain age or tenure with the company) would be entitled only if they retire (or work for a noncompetitor), but not if they were to work for a competitor within a certain period after leaving (thus they are can choose either to receive retirement benefits or work for a competitor)?

But even if the standard could be stated with more precision, it would still raise more questions than it would answer: Who would make the decision that a restrictive covenant crosses the line and qualifies as a *de facto* noncompete? Would it be the Commission? Or would it be a court? And would the decision be based simply on the language as drafted, or would it be based on the individualized application to a particular employee and industry? Would it matter if the language could be read broadly, but would not apply that way to a particular individual? When would the evaluation be made? Would it be evaluated in light of

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\(^\text{183}\) As a consequence, the proposed functional test would also undermine the Commission’s stated goal of certainty through uniformity.
the circumstances that existed when the agreement was drafted, or would it be evaluated when it is enforced? What happens if circumstances change, such that an agreement that was once appropriate can later be interpreted as too broad?

Further, there are no studies identified by the Commission (or of which the signatories to this submission are aware) that address the impact that a rule like this would have. Accordingly, without precedent, regulating them in a complete vacuum of information poses a risk of serious harm to companies, employees, and the economy.

Presumably the goal of the functional test is to encourage good faith drafting of the restrictive covenants that will remain after the rule takes effect. If so, to the extent that noncompetes are prohibited, courts are more than capable of determining whether an agreement, despite its appellation, is effectively a substitute noncompete.

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**Request:** The Commission also seeks input on whether the rule should apply to workplace policies.\(^{184}\)

**Comment:** It should not. As a threshold matter, workplace policies apply only during employment; they do not restrict post-employment conduct.\(^{185}\) The Commission has stated that “the Rule would apply only to post-employment restraints—i.e., restrictions on what the worker may do after the conclusion of the worker’s employment with the employer. The Rule would not apply to concurrent-employment restraints—i.e., restrictions on what the worker may do during the worker’s employment.”\(^{186}\) Accordingly, for that reason alone, the Commission should not apply its proposed rule to workplace polices.

Further, there is no empirical evidence identified by the Commission (or of which we are aware) that identifies, much less purports to evaluate, the impact of applying the proposed rule (or a similar rule) to workplace policies.

Finally, the Commission should consider the unintended negative consequences of a rule prohibiting internal policies ensuring employees do not compete against their employer, solicit

\(^{184}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3510 (NPRM at p. 111).

\(^{185}\) Even California permits the use of policies preventing “in-term” restraints, i.e., prohibiting competition during employment. See, e.g., Techno Lite, Inc. v. Emcod, LLC, 44 Cal.App.5th 462, 671 (Cal. Ct. App., 2nd Dist. 2020) (“During the term of employment, an employer is entitled to its employees’ ‘undivided loyalty.’”).

customers on behalf of a competitor, or use confidential information other than as needed to further the success of the business, which should be in the joint interest of the employer and its employees.

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**SALE OF BUSINESS NONCOMPETES**

**Request:** The Commission seeks comment on whether the 25% threshold is the right approach or whether some other percentage or use of a more flexible term (such as “substantial owner, substantial member, and substantial partner”) would be better.187

**Comment:** A flexible approach is recommended.

As a threshold matter, as the Commission recognized, “there has been little empirical research on the prevalence of non-compete clauses between the seller and buyer of a business. The Commission is also not aware of empirical research on the economic effects of applying additional legal restrictions to these types of non-compete clauses.”188 Indeed, the Commission does not identify any unfair method of competition arising from the use of noncompetes tied to the sale of a business. To the contrary, it would be unfair in the truest sense to prohibit noncompetes in the context of a sale of a business and thereby permit the seller to “derogue from the value of the business as sold by competing with it . . . .”189 Given the lack of information and the importance to the economy of lawful mergers and acquisitions, the Commission should avoid placing any limitations on the exemption.

Further, any specific percentage is artificial, arbitrary, and harmful. If the 25 percent threshold were adopted, the maximum number of people who could be bound by a noncompete arising out of the sale of a business would be four, thereby significantly limiting the number of potential target companies. Further, using a straight percentage ignores the value conferred on the sellers. The combination of these two problems leads to illogical results. For example, four


188 Non-Compete Clause Rule, 88 Fed. Reg. at 3514 (NPRM at p. 131). The Commission also observes that this type of exemption is recognized in the majority of states. Id. 129. Of course, noncompetes are also recognized in the majority of states. To the extent that the Commission’s analysis is informed by how the majority of states handle these issues, it may wish to reevaluate whether to impose any ban on noncompetes, except, perhaps, in the most categorically-narrow of circumstances (such as to ban them for low-wage, low-skilled workers). Doing so would, according to the research relied upon by the Commission, eliminate 53 percent of noncompetes. See Non-Compete Clause Rule, 88 Fed. Reg. at 3485 (NPRM at p. 16).

equal owners of a company that sells for $100,000 net (meaning each owner receives $25,000) can each be bound by a noncompete, whereas none of five equal owners of a company that sells for $100 million net (meaning each owner receives $20 million) can be bound by a noncompete. As noted during the Commission’s February 16 “public forum,” even Jeff Bezos could not be bound by a noncompete under this standard.

Setting a specific percentage can also result in owners holding less than a 25 percent interest having to discount their sale price to account for the potential that usual and ordinary noncompetes will be deemed to be unenforceable at a later date.

Leaving the approach flexible allows the parties, all of whom are likely to be represented by counsel and have negotiating power, to determine what is fair. If they are unable to do so, a court certainly can. This was the conclusion reached in Massachusetts, when it rejected various alternative bright-line approaches in favor of an open standard,\(^{190}\) and is the approach taken in California.\(^{191}\)

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**RECESSION/RETROACTIVE EFFECT**

**Request:** The Commission seeks comment on each aspect of section 910.2 (Unfair Methods of Competition – Retroactive Effect/Recission) of the proposed rule.\(^{192}\)

**Comment:** We comment on only the retroactive impact of section 910.2.

Because noncompetes and other restrictive covenants entered into with employees are contracts, they must be supported by consideration.\(^{193}\) For a new employee, consideration typically takes the form of their employment and all incidents of their employment. Specifically, employees agree to provide their services subject to various terms and conditions, sometimes including restrictive covenants, and employers pay them for this in the form of compensation and

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\(^{190}\) See M.G.L. c. 149, § 24L(a) (applying the exemption to anyone who “who will receive significant consideration or benefit from the” transaction).


\(^{192}\) Non-Compete Clause Rule, 88 Fed. Reg. at 3512 (NPRM at pp. 121-22).

benefits. But sometimes, for new employees and existing employees, the consideration for the restrictive covenants is more direct and obvious. For example, employers often provide bonuses, stock awards, and options in exchange for an employee’s acceptance of a noncompete and other restrictive covenants. Further, at the time of departure, employers will sometimes provide separation payments conditioned on the employee’s agreement to a noncompete. Whatever the form – whether part of the overall compensation and benefits or in the form of a bonus, stock award, option grant, or something else – the employee has received something in exchange for the noncompete and other restrictive covenants.

As a consequence, recission of existing contracts undoes half of the bargained-for exchange. If the estimates are correct and approximately 30 million people are bound by noncompetes, the elimination of those agreements changes 30 million previously-agreed upon financial arrangements. But, under the law of rescission, the parties must be returned to the status quo \textit{ex ante}, i.e., the parties must be returned to their positions as if the contract had not been made (or as near as possible).

As currently proposed, the rule would not do that. Instead, the employee would be able to retain all benefits of the agreement, without returning to the company that which the employee received in exchange. The employee would be relieved of compliance with the noncompete, but permitted to retain stock given by the company. The employer would have essentially given the stock to the employee as a gift. That would also be true of bonuses paid for the noncompete. And it would even be true where severance was negotiated at the end of employment. All noncompetes will be gone, but the employees will retain the consideration they received for

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195 For new employees, bonuses would be in the form of a signing bonus.

196 After nearly a decade of legislative wrangling, Massachusetts enacted a statute that prohibits (among other things) the enforcement of noncompetes against employees who were “terminated without cause or laid off,” unless the noncompete is agreed to as part of a qualifying separation from employment. M.G.L. c. 149, § 24L(a), (c). Similarly, Washington prohibits the use of noncompetes “against an employee . . . [i]f the employee is terminated as the result of a layoff, unless enforcement of the noncompetition covenant includes compensation equivalent to the employee’s base salary at the time of termination for the period of enforcement minus compensation earned through subsequent employment during the period of enforcement.” RCW§§ 49.62.020(1)(c).

197 26 Williston on Contracts § 68:25 (4th ed.) (Requisites and conditions of restitution, In general).
them.\textsuperscript{198} In contrast, if a ban were to go into effect, employers will, at that time, presumably suspend mid-stream any benefits still to be provided in exchange for the noncompete, terminate all unvested options and stock provided in exchange for the noncompete, and cancel bonuses agreed to in exchange for the noncompete.

The same type of asymmetrical undoing of agreed-upon bargains will exist in the context of past sales of businesses where the buyer of a business priced into the transaction noncompetition from former owners or in which a business hired a former owner for a role and at a salary level which would have been lower had there been a risk that the individual would leave and immediately compete. The proposed rule thereby (presumably unintentionally) favors former business owners over those that purchased their business.

Ultimately, there is no way to predict how parties to these transactions would react. However, it is certainly the case that there could be a flood of piecemeal litigation around the country seeking declarations from the courts about how the ban impacts contracts and obligations going forward. It is not an exaggeration to say that the immediate cancellation of 30 million contracts would be unprecedented and potentially create chaos in the economy and judicial system.

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ALTERNATIVE APPROACHES\textsuperscript{199}

\textbf{Request:} The Commission seeks comment on alternate approaches to a straight ban, specifically, the use of presumptions, with varying burdens of proof and interests.\textsuperscript{200}

\textbf{Comment:} If the Commission were to adopt a rule, the signatories recommend the use of a category-based, relatively bright-line standard. As previously noted, clarity and predictability benefit all parties. It is not just a corporate interest; workers signing noncompetes need to understand what will happen. Using reasonably objective standards helps to provide that certainty. Indeed, all stakeholders, including the courts, would benefit from applying a bright-
line rule in any enforcement proceeding. While in theory presumptions might appear to be a feasible compromise between an outright ban and no rule at all, in practice, the likely alternatives would create unworkable uncertainty and concomitant litigation.

The Commission views existing noncompete law as similar to a rebuttable presumption. That is a misperception. As with all litigation, parties with the burden of proof must prove their case. But presumptions alter that framework. And while some states do use rebuttable presumptions in the noncompete context, those states typically permit enforcement of noncompetes, and then make it easier to enforce them based on the presumption and harder to do so if the presumption is not met; they do not use the presumption as a bar to enforcement that must be overcome.201

Further, depending on the standard, the ability to overcome the presumption may be largely illusory. For example, the Commission identifies a possible standard as requiring that the employer “show[] by clear and convincing evidence that the non-compete clause is unlikely to harm competition in labor markets or product or service markets, or identifies some competitive benefit that plausibly outweighs the apparent or anticipated harm.”202 This proposed rule would effectively require an employer (and therefore the employee) to approach a litigation over a noncompete in a manner similar to the way one litigates an antitrust case, i.e., by hiring experts on competition and labor markets. Noncompete issues, however, are much different, and are (typically) focused on what one individual knows or can do with specific knowledge or company goodwill for a discrete new and competitive employer. Given the Commission’s findings concerning what the academic research shows about the theoretical impacts of noncompetes on competition (findings we believe to be unwarranted for the reasons expressed in this submission), it seems unlikely that an employer would ever be able to overcome those findings. Even lowering the standard to a preponderance of the evidence, rather than a clear and convincing showing, would not ameliorate the concern.

* * *

Request: The Commission asks for comment on whether to differentiate among categories of workers and, if so, how.203

201 See, e.g., Fla. Stat. Ann. §§ 542.335 (Florida); M.G.L. c. 149, § 24L(b)(iii), (v), (vi) (Massachusetts); RCW §§ 49.62.005–20 (Washington).


Comment: As identified in prior submissions, if any restrictions are adopted, the most practical, workable (nonarbitrary) approach would be to prohibit the use of noncompetes for workers who are not exempt under the Fair Labor Standards Act (the “FLSA”), 29 U.S.C. § 203.

Before turning to the reasons for such an approach, we pause to comment on a comprehensive ban. We note that, in the last eight years alone, there have been 43 changes to noncompete laws in 27 states, plus changes in Washington, D.C. Further, legislative activity continues. Last year, there were 98 bills pending in 29 states, plus D.C. Significantly, only five of those nearly 100 bills proposed a complete ban—a number that was down from prior years. In the end, five states made eight changes to their noncompete laws, and D.C. made a change to its law too. None was a ban. This year (early in the legislative process for most states) there have already been 74 bills in 28 states, 12 of which include protections for low-wage workers. So far, only nine of those bills propose a complete ban (one of which has already died).

The legislative activity around the country reflects one thing: While there is not uniformity of opinion about what a national standard should be, there is unanimity about what it should not be—a complete ban.

While complicating matters for employers with employees in multiple states (especially with remote work exacerbating the difficulties), this patchwork of ideas is working precisely as Supreme Court Justice Brandeis imagined: The states are functioning as laboratories of

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204 For a summary of the changes, see Almost 60 percent of states updated their noncompete laws in the last decade, available at https://faircompetitionlaw.com/2023/02/12/noncompete-law-changes-in-the-last-decade-updated-february-12-2023/. Since that article, Kentucky passed another change to its noncompete law, bringing the total to 43 changes. See https://legiscan.com/KY/bill/HB502/2023.

205 See https://faircompetitionlaw.com/2022/07/12/curious-which-states-have-changed-their-noncompete-laws-in-the-last-decade-more-than-half/.

206 Although Washington, D.C. initially passed a near total ban (it had some exemptions), it ultimately concluded that that was a bridge too far and replaced it with a wage threshold before the near-total ban went into effect. See A second paradigm shift in D.C.’s noncompete law — no longer a ban, now a wage threshold, available at https://faircompetitionlaw.com/2022/07/15/a-second-paradigm-shift-in-d-c-s-noncompete-law-no-longer-a-ban-now-a-wage-threshold/. Indeed, the last time a permanent ban on employee noncompetes was adopted was in 1890 (in Oklahoma). Interestingly, Michigan banned noncompetes in 1905, but then repealed the ban in 1985. See Michigan Experiment Study (supra at n.108) at 6 (discussing Michigan’s 1905 statute banning noncompetes and the Michigan Antitrust Reform Act of 1985 repealing it). Similarly, Montana also had imposed a ban in 1895, though courts have in recent years interpreted the statute to permit the use of reasonable noncompetes. See Montana allows noncompetes! (Only California, Oklahoma, and North Dakota don’t.), available at https://faircompetitionlaw.com/2021/01/30/montana-allows-noncompetes-only-california-oklahoma-and-north-dakota-dont/.
democracy, trying many different types of changes and avoiding the potentially “serious consequences to the nation” of taking a national approach, before knowing the economic and other risks of such approaches.207

To the extent that the Commission intends to step in, we recommend proceeding with caution and testing out a rule with the most impact and least risk: That is the adoption of the FLSA nonexempt standard. We know only that, as Professor Starr explained, “roughly 18 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 15 percent.”208 But, because low-skill workers represent a high percentage of the workforce, that 15 percent translates, as noted by the Commission, to 53 percent of all workers bound by noncompetes.209

While the Commission indicated an openness to alternatives, including the use of the FLSA as a standard for which employees may be subject to noncompetes, the Commission understandably expressed concerns about non-bright-line standards. In particular, the Commission worries that if “the Rule were to define workers as ‘employees’ according to, for example, the FLSA definition, employers may misclassify employees as independent contractors to evade the Rule’s requirements.”210 Intentionally (and even unintentionally) misclassifying workers is unlawful and carries with it potentially significant adverse financial consequences, steep penalties, and even criminal responsibility.211 Despite the existence of some bad actors, if

207 As Justice Brandeis long ago said relating to federal regulation of state rules, “Denial of the right to experiment may be fraught with serious consequences to the nation. 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.” New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, dissent). Many states are engaging in precisely those types of experiments now, from banning noncompetes for workers at different compensation thresholds or based on other criteria to requiring various types of notice be provided to workers. Interfering with that process and imposing a one-size-fits-all approach, creates the very type of risk that Justice Brandeis warned about.


companies make a misclassification mistake, in the experience of the signatories, it is usually through ignorance, not malice, and there is no reason to assume otherwise.\textsuperscript{212}

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 1:1 alignment, workers who are nonexempt 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. This standard was adopted first in Massachusetts,\textsuperscript{213} and has been followed by Rhode Island\textsuperscript{214}; Nevada adopted a similar-in-concept ban based on whether the employee is paid hourly.\textsuperscript{215}

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 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 Commission observes, for the number to have the same impact each year, it would need to be adjusted annually, thereby creating more uncertainty.\textsuperscript{216} Alternatively, setting the threshold as a multiple of the federal

\textsuperscript{212} Absent evidence of widespread intentional misconduct, it is typically best to follow Hanlon’s razor and not attribute to malice that which can be adequately explained by ignorance. See https://en.wikipedia.org/wiki/Hanlon%27s_razor. Moreover, generally speaking, contractors must be free from an employer’s control and be able to utilize their skills generally for other companies. Accordingly, it can be more difficult to enforce a noncompete in a contractor relationship. The incentives therefore would likely lead employers to retain workers as employees, rather than as contractors to be able to better enforce a noncompete.

\textsuperscript{213} M.G.L. c. 149, § 24L(c). Massachusetts added additional restrictions based on age, status as a student, and whether the employee’s employment had been terminated without cause. \textit{Id}.


\textsuperscript{215} Nev. Rev. Stat. § 613.195(3).

\textsuperscript{216} 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, whereas in Oregon, it must be met at the time of enforcement, and in
minimum wage provides clarity, but, like wage thresholds, does not allow for variations in cost of living. Similarly, the threshold as a multiple of the federal poverty level also provides clarity, but fluctuates annually and also does not allow for variations in cost of living.

The Commission is also considering basing an exemption on job functions or occupations. Some states have taken this approach for specific jobs functions and occupations. In contrast, Colorado recently abandoned a more nebulous categorical approach (focused primarily on whether the worker was “executive or management employees and professional staff” or had access to trade secrets) in favor of a wage threshold. This abandoned-approach suffered from the very problems that the Commission identified with respect to how to define a “senior executive,” i.e., there will inevitably be an inherent lack of clarity. Moreover, some industries have a greater need for protection of intellectual property than others, leading to significant disparities across industries in the percentages of employees and at what levels of compensation are required to sign them. Such categorizations, including trying to define “other highly paid or highly skilled workers who are not senior executives,” suffer from the same difficulties and ambiguities.

Whatever the approach, these are policy decisions that would be made in the absence of evidence needed to distinguish among the categories. Instructively, both President Obama with the assistance of then-Vice President Biden (after lengthy research, analysis, and discussion), as

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217 New Hampshire is experimenting with this approach, having adopted a threshold of two times the federal minimum hourly wage. See RSA 275:70-a-I(b).

218 Maine and Rhode Island are experimenting with this approach, having adopted a threshold of four times and 2.5 times the poverty level for individuals, respectively. See Me. Rev. Stat. Ti. 26, c. 7, § 599-A(3) (Maine); R.I. Gen. Laws §§ 28-59-2 (Rhode Island).


220 50 State Noncompete Survey. Such an approach is fraught with risks of over-inclusiveness and under-inclusiveness unless every potential job function and occupation were reviewed for whether and what extent it posed a risk to an employer’s legitimate business interests if not subject to a noncompete.


222 Non-Compete Clause Rule, 88 Fed. Reg. at 3520 (NPRM at p. 151) (“This term may be challenging to define, given the variety of organizational structures used by employers.”).

well as Washington, D.C. and eleven states so far, have (after years of experience and deliberations) taken an approach of retaining noncompetes, but limiting their use for certain workers, categorized in different ways, primarily based on bright-line wage thresholds, the FLSA, or something similar (e.g., hourly workers). Accordingly, we note only that an approach that provides clarity (even if somewhat imperfect, like the FLSA) while enabling companies to protect their state-recognized legitimate business interests without the variations in cost of living or annually-changing and potentially uncertain increases tends to be the most practical, workable, and nonarbitrary.

To the extent that the Commission is concerned that anything other than a uniform ban might result in some workers being unaware of their rights, the concern is somewhat misplaced. As the Commission also notes, in California, where noncompetes have been banned since 1872, workers still have noncompetes at the same rate as other states, suggesting that the existence of even a blanket rule is not what is needed. Washington, D.C. is experimenting with requiring a notice about the law to be provided to employees anytime a noncompete will be required, whereas Virginia is experimenting with requiring the posting of a notice where other workplace notices are required.


For a current summary of the standards, see Russell Beck, New Noncompete Wage Thresholds for 2023, available at [https://faircompetitionlaw.com/2023/02/06/new-noncompete-wage-thresholds-for-2023/]. Instructively, while the impact of raising the wage threshold in Hawaii and Oregon have been studied, the others have not. Making changes without fully understanding the impact of each of those changes, as well as the impact of the changes in notice requirements, may result in unnecessary further regulation with significant adverse unintended consequences.

While the FLSA is not a perfect bright-line, there is ample caselaw to guide employers, and, as noted above, ample incentives for employers to comply with the law.


D.C. Code § 32-581.03a.

Virginia code § 40.1-28.7:8.
To the extent that the Commission is concerned that anything other than a wholesale, across-the-board ban would not fully address its objectives concerning the economic impact of noncompetes on the labor market, we address those issues elsewhere in connection with the research supporting that conclusion.\footnote{We note in this regard, that the signatories who represent employers typically and routinely advise their clients that one size does not fit all, and that such an approach is likely to miss key aspects of what needs to be protected, while creating unwanted consequences and unenforceable agreements. Accordingly, if the Commission were to take a “one size fits all” approach, it would certainly create unanticipated and unwanted results, without fully addressing the problems that the proposed rule is designed to address.}

**COST ESTIMATES**

**Request:** The Commission seeks comment on its estimates of the costs for companies to comply with the order and update their agreements, and its belief that litigation costs would decrease.\footnote{Non-Compete Clause Rule, 88 Fed. Reg. at 3528 (NPRM at p. 183).}

**Comment:** We believe the Commission’s estimates are significantly understated.

The Commission has estimated that it would take an average of 20 minutes to send out the required notice, at an average cost of $9.98 (estimating the rate at $29.95 per hour) per firm.\footnote{Non-Compete Clause Rule, 88 Fed. Reg. at 3528 (NPRM at p. 184).} In the experience of the undersigned, sending out a notice like that anticipated by the proposed rule is precisely the type of requirement about which companies will seek advice of outside counsel to ensure they understand and comply with their obligations. This problem would only be magnified in circumstances where employers would need to consider how to handle and possibly rescind promises of future compensation that were provided in consideration of employees executing noncompetes. Litigation in that circumstance is inevitable. Therefore this process will almost certainly take a significant amount of time for all but the smallest companies (who likely will still seek legal advice).\footnote{We have not polled clients for how long they believe it would take them to determine who to send these notices to, and therefore offer no opinion as to that portion of the process.} Accordingly, outside counsel will need to explain the issues to human resources, in-house counsel, and potentially others at the business as well. But disregarding the actual time it is likely to take and instead using the Commission’s estimates of time and number of companies with noncompetes, this process (undertaken with involvement of outside counsel) will likely cost (at a bare minimum) many multiples of the Commission’s estimate.
Specifically, the commission estimates the hourly rate of an in-house lawyer at $61.54/hour. But outside counsel will be involved. Not a single lawyer signing onto this letter (i.e., the types of lawyers who handle these matters) bills at an hourly rate of less than five times that amount. Accordingly, we’ve used a conservative estimate of $307.70 per hour ($61.54) as the hourly rate. Performing the same math as the Commission, we get $307.70/3, or $102.56 per firm, as opposed to $9.98 per firm. To calculate the total cost, we perform the same calculation as the Commission: $102.56*7.96 million*0.494 = $403.29 billion.

The Commission has estimated that “ensuring contracts for incoming workers do not have non-compete clauses would take the equivalent of one hour of a lawyer’s time (valued at $61.54), resulting in a total cost of $61.54*7.96 million*0.494=$241.96 million.” Again, we believe that the Commission has significantly underestimated the time this would take. However, using the Commission’s estimates and adjusting for a conservative outside counsel’s rate ($307.70 per hour), the total cost (excluding in-house costs) would be $307.70*7.96 million*0.494 = $1.2 billion (not $241.95 million).

Finally, the Commission has estimated that, on average, it would take between four and eight hours to redo a company’s existing restrictive covenant agreements. Based on that, the Commission calculates the “total expenditure on updating contractual practices to range from $61.54*4*49.4%*6,102,412=$742.07 million to $61.54*8*49.4%*6,102,412=$1.48 billion.” In the experience of the undersigned, who are involved in the drafting and revising of these NDAs and restrictive covenant agreements around the country, the Commission’s estimates of both the time and hourly rate are dramatically understated, particularly if the proposed functional test

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235 Of course, this ignores both that the in-house costs the Commission identified (and probably more) will still be needed and that most lawyers around the country will bill at a significantly higher rate than that used. At the higher end, that rate can easily be 15-20 times (or more) than the rate used by the Commission. At that lower end of the higher rate (15 times), the rate would be $923.10/hour and the cost would be $307.70 per firm.


237 Calculated at a higher rate ($923.10/hour), the actual cost would be $1.2 billion. The Commission estimated $39.25 million. See Non-Compete Clause Rule, 88 Fed. Reg. at 3528 (NPRM at p. 184). If the time estimate is understated at all, this number only increases.


239 Calculated at a higher rate ($923.10/hour), the actual cost would be $3.6 billion. The Commission estimated $241.95 million. See Non-Compete Clause Rule, 88 Fed. Reg. at 3528 (NPRM at p. 180). If the time estimate is understated at all, this number only increases.

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were to take effect and thereby require reexamination of every clause that might potentially be considered a noncompete. However, adjusting for just the hourly rate, these calculations (excluding in-house costs) change to the following: $307.70\times 4\times 49.4\times 6,102,412 = $3.7\ billion$ to $307.70\times 8\times 49.4\times 6,102,412 = $7.4\ billion.$

As for litigation costs, the Commission states that “[t]he proposed rule would likely reduce litigation costs associated with non-compete clauses, since there would be little to no uncertainty that the vast majority of those clauses are prohibited.” We would agree, if such litigation were limited to only alleged violations of a noncompete clause, which rarely is the case. As the Commission notes, “it is also possible that costs associated with trade secret claims or other post-employment restrictions, such as non-disclosure agreements or non-solicitation agreements, would increase.”

However, while the Commission “is not aware of any evidence indicating the magnitude of the change in litigation costs associated with any of these claims,” the undersigned can unequivocally report that the costs of trade secret litigation are significantly greater than the cost of noncompete litigation. Consistent with our experience, estimates of attorneys’ fees for trade secret litigation range in the millions of dollars. Noncompete litigation is a fraction of that amount. Moreover, the Commission’s analysis does not appear to take into account the likely flood of litigation that would ensue to clarify the legal effect of cancelling 30 million contracts overnight. And none of these cost analyses take into account the potential damage to businesses caused by the disclosure of their most critical information if noncompetes were to become unlawful.

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SCOPES OF THE PROPOSED RULE

The proposed rule states that it “shall supersede any State statute, regulation, order, or interpretation to the extent that such statute, regulation, order, or interpretation is inconsistent

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$^241$ Calculated at a higher rate ($923.10/\text{hour}$), the actual cost would be $11.13\ billion$ to $22.2\ billion$. If the time estimate is understated at all, this number only increases.


$^244$ Non-Compete Clause Rule, 88 Fed. Reg. at 3530 (NPRM at 190).

Putting aside the anticipated legal challenges to such an approach, the scope of this section of the proposed rule is unclear. For example, it is unclear if it would preclude courts from using springing/time out noncompetes or from relying on the trade secret law inevitable disclosure doctrine. If the Commission is intending to take away those remedies, it should be clear.

It is also unclear how the proposed rule would apply to transactions between businesses, including franchisor-franchisee transactions, that require the contracting parties to restrict their respective employees from using the other party’s trade secrets to compete, and may rely on the other party having noncompete agreements in place with its employees before it would share its trade secrets.

IV. **RECOMMENDATIONS FOR A FAIR APPROACH**

As before, assuming the Commission were to adopt a rule (which we do not believe is justified by the available research), we have included recommendations for incremental changes that we believe would accomplish most of the Commission’s objectives, while avoiding many of the likely severe unintended adverse consequences of a wholesale ban.  

**Unintended Consequences**

Before considering the possible areas for regulation, it is important to understand the other, less-obvious, potential unintended consequences of barring the use of noncompetes.

The Commission has identified many of them; some it has acknowledged, some are unquantified and unquantifiable, and some it has dismissed. But there are more. And worse, there could be many unintended consequences that are simply unknown at this point. The following are the some of the more significant unintended consequences of which we are aware:

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246 Non-Compete Clause Rule, 88 Fed. Reg. at 3536 (NPRM at 217), proposed “§910.4 Relation to State laws.”

247 Again, the signatories to this submission take no position in these comments about whether the Commission has the authority to promulgate any rule whatsoever, regardless of its scope.

248 Of course, given the activity at the state level, we question the wisdom of rushing to impose a federal overlay before the state experiments have a chance to run their course (putting aside the significant legal challenges that the Commission would face if it were to proceed).

249 The fact that we do not know is a significant problem in and of itself, and due in large part to a lack of research. Accordingly, we urge the Commission to consider sponsoring or waiting for that research. As noted above (pp. 55-57), there have been “policy shocks” in multiple states. The impacts of those
• A significant increase in the likelihood that trade secrets will be unlawfully taken to a competitor.

• The substitution of noncompete litigation in favor of more-costly, less-predictable, longer-lived trade secret litigation.

• Less firm-sponsored training, with a concomitant reduction in employee development and opportunities. Research suggests training is more common in states with stronger noncompete enforcement.250

• It will cost companies billions of dollars to comply.251

• It will cost companies hundreds of billions in wages too.252 And some employees might lose future benefits once their existing agreements are abrogated.

• Small businesses and their employees will be disproportionately adversely impacted in multiple ways. Small businesses are frequently formed with the personal life savings of the owner. Many of these small companies (as well as many thinly-capitalized companies and start-ups) will be unable to survive the loss of the comparatively-inexpensive protections provided by noncompetes.253


251 Based on the Commission’s cost estimates at Non-Compete Clause Rule, 88 Fed. Reg. at 3522 (NPRM at p. 159); see supra at pp. 58-60 (addressing the cost estimates).

252 Based on the Commission’s cost estimates at Non-Compete Clause Rule, 88 Fed. Reg. at 3522 (NPRM at p. 160).

253 During the Massachusetts noncompete/trade secret law legislative process, many small companies emphasized this and similar concerns. In particular, some small business owners explained passionately that they had invested their entire life savings in the company, and if they cannot prevent a former employee from working (for a limited period) in a competitive role, it would threaten the existence of the company, their savings, their livelihood, and the remaining employees’ jobs will all be lost.
• Similarly, many of these small businesses and thinly-capitalized companies will be unlikely to provide new opportunities and detailed training if their business will be at risk. That could curtail investment and expansion of what has been the dominant engine of U.S. job growth over the last decade, or it could constrain recruitment and retention efforts to family members or others within the social network connections of such employees.

• Small businesses and start-ups will also be the most adversely impacted insofar as they often have few or only one trade secret that forms the basis of their value, but cannot afford costly litigation when their trusted employees leave for competitors or are lured away by larger companies that can easily misuse the trade secret(s) in ways that may not be detectable.

• Businesses of all sizes, including small and family owned businesses, will lose substantial value in a sale of business or merger context because of the loss of protection to the buyers that would otherwise be provided by noncompetition agreements; the proposed “25% owner rule” is insufficiently protective in an environment where owners of other percentages and key employees are critical contributors to the businesses being sold, and without noncompetition agreements, buyers will not buy, and are likely to instead simply hire away key personnel.

• Customers are likely to suffer, as companies will likely pass the increased costs to consumers.

• Increased costs for companies may also impact consumers in the form of other inflationary consequences, including increased housing costs and rising cost-of-living. If Silicon Valley is any indication, this is a significant concern.


255 This not only limits employee opportunities generally, but could in fact have a greater deleterious effect on minority applicants unable to provide contractual assurances to new employers with whom they have no previous connections.
• Although the Commission believes that a ban might help competition in product and service markets, which may lead to lower prices for consumers, the sizes of these effects are not quantifiable based on the estimates in the economic literature, and worse, some studies suggest the opposite.

• Although the Commission identifies that there would be an increase in new firm formation (an impact that is not certain, given conflicting research), it is unclear what the benefit would be, if the increase were simply to result in startups that are more likely to fail.

• Although the Commission identifies increased innovation, the studies reflect inconsistent predictions.²⁵⁶

Given these many partially-researched or unresearched potential consequences, a ban should await additional studies to ensure the potential consequences are fully identified and understood.

Possible Balanced Guidance or Regulations

To the extent that the Commission has authority to promulgate a rule²⁵⁷ and chooses to exercise such authority, we urge the Commission to instead provide guidance on how the Commission views noncompetes under Section 5 of the Federal Trade Commission Act. But whether issued as guidance or a rule, we urge the Commission to be judicious, to tailor any regulation to the specific abuses, and to recognize that reliance on early-stage empirical research, conflicting evidence, and faulty assumptions²⁵⁸ to change noncompete laws is, in the end, not

²⁵⁶ Indeed, the quality of the innovation may vary as well. At least one study finds that where noncompetes are enforced more strictly, firms are more likely to develop extremely valuable technological breakthroughs. See Innovation Study (n.28 supra).

²⁵⁷ As noted above, the signatories to this submission are aware that a significant legal issue has been raised concerning whether the Commission has such power; we express no opinion on that issue in this submission.

²⁵⁸ In particular, the assumption that the rise of Silicon Valley and the (somewhat exaggerated) decline of Massachusetts’ Route 128 is a reflection of the different noncompete enforcement regimes has taken on an almost mythical quality that is not supported by the record. It is not what AnnaLee Saxenian (who first compared the two regions) said, nor is it what Ronald Gilson (who built on that work and specifically looked at the different treatment in noncompetes) said either. What they discussed was much more nuanced. In any event, Professor Gilson added an important caveat: “I think caution is in order in assessing the policy implications of Silicon Valley’s history. . . . [E]ach state’s particular industrial population may dictate a different balance.” Ronald J. Gilson, The Legal Infrastructure of
only unnecessary, but potentially counterproductive and contrary to the U.S. government’s policy of protecting trade secrets, as expressed through the Defend Trade Secrets Act. We recognize that a ban may be seen as popular to the uninformed and therefore politically expedient, but this is a complicated issue, and complicated issues call for carefully considered, balanced solutions.259

Given all of the above, if the Commission were to determine that noncompete contracts are an appropriate subject of federal guidance or regulation, we identify the following two broad categories:

A. Fairness and Transparency

There are several steps that 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.

259 The Commission posited the possibility of a requirement that every company in the country that uses noncompetes report to the Commission. Non-Compete Clause Rule, 88 Fed. Reg. at 3521 (NPRM at pp. 155-56). Such a requirement would likely be unduly administratively burdensome on the Commission. It would also be unnecessary; if the steps contemplated in this section were required, most of the Commission’s concerns could be addressed, and the impacts on workers, companies, and the economy can be assessed in due course.
• **Guidance** or a **requirement** that employers provide **advance notice**
  that a noncompete will be required.\(^\text{260}\)

• **Guidance** or a **requirement** that employers provide the employee
  with a short “clear and conspicuous” summary of the restrictive
  covenants it is asking the employee to agree to.\(^\text{261}\)

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\(^{260}\) The Commission 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 Clause Rule, 88 Fed. Reg. at 3482 (NPRM at pp. 154-
55). 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 that study, more than half (52 percent) of people presented with a
noncompete chose to “forgo[] the opportunity to negotiate [because] the terms were reasonable,”
while 41 percent assumed they were not negotiable, *id.* at p. 9, the latter of which could be addressed
with advance notice. Indeed, 55 percent of people presented with a noncompete before they accepted
the offer thought it was reasonable and 48 percent thought they could negotiate it. *See Noncompete
Agreements in the U.S. Labor Force* (n.27 supra).

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 Commission 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, 88
Fed. Reg. at 3503 (NPRM at p. 84). The Commission 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
Commission 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.

The other concerns raised by the Commission are addressed elsewhere in this submission.

\(^{261}\) This is similar to an approach implemented in Colorado last year. *See Colo. Rev. Stat. § 8-2-
113(4)(b).*
• 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. 262

• Penalties for companies that willfully violate the law. 263

B. Limitations on Use to Only What Is Necessary

Recognizing that noncompetes are an important tool in the protection of 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

262 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.

263 One of the concerns raised by the Commission is that some companies may use noncompetes knowing that they are unenforceable, or worse, that violate the law. Non-Compete Clause Rule, 88 Fed. Reg. at 3511 (NPRM at p. 115). While, somewhat ironically, this seems to be an issue in California – a state that does largely what the Commission 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) (Colorado); 820 I.L.C.S. § 90/30(d) (Illinois); Me. Rev. Stat. Ti. 26, c. 7, § 599-A(6) (Maine); RCW § 49.62.80 (Washington); D.C. Code § 32-581.04 (Washington, D.C.). To avoid adversely impacting small, less-sophisticated 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.
to as the “all or nothing” approach, which, as its name implies, requires a court to void any restriction that is overly broad, leaving nothing to enforce. Although in its new law, Massachusetts retained the reformation approach (which it and the majority of states have historically used), an equitable, middle-ground approach (which one Massachusetts state senator dubbed the “purple pencil” approach) 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.

- 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 a 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 certain 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. We colloquially refer to these as “springing noncompetes” (or sometimes “time out” noncompetes) because they are not required of the employee in the first instance, but are only activated if the employee engages in certain unlawful behavior.

The signatories below wish to again express their great appreciation for the Commission’s consideration of this submission and for taking on such an important and fraught issue. We again offer any other assistance that the Commission may find helpful, including providing additional real-world experience or assisting in the drafting of language for guidance or a revised rule.

Respectfully submitted,

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The views and opinions expressed in this letter are those of the signatories in their individual capacity and do not necessarily reflect the views or opinions of their firms.
Appendix A
INDIVIDUAL BIOGRAPHIES

Russell Beck
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Russell Beck is a business, trade secrets, and employee mobility litigator, nationally recognized for his trade secrets and noncompete experience. He is the immediate past President of the Boston Bar Foundation and, for over ten years, has also taught the course, Trade Secrets and Restrictive Covenants, at Boston University School of Law (a course he developed for the school). He was the lead advisor and drafter of the Massachusetts noncompete statute, and revised the Massachusetts Uniform Trade Secrets Act. In 2016, he was invited to the White House to participate in the working group discussions that led to the development by the White House of a Call to Action on noncompetes. He authored the books, Trade Secrets Law for the Massachusetts Practitioner (1st ed. MCLE, Inc. 2019) (covering trade secrets nationally, with a focus on Massachusetts law) and Negotiating, Drafting, and Enforcing Noncompetition Agreements and Related Restrictive Covenants (6th ed., MCLE, Inc. 2021) (covering Massachusetts noncompete law, with national information included). Russell is a frequent speaker, panelist, and author, and created the widely used and cited (and first of its kind) 50 state noncompete law survey chart (Employee Noncompetes, A State-By-State Survey) and 50 state trade secret law comparison chart (Trade Secrets Acts Compared to the UTSA). Russell is a member of the Steering Committee for the Sedona Conference’s Working Group 12 (Trade Secrets), assisted the Uniform Law Commission’s Covenants Not to Compete Drafting Committee, and has served as chair of the American Intellectual Property Law Association’s Trade Secrets Committee. He also monitors changes to noncompete and trade secrets laws around the country, as detailed on the blog, FairCompetitionLaw.com. Russell has appeared on National Public Radio, PBS, the BBC World News Service, and been relied on as an expert on trade secrets and noncompetes by The New York Times, The Wall Street Journal, the White House, the Treasury Department, Le Monde, and many others, including in many studies and scholarly publications.

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Erika Hahn is a paralegal at Beck Reed Riden LLP. She provides extensive support on trade secret and noncompete matters nationally, and has been a substantial contributor and editor on multiple books and articles on noncompete law and trade secret law, as well as many other publications. Erika also tracks state and federal legislative noncompete and trade secret law developments around the country.
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Henson Adams is focused on counseling and defending clients in labor and employment and business matters. Henson takes a results-driven approach. Although he foremost believes in helping clients reduce risk of conflict, Henson is ready to fight for clients when a dispute does arise. He has represented clients in employment, environmental, and commercial litigation in both state and federal court.

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Janice Sued Agresti represents employers in high-stakes matters and high-profile employment litigation, including trade secrets and employee mobility litigation; discrimination litigation; whistleblower litigation, and retaliation litigation. Janice is also a trusted advisor to her clients and counsels on drafting, enforcing, and interpreting restrictive covenants, including non-competes. She also counsels on employment issues that impact businesses, including mergers and acquisitions, reductions in force, handbooks, performance management, contracts, and compliance with federal and locals laws.

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Clifford Atlas is a principal in the New York City, New York, office of Jackson Lewis P.C. He is the co-leader of the Restrictive Covenants, Trade Secrets and Unfair Competition practice group. Cliff works extensively with clients in developing and drafting employment contracts and restrictive covenant agreements, and developing programs to best protect clients’ confidential information and business relationships. He has significant experience in prosecuting as well as defending actions involving breach of noncompetition and nonsolicitation agreements, employee raiding, misappropriation of confidential information, tortious interference with contract, unfair competition, and related business claims. Cliff also has assisted clients with restrictive covenant issues arising from corporate transactions. Additionally, Cliff handles all types of employment discrimination, harassment, wrongful discharge, and related employment claims. He has tried cases in state and federal courts, and before administrative agencies. Cliff has argued numerous appeals to the United States Court of Appeals for the Second Circuit, and the New York State Supreme Court, Appellate Division.
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Raymond P. Ausrotas is a Founding Partner of Arrowood LLP in Boston, Massachusetts. Ray is a graduate of Brown University and the George Washington University Law School. His practice is primarily focused on commercial litigation and business disputes, including in the areas of misappropriation of confidential information & trade secrets, and breach of fiduciary duty involving corporate officers and directors. Ray has twice been trial counsel on “Top Ten” verdicts awarded for the year in Massachusetts, including as first-chair on a favorable $16 Million verdict in 2019, which was the only business dispute among the Top 10 that year. He is the lead author of both Massachusetts Civil Trial Practice and Massachusetts Civil Pretrial Practice, which are published and regularly updated by LexisNexis. He has presented on statewide CLE panels, and written several articles on discovery and other topics (including noncompete law). Since 2014, Ray has been recognized annually as a “Top 100” SuperLawyer for both New England and Massachusetts in the area of Business Litigation; since 2016 he has been recognized nationally by Best Lawyers in the categories of Commercial Litigation and Litigation / Regulatory Enforcement (and “Lawyer of the Year” for Boston in the latter category in 2021). In 2015, he was inducted as a Fellow of the Litigation Counsel of America, a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Ray has also earned an AV®Preeminent™ Peer Review Rating from Martindale-Hubbell® in the categories of Litigation and Business Law.”

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Eric s Co-Chair of Benesch’s Labor & Employment Practice Group and Co-General Counsel of the Firm, maintains a national labor and employment practice which includes representing employers in all areas of employment and labor relations, as well as related employment litigation, before federal and state administrative agencies and in trial and appellate courts across the country.

Eric advises clients regularly concerning protecting trades secrets and confidential information as well as preventing unfair competition from former employees. Eric has significant first chair experience in protecting employers from unfair competition, litigating the enforceability of restrictive covenants and confidentiality agreements as well as misappropriation of trade secrets, including obtaining and opposing TROs, preliminary injunctions and damages awards.
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Jennifer S. Baldocchi is Co-Vice Chair of the Paul Hastings Employment Department and the Chair of the International Employee Mobility and Trade Secrets practice. Her practice focuses on employee mobility and intellectual property, including trade secrets, covenants not to compete, unfair competition, and fiduciary duties. She is ranked by Chambers USA, recognized by The Legal 500 US for trade secrets litigation and non-contentious matters, and recognized as both a Top Labor and Employment Lawyer and a Top Trade Secrets Lawyer by the Daily Journal. Ms. Baldocchi has significant trial experience. She litigates trade secret misappropriation claims, as well as disputes over restrictive covenants in employment-related agreements. She provides advice on best practices to protect and enforce intellectual property rights and restrictive covenants.

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Katheryn Bradley is a shareholder who co-chairs Lane Powell PC’s Labor, Employment & Benefits Team. She is a management-side employment lawyer who has devoted her career to finding practical solutions for resolving workplace disputes. Katheryn is experienced in preparing and litigating executive employment agreements, covenants not to compete, and trade secrets and intellectual property agreements across multiple jurisdictions in the Pacific Northwest.

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Brandon Bundren is a trial lawyer who represents both plaintiffs and defendants in state and federal courts. Brandon’s clients range from small businesses to numerous publicly traded companies.

While Brandon handles a variety of complex commercial cases, his practice is focused primarily on intellectual property and competitive practices litigation, including non-compete, trade secrets, patent, trademark, copyright, and similar unfair competition matters. Brandon is a published author on the subject of non-competition agreements and is a frequent speaker on unfair competition matters both to in-house counsel and to various associations, including the Tennessee Intellectual Property Association and the Nashville Bar Association.
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Mark Burak is a founding shareholder of Ogletree’s Boston office and was the Boston office Managing Shareholder from 2014 until 2022. Mark has specialized in the representation of employers in labor and employment matters for over 30 years. Mark’s practice focuses on defending employers in state and federal courts and before administrative agencies. Mark has successfully handled cases involving virtually the entire spectrum of employment related laws, with a particular emphasis on discrimination laws, pay equity and wage/hour matters. He has tried several cases successfully to conclusion and obtained dismissals or summary judgments on scores of claims. Chambers USA 2022 review notes that “Mark is very knowledgeable and a good speaker” and “he is a subject matter expert and offers great client service.”

Mark has represented many of his clients for over a decade, and several for over 20 years. His clients span a number of industries, including high technology, healthcare, hospitality, manufacturing, financial services, and non-profit organizations, with a particular focus on employers in the life sciences space (Mark is the co-chair of Ogletree’s Life Sciences Industry Group).

Mark earned his Bachelors of Business Administration from the University of Massachusetts in 1987 and his JD, magna cum laude, from Boston University School of Law in 1991.

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Leigh Ann Buziak is Partner at Blank Rome LLP and her practice is focused on a national basis in all aspects of disputes regarding trade secrets, confidential information, and the agreements designed to protect them. She currently Co-Leads the firm’s Trade Secrets & Competitive Hiring Practice. Leigh Ann is recognized by Chambers USA as leading Labor & Employment lawyer. Leigh Ann focuses her practice on litigating and preventing litigation over trade secrets and regularly handles these types of cases in the federal, state, and appellate courts, as well as through private mediation and arbitration. In addition to trade secret litigation work, Leigh Ann provides strategic advice and counsel in employment matters, helping clients assess and manage litigation risks and successfully navigate investigations. As a result, Leigh Ann has experience developing digital evidence, including forensic investigations.
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Jerry Cohen’s law practice, teaching, writing/speaking and legislative testimony in several areas of intellectual property (IP) have a common theme of balancing interests based on transparency and truth. The balancing can occur as to scope and perfection of IP rights within just limits, enforcement with proportionality based on hard facts and permissible exploitation consistent
with public interest. As applied to noncompetition covenants it is necessary to overcome ambiguity in defining valid employer and employee interests to be protected including proper definitions of fair and unfair competition and material injury to employers and employees tailored to circumstances of the parties. These have been and continue as the subjects of worthwhile professional and political engagement.

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Jonathan Cooper is the founding member of the New York firm of the Law Offices of Jonathan M. Cooper. For years, Jonathan has worked extensively with clients in developing and drafting employment contracts and restrictive covenant agreements, and has tried numerous cases before New York’s State and Federal courts pertaining to misappropriation of confidential information, tortious interference with contract, unfair competition, and the breach of noncompetition and nonsolicitation agreements. He has been recognized as a returning SuperLawyer and AV-Preeminent lawyer in the area of Business Litigation. Jonathan is the published author of six books, including “To Compete or Not to Compete: The Definitive Insider’s Guide to Non-Compete Agreements Under New York Law,” has published in the New York Law Journal on this topic, and has delivered several CLE lectures regarding noncompetition and nonsolicitation agreements.

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Jonathan Crook is the Founder of Blue Pencil Box, a knowledge management platform focused on restrictive covenants between employers and employees. Blue Pencil Box offers automated practice tools, including a custom enforceability checklist creator and a comprehensive 25-issue legal database, as well as daily insights on new cases, bills, and regulatory activities around the country.
Before founding Blue Pencil Box, Jonathan was a Knowledge Management Attorney for one of the largest employment law firms in the country, focusing on the law of non-competes and restrictive covenants. Jonathan practiced for several years as a litigator and counselor. He was responsible for prosecuting and defending against unfair competition claims in court and drafting national restrictive covenant agreements for clients across a broad range of industries and sizes.

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Mr. Curran is a shareholder in the Boston office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., where he practices labor and employment law. He routinely represents and counsels employers on issues relating to restrictive covenants, including noncompetition agreements. Mr. Curran has also served as a lecturer at Boston University Law School, and as a law clerk to the Honorable Peter J. Messitte in the U.S. District Court for the District of Maryland.

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Jay M. Dade is Of Counsel in the Overland Park, KS and Kansas City, MO offices of Jackson Lewis. Jay has practiced management-side labor and employment relations law since 1993, representing clients from Southwest Missouri, Northwest Arkansas, Central Missouri, metro Kansas City and around the nation. He works with manufacturing, financial services, trucking and logistics, distribution center, retail, healthcare clients, among others.

Jay counsels and represents clients regarding personnel matters (including policies development, administration and training), restrictive covenant matters (including implementation and enforcement), labor relations matters, discrimination claims and litigation, federal and state wage-hour matters, FMLA matters and unemployment compensation proceedings.

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Daniel J. Doron is a Principal in the New York City office of Jackson Lewis P.C. Daniel has devoted his career to the practice of labor and employment law. As a substantial component of Daniel’s practice, he advises buyers and sellers on the labor and employment aspects of M&A transactions. He has advised clients in hundreds of transactions. Prior to joining Jackson Lewis, Daniel was the Partner-in-Charge of the Transactional Employment and Executive Contracts practice at an Am Law 25 firm. Daniel is a graduate of the University of Michigan Law School (J.D. 2002) and Cornell University (B.S. Industrial and Labor Relations 1999).

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Denise Drake serves as the Department Chair of Polsinelli’s national Labor and Employment Department. She also holds numerous leadership positions outside the law firm, including being a member of the Leadership Council for the Labor & Employment Section of the American Bar Association. Denise is known for her creative and practical approach to employment law issues, as well as her sincere interest in helping employers improve their workplaces, proactively avoid litigation, and strategically defend lawsuits. Denise consistently strives to help employers and executives “do the right thing” for employers and employees, and their communities.

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Michael Elkon is a partner with Fisher Phillips. Michael practices in Atlanta and advised the Georgia Legislature on the bill that ultimately became Georgia’s new Restrictive Covenant Act in 2010-11. Michael advises clients on restrictive covenant, trade secret, fiduciary duty, and
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Jim Flynn is the Managing Director of Epstein Becker Green, and a lawyer with over 30 years’ experience in noncompetition and trade secret matters during which he has represented various stakeholders, from departing employees to new employers to former employers. As an invited attorney advisor, he worked closely with the New Jersey Law Revision Commission before the state’s 2012 adoption of its version of the Uniform Trade Secrets Act, and was co-lead counsel on the appeal and later successful trial in New Jersey’s leading physician restrictive covenant case (Community Hospital v. More, 183 N.J. 36 (2005)). His practice regularly includes high-stakes trade secret and data theft cases, and other matters involving employee mobility and the migration of confidential and proprietary information. He is long-time co-author of the Thomson Reuters Practical Law summary of Noncompete Laws: New Jersey, and has spoken and written on such topics many other times over the course of his career, and continues to do so (including at the upcoming (in September) Practicing Law Institute’s Noncompetes 2021, where he will speak on Managing a Key Employee Departure to Avoid the Loss of Trade Secrets, Customers, and Colleagues).

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Richard B. Friedman is the managing attorney of New York-based Richard Friedman PLLC, a seven lawyer firm which specializes in the following kinds of matters: counseling, drafting, and negotiating on behalf of executives and professionals in connection with separation, employment, and other executive compensation agreements; “switching side” a/k/a “lift out” employment litigation matters involving, among other things, non-compete, trade secret, and fiduciary duty issues where the firm represents one or more employees generally referred by the clients’ new employer’s law firm; commercial litigation cases, particularly in the New York County Commercial Division where he serves as one of fifteen or so judicially appointed trial lawyers on the Advisory Committee along with the eight judges of that court; negotiating and, where necessary, litigating business divorces among shareholders of closely held corporations, members of limited liability companies, and partners; internal investigations referred to the firm by a corporation’s law firm so that it can reduce the likelihood of a motion to disqualify that firm as litigation counsel and improve its prospects of defeating any such motion; and FINRA arbitrations involving restricted stock units and other compensation-related issues on behalf of senior finance personnel against their former employers.
Mr. Friedman has been a legal commentator on CNN, FOX News, Fox Business, HLN, and several other major networks on employment-related issues. Mr. Friedman holds a B.A., magna cum laude (with distinction in all subjects), from Cornell University and a J.D. from the University of Chicago Law School. Mr. Friedman is the founding co-chair of the In-house/Outside Counsel Litigation Group of the NYC Bar Association (the “Association”). He is a former member of the Board of Directors of the New York County Lawyers Association (“NYCLA”), a member of the Executive Committee of the Commercial & Federal Litigation Section of the New York State Bar Association (“NYSBA”), and a former NYCLA delegate to the NYSBA House of Delegates.

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Mr. Fuhs has been selected as a Business Litigation, Trade Secret and Franchise Top Lawyer by DBusiness Magazine (2014-2022) and a Michigan Super Lawyer (an award recognizing no more than 2.5% of lawyers in Michigan) (2013-2022). He was also named to Crain's Detroit Business' 2012 Class of “40 under 40,” which honors “the best and brightest in Southeast Michigan who have made their marks in business before age 40,” as well as Oakland County’s Elite 40 Under 40 Class of 2013, which includes young thought leaders and trailblazers who live or work in Oakland County and are under the age of 40.

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Nicole Gage is a Partner at Beck Reed Riden LLP with over 20 years of litigation and counseling experience in all aspects of intellectual property law and in relation to numerous industries. With an in-depth knowledge of IP law and its application, Nicole frequently teaches and advises companies and individuals on how to protect and enforce their respective intellectual property rights.
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Jim Gale is Co-Chair of Cozen O’Connor’s IP Litigation department. He has been practicing Intellectual Property law and litigation for over 38 years, both as an outside lawyer in national and international law firms, and as General Counsel for an international medical device company. Jim was the inaugural chair of Florida’s IP Board Certification Program. He has handled well over 400 injunctions in state and federal courts in over 35 different states in Trade Secret, Restrictive Covenant and employee “raiding” cases. In addition to multimillion dollar jury verdicts, and defense verdicts in “bet the company” litigation, Jim obtained a $2,300,000,000.00 judgment against a Chinese company that misappropriated his client’s trade secret technology.

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Nicole D. Galli is the founder and Managing Member of ND Galli Law LLC, an intellectual property (“IP”) and litigation boutique law firm located in Philadelphia, PA, New York, NY and Louisville, KY. Nicole’s practice focuses on commercial and IP litigation, IP counseling and trade secret protection. She has represented numerous companies and individuals in intellectual property and business disputes for thirty (30) years, with a heavy emphasis in patent infringement, trade secrets misappropriation and restrictive covenant litigation, and other technical litigation in a variety of industries and scientific disciplines. Nicole also devotes considerable time to several national initiatives to enhance effective trade secrets management and protections. She served as a Vice Chair of IP Protection in the Supply Chain Committee for the LES Standards Setting Project that developed an ANSI “best practices” standard for managing IP (especially trade secrets) in a supply chain (issued as a formal standard in the Fall of 2022). Nicole also serves on the Sedona Conference Working Group on Trade Secrets (WG12) Steering Committee, where she co-chaired the team that developed a Commentary on the Governance and Management of Trade Secrets (published in the Spring of 2022), and currently co-chairs the team developing model jury instructions under the Defend Trade Secrets Act.

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Lee Gesmer is a founding partner of Gesmer Updegrove LLP. He has 40 years of experience in business and intellectual property litigation, which includes advising companies and employees on noncompete agreements and litigating and arbitrating noncompete disputes. He has presented educational programs on noncompete law before the Massachusetts and Boston Bar
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For more than 35 years, Scott F. Gibson has helped businesses protect themselves from unfair competition and disloyal employees. He does so through a unique position in the law, a position based on a blend of skills derived from his courtroom experience and from a deep understanding of the legal theories implicated by unfair competition. As a result, his clients are able to more effectively protect their intangible business interests.

Scott has an uncanny ability to quickly spot the most important issues in a case, which enables him to focus on ways to resolve rather than expand litigation. He is an effective advocate and a creative negotiator for his clients. His ability to spot critical issues has helped many clients bring cases to an early conclusion through negotiation or motion practice. When a case cannot be settled through legal motions or favorable negotiations, Scott is a well-prepared and effective trial attorney.

Scott also is the only lawyer you will ever meet with two advanced legal degrees in cutting-edge areas of the law: Biotechnology and Genomics (LLM from the Sandra Day O’Connor College of Law at Arizona State University in 2007) and Litigation Management (LLM from Baylor Law in 2021). As part of his studies in Litigation Management, Scott performed specialized research into changing the way lawyers think about legal dilemmas to help clients avoid those problems before they arise.

In addition to being a student of the law, Scott is a skilled teacher. Since 2008, he has taught a course in Trade Secrets and Restrictive Covenants at the Sandra Day O’Connor College of Law at Arizona State University. He regularly writes, speaks, and teaches on trial skills, intellectual property, and employment law issues, particularly regarding trade secrets and restrictive covenants.

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Maxwell Goss is a litigation and trial lawyer handling trade secret, IP, and business cases in Michigan and around the country. Max regularly counsels businesses and professionals on non-compete matters. He is a frequent writer and speaker on trade secret and non-compete topics, and he is the host of the podcast The Litigation War Room. Max has been recognized by Best Lawyers in America and DBusiness Magazine in the area of intellectual property litigation.
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Dustin F. Hecker is a partner of a large, national firm. For the bulk of his 40 year career he was a partner of a midsize, Boston-based business law firm. He is primarily a commercial litigator with extensive experience litigating noncompete, non-solicit, and trade secret cases in Massachusetts and elsewhere including California. He has represented both ex-employers, new employers, and ex-employees in these cases.

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Seth Hudson is a partner with Maynard Nexsen in Charlotte, NC. He is an intellectual property attorney with extensive experience in all areas of intellectual property law, including the procurement, enforcement, and maintenance of patent, trademark, and copyright portfolios. He regularly counsels clients and litigates disputes regarding restrictive covenants, trade secrets, false advertising, and noncompetition issues. He conducts trade secret audits and advises clients on which strategies to employ to protect their trade secrets and drafts appropriate nondisclosure and nonuse agreements.

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Rob Isackson is a partner at Leason Ellis and an accomplished, front-line IP litigator and counselor. For the last twenty some years his day job has been litigating patents, trade secrets and non-disclosure agreements in diverse technologies, such as computer hardware and software, genetically modified corn and cotton, smart phones, hangers, luggage and fuzzy slippers, on both
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Adam Israel is a partner in Balch & Bingham’s Birmingham office and member of the firm’s Litigation Practice. He focuses on complex business litigation, primarily in the areas of business torts and unfair competition and banking and financial services. A substantial portion of Adam’s practice is devoted to representing businesses and individuals in non-compete, non-solicitation, and theft of trade secrets cases in trial and appellate courts.

Adam is also regularly involved in complex litigation on behalf of highly-regulated businesses. For example, he has represented financial institutions in individual and class actions regarding, among other things, debit card processing and overdraft practices. Adam also regularly represents nuclear utilities in ongoing litigation against the federal government arising from the Department of Energy’s delay in disposing of the nation’s commercial spent nuclear fuel.

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Jackie is a subject matter expert in the area of unfair competition and restrictive covenant agreements. She co-chaired Littler Mendelson’s Unfair Competition and Trade Secrets practice group for almost a decade before leaving the firm in 2020 to start her own firm focusing on this subject area. Jackie is a frequent author and speaker on restrictive covenants and is the co-author of the treatises Unfair Competition and Intellectual Property Protection in Employment Law (Bloomberg BNA 2014) and Drafting and Enforcing Covenants Not to Compete (BNA 2009).
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Steve is a Member of the New York office of Rottenberg Lipman Rich, P.C. After graduating from the University of Virginia Law School, Steve spent the bulk of his career at Proskauer Rose LLP, including more than 30 years as a Partner. He has experience litigating disputes and advising clients in a diverse array of areas, including securities, bankruptcies and workouts, real estate, employment, contracts and business break-ups, and in a variety of industries, including financial services, consulting and entertainment.

Steve’s particular area of expertise is intellectual property litigation, with a focus on disputes involving non-competes, trade secrets and the movement of employees from one company to a competitor. Steve founded Proskauer’s Non-Compete & Trade Secrets Group and headed it for many years. He has written extensively about trade secrets and non-competes and has participated in and moderated many programs on those subjects. He has also served for eight years as an Adjunct Professor at Brooklyn Law School, teaching a class on trade secrets.

From the start of his career, Steve has been active in bar association affairs, including three years serving as Chair of the NYC Bar Association’s Council on Judicial Administration. He is currently chairing the NYC Bar’s Efficiency Working Group, which is dedicated to improving the efficiency of New York’s and America’s judicial systems.

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Paul Kennedy is a senior member and former co-chair of Littler Mendelson’s Unfair Competition and Trade Secret practice group. A practicing trial lawyer for nearly four decades, Kennedy’s focus is litigating non-compete and trade secret cases. He regularly speaks before trade associations and professional groups on these topics, and also has testified on multiple occasions about legislation concerning non-compete restrictions.

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David N. Kleinmann is a partner at Tarter Krinsky & Drogin LLP and co-chair of the firm’s Restrictive Covenant practice. The practice provides strategic counseling, and representation in disputes concerning restrictive covenants, confidential information, trade secrets and related business torts and is both agnostic as to industry and party, representing companies and professionals across a wide range of industries.
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Phillip C. Korovesis is a Shareholder practicing in Butzel's Detroit office. He is a graduate of Wayne State University (B.S., with distinction, 1984; J.D., *cum laude*, 1987). He is also a graduate of Leadership Oakland, Class XVIII, and has been recognized by *Michigan Super Lawyers* (Business Litigation) and the *Best Lawyers in America* (Commercial Litigation).

Mr. Korovesis' practice is focused on commercial disputes, with trial, litigation and consultation expertise in non-compete/trade secret disputes, product liability defense, life insurance claims and business and financial services industry disputes. Mr. Korovesis has successfully tried cases in state and federal courts in various parts of the country and has successfully represented clients in state and federal appellate courts. He has successfully arbitrated cases before the American Arbitration Association and The Financial Industry Regulatory Authority.

Mr. Korovesis is the former Litigation Practice Group Leader and currently serves as the Chair of the Firm's Trade Secret and Non-Compete Specialty Team which focuses on trade secret, non-compete and business tort litigation. Mr. Korovesis is a regular presenter on trade secret and non-compete issues to lawyers and other professionals. He is an active member of the Defense Research Institute in the commercial litigation, product liability and life insurance areas. He is a former President of the Michigan Defense Trial Counsel. He is a member of the State Bar of Michigan, the Federal Bar Association and the American Bar Association.

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As chair of Nutter’s Labor, Employment and Benefits practice, Chris Lindstrom advises clients on all aspects of non-competition agreements, from crafting nationwide restrictive covenant programs for employers to litigating non-compete agreements on behalf of both employees and employers. He has handled cases involving non-compete agreements in federal and state courts in almost half the states across the country. Lindstrom works with companies of all sizes, from several in the Fortune 100 to emerging businesses, with a particular focus on life sciences and financial services.

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Isaac Linnartz is a partner with Smith Anderson in Raleigh, North Carolina and serves a co-leader of its Non-Compete and Trade Secrets practice group. In that capacity, he has experience drafting, assessing, and litigating non-compete, non-solicit, and confidentiality provisions, including litigating requests for emergency injunctive relief. He also represents companies in high stakes litigation involving complex contracts, trade secret and confidentiality disputes, and various business torts. In addition, he routinely represents employers defending against claims of discrimination, retaliation, harassment, wrongful termination, and wage and hour violations.

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Aaron D. Lovaas is a partner in Las Vegas office of Newmeyer & Dillion. As a transactional business law attorney and business litigator for nearly 30 years, Aaron helps his clients understand their options in tackling both business opportunities and challenges. Unique to
Aaron’s experience is his deep blend of transactional and litigation skills, enabling him to spot the legal issues from the perspectives of both a transactional attorney and litigator. Aaron also brings to the table his perspective as a business owner, having owned and managed his own boutique law firm for twelve (12) years. Aaron has substantial experience representing both transactional and litigation clients across the business spectrum in industries as diverse as real estate development, construction, manufacturing, telecommunications, financial services, nightclub management, and petroleum franchising, utilizing his additional perspective as an MBA to provide his clients with comprehensive advice. Aaron’s practice frequently involves non-compete and trade secret issues.

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Allan N. MacLean is the owner and founder of MacLean Employment Law, P.C. based in Cambridge, Massachusetts. Mr. MacLean has practiced employment law for approximately 17 years. A substantial portion of Mr. MacLean’s practice focuses on counseling clients (individuals and companies) in connection with the preparation and enforcement of restrictive covenant agreements, including provisions concerning non-competition, non-solicitation, non-disclosure, and trade secret protection.

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Caren Marlowe is a shareholder in the Tampa office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. She serves on the steering committee of Ogletree’s international Unfair Competition and Trade Secrets practice group. Caren represents corporations and management in labor and employment matters, including unfair competition claims, discrimination, retaliation, whistleblowing and FMLA. She has extensive experience and a proven track record of litigating restrictive covenant (non-compete, non-solicitation and confidentiality agreements) and discrimination matters in state and federal court. Caren regularly provides advice and assistance to employers related to restrictive covenant agreements, executive agreements, employee policies and other personnel matters. Caren frequently presents seminars and training on these matters.

Caren was named a Florida Rising Star in 2010, 2011, 2012, 2013, 2014, 2015 and 2019. She also received awards as 2018 and 2021 Florida Legal Elite and was selected as one of the Best Lawyers in America every year since 2019.
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John advises and represents a wide range of clients in many industries, from Fortune 500 companies to individuals, in trade secret and restrictive disputes throughout the United States. As Chair of the American Intellectual Property Law Association’s Trade Secret Law Committee, John was actively involved in providing comments and supporting the enactment of the Defend Trade Secrets Act, the federal statute that *The Wall Street Journal* called the “most significant expansion” of federal IP law in 70 years. John has written and presented on trade secret and restrictive covenant issues and he has been quoted on those issues by *The Wall Street Journal, Wired, Inside Counsel, Law360, The National Law Journal, Managing IP* and *Wired*; and his blog, “The Trade Secret Litigator” ([www.tradesecretlitigator.com](http://www.tradesecretlitigator.com)), has been cited by publications including *The Wall Street Journal*. John is listed in the 2016-2020 editions of *The Best Lawyers of America* for Litigation – Intellectual Property and in the 2009-2020 editions of *Ohio Super Lawyers*. John graduated in 1986 from John Carroll University and is a 1989 graduate of Vanderbilt Law School.

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Jeff Mayes is a shareholder in the Houston office of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. and a member of the firm’s Unfair Competition and Trade Secret practice group. Throughout his 26 years of labor and employment law practice, Jeff has regularly and successfully litigated cases in state and federal court involving unfair competition, restrictive covenants, trade secrets, and tortious interference. Jeff regularly counsels clients on the applicability, construction and enforcement of their employment policies and agreements, including those protecting confidential information, customer relationships and talent investments. Jeff has been Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization since 2002.

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Melissa McDonagh is a shareholder with Littler Mendelson, P.C., and the Co-Chair of Littler’s Unfair Competition and Trade Secrets Practice Group. She has extensive experience representing employers, on both the prosecution and defense side, in actions involving unfair business competition around the country. To protect valuable company assets, Melissa works with employers to draft multi-state compliant restrictive covenant agreements to fit a company’s unique needs. Her experience includes working with companies of all sizes in a variety of
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Mr. McDonald is a Shareholder in Littler Mendelson PC. He graduated from the University of Texas School of Law in 1987 and has spent the vast majority of the past 30 years of his legal career focused on labor and employment law issues with a concentration in unfair competition and trade secret disputes. He is the author and editor of numerous books and scores of articles related to the subject, including *Unfair Competition and Intellectual Property Protection in Employment Law*, Bloomberg BNA, McDonald & Johnson (2014), and *Drafting and Enforcing Covenants Not to Compete*, Bloomberg BNA, McDonald & Lichty (2009). He is a Co-Founder of Littler’s Unfair Competition and Trade Secret Practice Group, a group that was recognized in Lex Machina’s July 18, 2018, Trade Secret Litigation Report as having handled more trade secret cases (for plaintiffs and defendants) between 2009 and 2018 than any other firm in the nation. Mr. McDonald has served on committees authoring revisions to the Texas noncompete statute, and served as an Advisor in the drafting of *Restatement of the Law – Employment Law* (ALI 2014). He has also participated in many precedent setting cases such as *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 648 (Tex. 2006) (as amicus curia for the Texas Assoc. of Businesses, helping correct a 10+ year misinterpretation of the Texas noncompete statute), *In Re Hewlett Packard*, 212 S.W.3d 356 (Tex. App. 2006) (establishing a new defense to pre-suit depositions in trade secret cases), and *Quantlab Technologies Ltd. v. Godlevsky*, 317 F.Supp.3d 943 (S.D. TX 2018) (establishing the standard for a large award of attorneys’ fees in a trade secret case, and ultimately securing in excess of $40 million in total judgments for Quantlab after jury trial and appeal). Mr. McDonald has been consistently recognized by clients, press and his piers for exceptional service to the law and his clients. His recognition includes: BTI’s Client Service All-Star Team; Best Lawyers in America (2006 - 2020) (Lawyer of the Year - Employment Law DFW (2013), Lawyer of the Year - Labor Law DFW (2015, 2017)); Law.com and Texas Lawyer (“Dallas Lawyer Preserves $12.2M Trade Secrets Verdict at the 5th Circuit,” June 28, 2017); and Chamber’s USA’s America’s Leading Lawyers for Business (2012 – 2019) which describes him as having “made a name for himself in the noncompete arena”). Mr. McDonald has a national practice that involves handling cases all across the nation and regularly advising clients on national unfair competition prevention and trade secret programs related to every state in the United States. He is past Chair of the Dallas Bar Association’s Labor & Employment Law Section, and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.
Paul M. Mersino is a Shareholder in the Detroit office of Butzel. He is the President and CEO of Butzel (effective March 2023) and serves on the firm's Board of Directors. Prior to joining the firm's Board, he served as the Chair of the Litigation Practice Department. Mr. Mersino represents public and private companies, both as plaintiff's attorney and defendant's attorney, in a number of areas including complex commercial litigation, contract disputes, non-competition and trade secret disputes, automotive supplier disputes, construction litigation, and First Amendment litigation. Mr. Mersino also represents and advises a number of Startup companies, assisting them with their legal needs and matching them with potential venture capital funding. Mr. Mersino also handles appeals in the Michigan Court of Appeals, the Michigan Supreme Court, and in federal courts across the country. He has been recognized as a *Michigan Super Lawyer*, as a Top Lawyer by *dBusiness Magazine*, as one of Oakland County’s Elite 40 under 40, as one of *dBusiness’s* “30 in their 30s,” and as an “Up and Coming Lawyer” by *Michigan Lawyers Weekly.*

Mr. Mersino is admitted to the State of Michigan, the United States District Court for the Eastern District of Michigan, the United States District Court for the Western District of Michigan, the 6th Circuit Court of Appeals, the 8th Circuit Court of Appeals, the Supreme Court of the United States, and has been admitted on a temporary basis in several state and federal courts across the United States.

Dawn Mertineit is a litigation partner in Seyfarth’s Trade Secrets, Computer Fraud and Non-Competes practice group. For more than a decade, Dawn has represented corporations and their directors and officers in a number of industries in complex commercial litigation, with special emphasis on noncompete and trade secrets litigation. She understands that many clients rely on noncompete and nonsolicitation agreements to protect their most valuable assets, while others face hurdles in recruiting and onboarding new employees bound by such restrictive covenants. Dawn brings her experience and knowledge of state and federal laws to help her clients navigate these issues, from drafting agreements and executing rollout and enforcement strategies, to analyzing competitor agreements and proposing recruitment and onboarding plans, and prosecuting or defending against claims related to breach of restrictive covenants or misappropriation of trade secrets. Dawn represents clients in trade secret and noncompete matters in a number of jurisdictions. This cross-state knowledge is particularly critical, as states continue to pass new legislation relevant to restrictive covenants and trade secrets. As the co-editor of and a frequent contributor to Seyfarth's award-winning Trading Secrets blog, Dawn remains current with new laws and key developments in this space, and provides clients with crucial updates about the laws that affect their businesses. In light of her thought leadership,
Dawn has been quoted in a number of legal and industry publications, including Bloomberg Law, The American Lawyer, Law360, Massachusetts Lawyers Weekly, and SC Magazine.

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Timothy P. Monsma is a partner in the Grand Rapids office of Varnum, LLP, a Michigan-based firm with eight offices throughout Michigan and Florida. Mr. Monsma’s practice focuses on commercial litigation, with a particular emphasis on trade secret disputes, unfair competition, and litigation involving restrictive covenants. He has represented clients on all sides of these disputes in hundreds of cases throughout Michigan and across the country, securing numerous multi-million dollar recoveries. He has consistently been recognized by Michigan Super Lawyers and was named a Top Lawyer by Grand Rapids Magazine in both the commercial litigation and trade secret litigation categories. Mr. Monsma regularly publishes and presents to business groups on matters relating to data privacy, trade secrets, and enforcement of restrictive covenants.

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Laura O’Donnell is a Partner at Haynes and Boone, LLP where she co-chairs the firm's Litigation Practice Group. Laura is board certified in labor and employment law by the Texas Board of Legal Specialization. Laura regularly handles trade secret, noncompete and other
restrictive covenant litigation, and Laura also drafts executive and other agreements that include restrictive covenants, in both the employment and sale-of-business contexts. Laura’s many professional accolades include recognition in Chambers USA, Chambers and Partners, for labor and employment in Texas since 2017, as well as previous recognition by Chambers USA as an “Up and Coming Leading Business Lawyer.” Laura was named “Lawyer of the Year” in 2016, 2018 and 2023 for labor and employment litigation in San Antonio, Texas and Best Lawyers, Woodward/White, Inc., has recognized Laura since 2011. Laura has also been selected for inclusion in the Lawdragon 500 Leading U.S. Corporate Employment Lawyers listing, Lawdragon Inc. since 2021 and has been recognized by Texas Super Lawyers, Thomson Reuters, since 2010, and as a Texas Super Lawyer Rising Star, from 2004-2010. Laura is listed as an AV Preeminent Lawyer by Martindale Hubbell Law Directory and received the San Antonio Business Journal, American City Business Journals, “40 Under 40 Rising Stars” award in 2006.

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William O’Toole founded O’Toole Law Group in 2009 after serving as counsel to healthcare technology leader Medical Information Technology, Inc. for nearly 20 years and is widely considered among the most experienced attorneys in this field, having represented or negotiated with roughly 25% of US hospitals, 40% of Canadian hospitals, and hundreds of software technology vendors both domestic and international. His extensive experience with healthcare organizations, vendors, and associated legislation has provided keen insight and guidance in the furtherance of innovation in health technology through carefully crafted complex software licenses, referral agreements, reseller collaborations, development agreements, government projects, mergers and acquisitions, as well as domestic and international distribution agreements for both emerging and established software companies. O’Toole proudly serves as mentor and judge to incubator organizations such as MassChallenge, on corporate advisory boards, and as outside general counsel to outstanding health technology companies. He graduated from Noble
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Eric Packel chairs his Firm’s trade secret and restrictive covenants practice group. During the course of his career, Eric has tried jury trials to verdict in five states, as well has argued and handled numerous bench trials and injunction hearings on both the enforcement and defense side. Eric has been recognized by Best Lawyers in America and Benchmark Litigation in the area of Employment Law. Eric’s trial practice has focused primarily on the enforcement and defense of restrictive covenants and trade secrets for more than a decade.

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Recognized by the Boston Business Journal as a “40 Under 40” honoree in 2020, a “Top Lawyer Under 40” by the Hispanic National Bar Association in 2019, and a Super Lawyers Rising Star in Massachusetts every year since 2013, Christopher M. Pardo represents a broad range of corporate clients nationwide in complex employment litigation and high-stakes commercial lawsuits. A member of the bar in Massachusetts, Florida, New York, Connecticut, Ohio and Maine, Chris represents businesses and their executives across a broad spectrum of industries, providing timely and thoughtful preventative advice to his clients, with a particular focus in the areas of trade secret litigation and restrictive covenant agreements. Additionally, Chris oversees and manages labor and employment diligence in M&A matters, and regularly advises clients with respect to strategic business planning and handling multifaceted employment situations. Chris is the Co-Chair of the Hispanic National Bar Association’s Labor and Employment Committee, a member of the Boston Bar Association’s Labor and Employment Steering Committee, and the Co-Chair of the Minority Lawyers Subcommittee at Hunton Andrews Kurth.
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Matthew H. Parker is a partner at Whelan Corrente & Flanders LLP in Providence, Rhode Island (a boutique law firm representing some of the largest unionized and non-unionized employers in the State of Rhode Island), the current Chair of the Rhode Island Bar Association’s Labor Law & Employment Committee (although he only signs this letter in his individual capacity), and an experienced drafter and litigator of non-compete, non-solicitation, and non-disclosure agreements. He has successfully represented both employers and employees in non-compete disputes in numerous state and federal courts (at the injunction stage and trial), he frequently counsels clients on the enforceability of restrictive covenants, and he helps clients to navigate non-compete issues when doing business in multiple jurisdictions on a near daily basis.

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Kevin Passerini is Partner at Blank Rome LLP and his employment practice includes a nationwide concentration on preventing and litigating disputes between competitors or with employees involving trade secrets, restrictive covenants, allegations of corporate raiding, breaches of fiduciary duty, and unfair competition, as well as mitigating risks with lateral recruiting in those contexts. Kevin’s practice also includes counseling clients on protecting trade secrets and other valuable information through drafting and implementing confidentiality and restrictive covenant agreements with employees and contractors, including in equity and incentive plans, and Kevin is regularly brought in as a specialist for M&A and other corporate or financing deals where restrictive covenants and provisions protecting trade secrets arise.

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Dean has been practicing intellectual property law for more than 25 years and focuses on leveraging patents and trade secrets. Dean’s litigation, trial and appellate experience includes experience in federal and state courts and at the International Trade Commission. Dean represented Amsted Industries, the prevailing trade secret owner, in TianRui v. ITC, 661 F.3d 1322 (Fed. Cir. 2011). Dean is a member of the Illinois bar, a registered U.S. patent attorney, a member of the Trial Bar for the Northern District of Illinois and actively involved with the American Intellectual Property Law Association (Trade Secret Law Committee) and Sedona Conference (Working Group 12 on Trade Secrets; Steering Committee Member, 2021-2023).
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Paul Peralta is a member at Moore & Van Allen, PLLC who focuses on employment litigation. For more than 30 years, Mr. Peralta has litigated a wide array of employment matters in federal and state courts throughout the country. His practice has included both enforcement of and defense actions against restrictive covenant agreements and related trade secret and unfair competition claims. In addition, based on his bi-lingual background, he has represented clients in extensive matters in Latin America. For more than 20 years he has served as an adjunct faculty member teaching courses on unfair competition and trade secrets at the University of Notre Dame Law School. He has been named in Best Lawyers in America and Super Lawyers for the past ten years.

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Kate Perrelli is the co-chair of Seyfarth Shaw LLP’s national Trade Secrets, Computer Fraud & Noncompetes group and she is the Chair of the ABA Committee on Trade Secrets and Interference with Contracts. Kate is also the immediate past national chair of Seyfarth’s Litigation department. Clients turn to Kate when they are most concerned about losing their confidential proprietary information and trade secrets or when other companies have hit them with a shot across the bow alleging violations of common and statutory laws for hiring a new employee or group of employees. Kate is a nationally recognized authority in trade secret and unfair competition law, and companies rely on her experience to counsel them in protecting their business assets both before and after a dispute arises. In addition to representing her clients across the country on such matters in federal and state courts, arbitrations and mediations, she is also frequently retained to conduct complex investigations concerning executives, internal workplace misconduct and other internal complaints. Her services also include preparation of individual and multistate employer noncompete, nonsolicit, nondisclosure and other restrictive covenant agreements; advice regarding onboarding of employees or groups of employees from a competitor, or departing employees joining a competitor; and preparation and implementation of trade secret protection programs, including trade secret audits.

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Sally Piefer is a partner in the employment law section of Lindner & Marsack, S.C.. With more than 25 years of experience, Sally represents employers in a variety of employment matters, with special emphasis in employment litigation, employment counseling and compliance issues. Sally's practice involves drafting, providing advice and litigating non-compete/non-solicitation
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Jim Pooley focuses on trade secret law and management, as an advocate, advisor, testifying expert and neutral. He is an author or co-author of several major IP works, including his treatise *Trade Secrets* (Law Journal Press) and the *Patent Case Management Judicial Guide* (Federal Judicial Center). His most recent business book is *Secrets: Managing Information Assets in the Age of Cyberespionage* (Verus Press 2015). The Senate Judiciary Committee relied on Jim for expert testimony and advice regarding the 2016 Defend Trade Secrets Act. From 2009 to 2014 Jim served as Deputy Director General of WIPO in Geneva, where he managed the international patent system. He is a past President of AIPLA and Chairman of the National Inventors Hall of Fame. He is Chair Emeritus of the Sedona Conference Working Group 12 on Trade Secrets. In 2016 Jim was inducted into the IP Hall of Fame for his contributions to IP law and practice.

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Lauri Rasnick is a partner with Epstein Becker Green and has been practicing law for twenty five years. Lauri focuses her practice on representing employers with respect to a broad range of issues. Among other things, Lauri advises companies on drafting non-competition, non-solicitation and confidentiality agreements and assists employers in hiring employees who are subject to restrictive covenants. She also regularly litigates and arbitrates employment cases including non-compete and trade secret matters in state and federal courts and arbitral forums. Lauri frequently speaks and write on trade secrets and restrictive covenants.
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Stephen Riden is a founding partner of Beck Reed Riden LLP in Boston. His practice is in commercial litigation, and he represents corporate and individual clients in a wide array of commercial disputes across the country. His primary focus is litigating trade secrets and employee restrictive covenants matters.

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Lauren C. Schaefer  
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Lauren Schaefer focuses her practice on management side employment counseling and litigation, with a specialty in employee mobility, restrictive covenants, and trade secret matters. Her practice involves helping to identify and protect a company’s valuable trade secrets, and assists in designing, implementing, and maintaining trade secret policies and protections within the construct of the federal Defend Trade Secrets Act, the Uniform Trade Secrets Act, and related state laws. Lauren also represents companies seeking to protect and enforce their trade secret and noncompete rights, as well as defend companies and individuals who are accused of trade secret misuse and misappropriation.

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Tobias Schlueter is the Managing Shareholder of the Chicago office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. He is also the Co-Chairperson of Ogletree’s international Unfair
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Mr. Shapero is an attorney/shareholder in the Seattle office of Ogletree Deakins, where he serves as outside legal counsel to employers of all sizes, both for-profit and not-for-profit, across a wide range of industries, including manufacturing, food-service and hospitality, healthcare, transportation, insurance, financial services, software development and retail. Mr. Shapero is an experienced civil litigator, trial attorney and counselor/advisor in all areas of employment law, and his civil litigation practice includes both single-plaintiff and class-action litigation.

Mr. Shapero has assisted clients in dozens of trade secret, non-competition and non-solicitation advice and litigation matters in Washington State and in various other locations throughout the country. Although Mr. Shapero’s litigation practice is primarily focused on defending employers against workplace discrimination and wrongful termination claims, his work on trade secret matters is evenly divided between plaintiff and defense work. Thus, Mr. Shapero is sometimes seeking to enforce or uphold non-compete, non-solicit, confidentiality or trade-secrets agreements and to hold individuals accountable for violating such agreements or obligations, and at other times is seeking to defend individuals or companies that have been accused of breaching such agreements or otherwise violating their legal obligations.

Mr. Shapero obtained his law degree from the DePaul University College of Law in Chicago, Illinois after first earning his Bachelor of Arts and Master of Business Administration degrees from California State University, Northridge.

Robert Shea
Beck Reed Riden LLP
Boston, Massachusetts
Full bio: https://beckreedriden.com/robert-shea/

Robert Shea is a labor and employment lawyer who has represented businesses and individuals in noncompete matters for over 35 years. For the past 20 years he also has acted as neutral in employment disputes and serves on arbitrator and mediator panels of both the American
Arbitration Association and the International Institute for Conflict Prevention & Resolution. He is a past Chair of the Smaller Business Association of New England. He is a Trustee of the National Small Business Association (NSBA) and also serves on NSBA's Health and Human Resources Policy Group.

**John Siegal**  
*BakerHostetler*  
*New York, New York*  
Full bio: [https://www.bakerlaw.com/JohnSiegal](https://www.bakerlaw.com/JohnSiegal)

John Siegal is a Chambers-ranked business trial lawyer. He is a New York-based partner with BakerHostetler and co-head of the firm’s national Noncompete & Trade Secrets Practice Group. He was the founding chair of the Trade Secrets Committee of the New York City Bar Association, a former member of the Sedona Conference Working Group on Trade Secrets and previously served as a PLI Program Chair on Protecting Corporate IP Assets: Enforcing Restrictive Covenants in the Employment Context. He has litigated noncompete and trade secrets cases in federal or state courts in more than a dozen states, frequently handles noncompete and related arbitrations at FINRA, and recently obtained a $65 million plaintiff’s judgment in a large group raiding jury trial. His writings on trade secrets and noncompete issues have been published in the New York Law Journal, the National Law Journal, as well as in various trade publications and an academic law review.

**Jeffrey S. Siegel**  
*Morgan, Brown & Joy, LLP*  
*Boston, Massachusetts*  
Full bio: [https://www.morganbrown.com/attorney/jeffrey-s-siegel/](https://www.morganbrown.com/attorney/jeffrey-s-siegel/)

Jeffrey S. Siegel is a partner and member of the Management Committee at Morgan, Brown & Joy, LLP. Morgan, Brown & Joy, LLP is the oldest and largest management-side employment law firm in New England. A significant portion of Mr. Siegel’s practice involves drafting restrictive covenants, and litigating restrictive covenant claims and other claims of unfair competition. Mr. Siegel has appeared in federal and state courts, before government agencies including the EEOC, MCAD, Department of Labor, Attorney General's Office, and state anti-discrimination agencies across the country. Mr. Siegel also counsels employers on day-to-day human resources matters, including workplace investigations, employment policies and handbooks, drug testing, commission plans, employment agreements, and employee leave issues. After graduating law school, Mr. Siegel clerked at the Massachusetts Appeals Court. Prior to joining Morgan, Brown & Joy, LLP, Mr. Siegel was an attorney in the labor and employment department at a large Boston firm, and then in-house employment law counsel for a large bank.
Abraham Y. Skoff  
Moses Singer LLP  
New York, New York  
Full bio: https://www.mosessinger.com/abraham-y-skoff

Abraham Y. (Avi) Skoff is a trade secrets, noncompete, unfair competition and complex civil litigation litigator, who has represented parties throughout the country on all sides of these matters, as well as in healthcare related business litigation, product liability/toxic tort and other disputes. Avi is a Partner and Chair of Moses & Singer's Trade Secrets, Noncompete & Unfair Competition Practice, and has been involved in a number of major, newsworthy cases. He served as Assistant U.S. Attorney and Deputy Chief of the Civil Division, U.S. Attorney's Office, Eastern District of New York, and is Co-Chair of the Trade Secrets Committee of the New York City Bar Association. Avi is a member of the Sedona Conference Working Group on Trade Secrets and was a Contributing Editor on the Sedona Conference Commentary on Monetary Remedies in Trade Secret Litigation.

Peter A. Steinmeyer  
Epstein Becker & Green, P.C.  
Chicago, Illinois  
Full bio: https://www.ebglaw.com/peter-pete-a-steinmeyer/

Peter A. Steinmeyer is the Managing Shareholder of Epstein Becker Green’s Chicago office and a co-chair of its Trade Secrets and Employee Mobility subpractice group. He frequently writes and speaks about workforce mobility issues, and he advised the Illinois Chamber of Commerce in its negotiations over the recently passed Illinois noncompete reform bill. Mr. Steinmeyer’s recent publications include: “Illinois Noncompete Reform Balances Employee and Biz Interests” (coauthor), Law360 (June 2021); “Hiring from a Competitor: Practical Tips to Minimize Litigation Risk” (coauthor), Thomson Reuters Practical Law (May 2021); and “Trade Secrets.

Carson H. Sullivan  
Paul Hastings LLP  
Washington, D.C.  
Full bio: https://www.paulhastings.com/professionals/carsonsullivan

Carson Sullivan is a partner in the Employment Law practice of Paul Hastings and is the chair of the Washington, D.C. Employment Law Department. Ms. Sullivan represents employers in all aspects of employment law, with an emphasis on the defense of class and collective action suits and litigation involving trade secrets and restrictive covenants. She is a member of the firm’s Employee Mobility and Trade Secrets practice group as well as the Pay Equity practice group.
Christopher Tackett  
Bailey Cavalieri LLC  
Columbus, OH  
Full bio: http://baileycav.com/people/christopher-tackett/

Chris Tackett is a Member/Partner in the Litigation practice group at the law firm of Bailey Cavalieri in Columbus, Ohio. Chris focuses his practice on commercial litigation matters involving complex contract disputes, trade secrets and other types of intellectual property, including claims of copyright or trademark infringement, and other unfair competition matters, including disputes regarding non-solicitation or non-compete agreements between businesses and high-level employees, as well as business breakups and various types of partnership/shareholder disputes. In the course of his business litigation practice, Chris has represented companies in courts throughout the country, and in state and federal courts all across Ohio, as First-Chair counsel in numerous hearings on preliminary injunctions and other substantive evidentiary hearings, trials, and appellate oral arguments.

Chris is a frequent writer and lecturer on topics relating to business torts and unfair competition, employment litigation, and procedural issues affecting complex litigation, including numerous articles nationally published in periodical journals of the American Bar Association. Additionally, Chris previously served as Editor of the Business Torts & Unfair Competition Quarterly Journal for the ABA's Litigation Section, and now serves as the Vice-Chair in charge of content and programming for the Section of Litigation’s Business Torts and Unfair Competition Committee.

Sarah Tishler  
Beck Reed Riden LLP  
Boston, Massachusetts  
Full bio: https://beckreedriden.com/sarah-tishler/

Sarah Tishler is a senior counsel at Beck Reed Riden LLP, a nationally-recognized boutique litigation firm based in Boston, Massachusetts. Ms. Tishler's practice is concentrated on trade secret and restrictive covenant advising and litigation, employee mobility, and commercial litigation. Ms. Tishler has won successful outcomes for clients on both sides of these disputes in all stages of litigation, including the preliminary injunction stage, jury trials, and mediation. Ms. Tishler has also counseled clients on the identification and protection of trade secrets, and the enforceability of noncompetes and other restrictive covenants.

Peter J. Toren  
Washington, D.C.  
Full bio: https://petertoren.com/about/

Peter J. Toren is a litigator with over 30 years of experience, who has successfully represented clients in a variety of matters in venues all over the United States at trial and appellate levels. He has a strong focus on patent, trademark, copyright, and trade secret cases.
Peter has represented clients in patent litigation involving a variety of technologies including computer software and hardware, light emitting diodes, bio-technology, semiconductor manufacturing and fabrication, optics and medical devices as well as business methods. He has successfully obtained and defended motions for preliminary injunctions and summary judgment motions involving the Patent Act, Copyright Act, Lanham Act, Digital Millennium Copyright Act and Computer Fraud and Abuse Act. In addition to intellectual property litigation. He also has experience in computer law including cybersecurity.

Before moving back to the D.C. area, Peter was a partner in the New York office of Sidley Austin. Before that, he was a federal prosecutor with the Computer Crime and Intellectual Property Section (“CCIPs”) of the Criminal Division of the United States Department of Justice where he worked for over eight years and also served as Acting Deputy Chief.

Christine Bestor Townsend
Ogletree, Deakins, Nash, Smoak and Stewart, P.C.
Milwaukee, Wisconsin
Full bio: https://ogletree.com/people/christine-bestor-townsend/

Christine Bestor Townsend is a shareholder in the Chicago and Milwaukee offices of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. She serves on the steering committee for Ogletree’s international Unfair Competition and Trade Secrets practice group. Ms. Bestor Townsend litigates cases involving unfair competition claims (including restrictive covenants (noncompete, nonsolicit and confidentiality), trade secrets, duties of loyalty, tortious interference, and civil conspiracy). She also partners with clients to craft and tailor their restrictive covenant strategies. Ms. Bestor Townsend was named a Super Lawyers Rising Star from 2014-2020.

Sean Urich
Ogletree, Deakins, Nash, Smoak and Stewart, P.C.
Dallas, Texas
Full bio: https://ogletree.com/people/sean-c-urich/

Sean Urich is a Shareholder in the Dallas office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. He serves on the steering committee of Ogletree’s international Unfair Competition and Trade Secrets practice group. Mr. Urich’s practice is focused on litigating cases involving the enforcement of restrictive covenants, trade secret theft, breach of the duty of loyalty, tortious interference, and various other claims related to unfair competition. He also advises clients daily on the implementation and enforcement of non-competition agreements and strategies for protecting company trade secrets. Mr. Urich was named one of the Best Lawyers in America in 2021, 2022, and 2023 for Litigation – Labor and Employment.
Danielle Vanderzanden  
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.  
Boston, Massachusetts  
Full bio: https://ogletree.com/people/danielle-vanderzanden/

Dani Vanderzanden is an information security and employment lawyer whose trial practice focuses on the myriad of ways, whether entirely innocent or wholly nefarious, that employees compromise the integrity of employer systems, data, and proprietary information. She successfully represents clients on each side of these issues in cases involving restrictive covenants, intellectual property disputes, claims under the Computer Fraud and Abuse Act, the Defend Trade Secrets Act (and its state analogues), and she defends employers in facing claims arising under state and federal anti-discrimination and wage payment laws. She obtained a complete defense verdict following a four-day Zoom trial that took place (virtually) in Bristol Superior Court in October 2020, and she regularly practices in the state and federal courts in Maine, Massachusetts, New Hampshire and Vermont. She is a member of The Sedona Conference Working Group Series, which recently prepared the “Commentary on Protecting Trade Secrets Throughout The Employment Life Cycle.” She regularly speaks on trade secret, cybersecurity, and employee mobility issues before industry groups and legal organizations and at conferences, roundtables, webinars, and seminars.

Jason Weber  
Polsinelli PC  
Dallas, Texas  
Full bio: https://www.polsinelli.com/professionals/jweber

Jason Weber is a Dallas-based shareholder at Polsinelli and a member of the firm’s Restrictive Covenants, Enforcement and Trade Secrets (RCETS) practice. Jason is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization and focuses his practice on business disputes and employment-related consulting and litigation. He has extensive experience enforcing and defending against restrictive covenants, both in Texas and nationally, and is a contributing author in the Texas Litigator’s Guide to Departing Employee Cases (2022).

Erik Weibust  
Epstein Becker & Green PC  
Boston, Massachusetts  
Full bio: https://www.ebglaw.com/people/erik-w-weibust/

Erik Weibust is a Partner in the Boston office of Epstein Becker & Green, P.C., where he is Vice Chair of the firm’s Trade Secret & Employee Mobility practice group. Many of the world’s leading pharmaceutical, biotech, medical device, technology, financial services, staffing, and insurance companies look to Erik for thoughtful and practical advice concerning how best to protect their trade secrets and customer relationships from misappropriation by former employees, ex-business partners, competitors, and hostile actors in the United States and abroad, and to avoid liability when hiring from competitors. When necessary, clients rely on Erik for aggressive representation in litigation, where he has won substantial victories in court and at the negotiating table, including broad-reaching injunctive relief and multimillion-dollar payouts, in
trade secret misappropriation, unfair competition, and breach of restrictive covenant cases. Erik regularly publishes articles and speaks locally and nationally about trade secret and restrictive covenant law, and he has been quoted on these topics in publications such as The Washington Post, Blomberg, Law360, Business Insurance, HR Dive, and Ignites (Financial Times).

Neal Weinrich  
Berman Fink Van Horn P.C.  
Atlanta, Georgia  
Full bio: https://www.bfvlaw.com/attorney/neal-f-weinrich/

Neal F. Weinrich is a shareholder at Berman Fink Van Horn P.C. in Atlanta, Georgia. Neal represents employers and employees, as both plaintiffs and defendants, in disputes involving noncompetes, customer nonsolicits, nonrecruits, and nondisclosure covenants. Neal has litigated restrictive covenant and trade secret disputes involving numerous industries throughout Georgia and in jurisdictions across the country. Recognized by Super Lawyers since 2012 and Best Lawyers since 2021, Neal writes and speaks frequently on issues that arise in competition-related cases and is the co-founder of and a regular contributor to Berman Fink Van Horn’s Noncompete & Trade Secrets blog.

Neal currently serves as Chair of the Labor & Employment Committee of the Atlanta Bar Association and Vice-Chair of the Trade Secret Committee of the State Bar of Georgia’s Intellectual Property Section. Neal previously served as an observer on the Drafting Committee on Covenants Not to Compete for the Uniform Law Commission. Neal graduated from Emory University School of Law in 2006 and received his Bachelor of Arts from Tulane University in 2003.

David B. Wilson  
Hirsch Roberts Weinstein LLP  
Boston, Massachusetts  
Full bio: https://www.hrwlawyers.com/team/david-b-wilson/

David B. Wilson is a founding partner of Hirsch Roberts Weinstein LLP, and has spent over three decades defending employers in employment, wage and hour, non-compete and general commercial disputes in the state and federal courts of Massachusetts and New Hampshire. In 2015 Dave was first recognized by his peers as Lawyer of the Year by Best Lawyers in America for his work in Litigation – Labor and Employment. He was again recognized by his peers as Lawyer of the Year by Best Lawyers in America (2018 Edition and 2020 Edition) for his work in Labor and Employment – Management.

Erik J. Winton  
Jackson Lewis, P.C.  
Boston, Massachusetts  
Full bio: https://www.jacksonlewis.com/people/erik-j-winton

Erik J. Winton is a principal in the Boston, Massachusetts, office of Jackson Lewis P.C. He is the co-leader of the firm’s Restrictive Covenants, Trade Secrets and Unfair Competition practice
group. His practice focuses on restrictive covenant drafting, counseling, litigation avoidance and litigation. He regularly provides valuable counsel to clients in New England and across the country regarding these issues. Erik has extensive experience as a litigator, including successful first chair jury trial experience. He represents employers in federal and state courts and administrative agencies in matters involving discrimination claims based on race, sex, sexual preference, national origin, and disability; retaliation, whistle blowing, wage/hour claims and Department of Labor complaints; allegations of wrongful discharge and breach of contract under the common law; and claims for tortuous injury, such as defamation, infliction of emotional distress and interference with advantageous relations. Erik has prevailed on the vast majority of dispositive motions filed on his clients’ behalf, including several reported cases. Erik’s practice emphasizes advising employers regarding how to comply with the full range of federal and state labor and employment laws. This includes advising clients on issues relating to disability and leave management, reductions in force, wage and hour laws and workplace safety. Erik also drafts and negotiates executive employment and severance agreements on behalf of both employers and executives. Erik speaks frequently regarding employment law issues. He joined the firm in 2000 after five years as a litigator at Fitzhugh & Associates (now Fitzhugh & Mariani, LLP), a litigation boutique with offices in Boston and Hartford, Connecticut. While attending law school, he was on the staff of the Cardozo Arts & Entertainment Law Journal.

James M. Witz
Littler Mendelson PC
Chicago, Illinois
Full bio: https://www.littler.com/people/james-m-witz

James M. Witz is a litigator specializing in noncompetition and trade secret disputes, and cases involving emergency and injunctive relief. He is the co-chair of Littler Mendelson’s national Unfair Competition and Trade Secret Practice Group. Mr. Witz represents both plaintiffs and defendants in restrictive covenant matters, and has obtained multiple seven figure trial verdicts in high-profile trade secret and restrictive covenant cases in courts around the United States and has successfully argued such matters in the higher courts as well. Mr. Witz counsels clients throughout the country regarding employee hiring, termination and related matters, including the drafting and implementation of effective employment agreements, confidentiality policies and restrictive covenants. Mr. Witz is a frequent speaker on restrictive covenant and trade secret matters, and has authored or contributed commentary on such matters for leading legal publications.

Russell M. Yankwitt
Yankwitt LLP
White Plains, New York
Full bio: https://www.yankwitt.com/attorneys/russell-m-yankwitt/

Russell Yankwitt founded Yankwitt LLP in 2009, after honing his litigation skills at the premier New York City law firm of Skadden, Arps, Slate, Meagher and Flom LLP, serving as Assistant United States Attorney in the Southern District of New York, and serving as a federal law clerk to Thomas C. Platt of the United States District Court for the Eastern District of New York. Russell litigates commercial matters of all kinds, including contract and partnership disputes,
employment and shareholder lawsuits, insurance coverage disputes, ADA litigations, and premises liability cases. He is recognized as Westchester’s go-to litigator and trial attorney, having accrued an enviable track record of trial victories over the past two decades. As a result, Russell is regularly retained by Westchester and New York City law firms to collaborate on their high-stakes trials throughout the state of New York.
Appendix B
<table>
<thead>
<tr>
<th>State</th>
<th>If Permitted and Statute</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>Yes. Ala. Code § 8-1-190-197 (§ 8-1-1 repealed effective 1/1/2016)</td>
<td>Trade secrets; confidential information; commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients; customer, patient, vendor, or client goodwill; specialized and unique training involving substantial business expenditure specifically directed to a particular agent, servant, or employee (if identified in writing as consideration for the restriction).</td>
<td>Must be in writing, signed by all parties, and be supported by adequate consideration. Must preserve a protectable interest. Employee-employer relationship must exist at the time the agreement is executed. A two-year restriction is presumptively reasonable. Employee has burden of proving undue hardship, if raised as a defense.</td>
<td>Professionals (includes physicians, physical therapists, veterinarians, public accountants, certified public accountants, and maybe securities brokers, all based on pre-2016 cases)</td>
<td>Yes (pre-amendment)</td>
<td>Reformation</td>
<td>Yes, likely (pre-amendment)</td>
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<tr>
<td>Alaska</td>
<td>Yes</td>
<td>Trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of his or her business practices; methods; profit margins; costs; other confidential information (that is confidential, proprietary, and increases in value from not being known by a competitor); other valuable employer data that the employer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness.</td>
<td>Factors: limitations in time and space; whether employee was sole contact with customer; employee's possession of trade secrets or confidential information; whether restriction eliminates unfair or ordinary competition; whether the covenant stifles employee's inherent skill and experience; proportionality of benefit to employer and detriment to employee; whether employee's sole means of support is barred; whether employee's talent was developed during employment; whether forbidden employment is incidental to the main employment.</td>
<td>-</td>
<td>Undecided</td>
<td>Reformation</td>
<td>Undecided</td>
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</table>

Russell Beck
Beck Reed Riden LLP
155 Federal Street
Boston, MA 02110
rbeck@beckreed.com

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February 11, 2023
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Not Legal Advice
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<td>Arizona</td>
<td>Yes</td>
<td>Trade Secrets; confidential information; customer relationships.</td>
<td>No broader than necessary to protect the employer’s legitimate business interest; not unreasonably restrictive; not contrary to public policy; ancillary to another contract.</td>
<td>Broadcasters; maybe physicians</td>
<td>Yes</td>
<td>Blue Pencil</td>
<td>Undecided</td>
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<td>Arkansas</td>
<td>Yes, AR Code 4-75-101</td>
<td>Trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of business practices; methods; profit margins; costs; other confidential information (that is confidential, proprietary, and increases in value from not being known by a competitor); training and education; other valuable employer data (if provided to employee and an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness).</td>
<td>Limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer. The lack of a geographic limit does not render the agreement unenforceable, provided that the time and scope limits appropriately limit the restriction. Factors to consider include the nature of the employer’s business interest; the geographic scope, including whether a geographic limit is feasible; whether the restriction is limited to specific group of customers or others; and the nature of the employer’s business. A two-year restriction is presumptively reasonable unless clearly demonstrated otherwise.</td>
<td>Various professionals (medical, veterinary, social workers, others)</td>
<td>Yes</td>
<td>Reformation (mandatory)</td>
<td>Undecided, but it can be a factor.</td>
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<td>California</td>
<td>No, except maybe as to trade secrets. Cal. Business &amp; Professions Code §§ 16600-16602.5</td>
<td>Trade secrets.</td>
<td>Uncertain status as to trade secrets. Ban may be waivable through compliance with Cal. Labor Code § 925.</td>
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<td>Colorado</td>
<td>Yes. Colo. Rev. Stat. § 8-2-113</td>
<td>Trade secrets; recovery of training expenses for short-term employees.</td>
<td>Prior to August 10, 2022, must fall within statutory exception (executive or management employees and professional staff or to protect trade secrets or recover cost of training); be reasonable; and be narrowly-tailored. Agreements on or after August 10, 2022: only if no broader than reasonably necessary to protect the employer’s trade secrets. Prospective employees must receive notice of the noncompete and its terms before they accept the offer of employment; existing employees must receive notice of the noncompete and its terms at least fourteen days before the earlier of the effective date of the noncompete or “the effective date of any additional compensation or change in the terms or conditions of employment that provides consideration for the covenant.” Notice must be in a separate document (accompanied by the noncompete) and must “in clear and conspicuous terms” identify the noncompete by name, “[d]irect[] the worker to the specific sections or paragraphs of the agreement that contain the covenant not to compete,” and “state that the agreement contains a covenant not to compete that could restrict the workers’ options for subsequent employment following their separation from the employer.” The notice must also be “in the language in which the worker and employer communicate about the worker’s performance” and be “signed by the worker.” Venue and choice of law are limited. (Note: The new law clarifies the limited application of Colorado’s criminal law.)</td>
<td>Physicians (damages not barred). For agreements entered on or after August 10, 2022, noncompete agreements cannot be used for anyone who is not a “highly compensated employee,” i.e., an employee earning (both at the time of execution and enforcement) at least $112,500 (as of 2023). (This amount will increase).</td>
<td>Yes (pre-amendment; no indication of a change post-amendment)</td>
<td>Reformation</td>
<td>Undecided</td>
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## Employee Noncompetes
### A State-by-State Survey

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<td>Connecticut</td>
<td>Yes</td>
<td>Trade secrets; confidential information; customer relationships</td>
<td>Factors: time; geographic reach; fairness of protection afforded to employer; extent of restraint on employee; extent of interference with public interest.</td>
<td>Broadcasters; security guards; limited as to physicians; individuals providing homemaker, companion, or home health services.</td>
<td>Yes, likely</td>
<td>Blue Pencil</td>
<td>Yes</td>
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<td>Yes</td>
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<td>Delaware</td>
<td>Yes</td>
<td>Trade secrets; confidential information; customer relationships</td>
<td>Reasonable in time and geographic reach; protects legitimate economic interests; survives balance of equities.</td>
<td>Physicians</td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes</td>
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<td>Yes</td>
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<td>D.C.</td>
<td>Yes</td>
<td>Trade secrets; confidential knowledge; fruits of employment.</td>
<td>Follows Restatement (Second) of Contracts, §§ 186-88: Reasonable in time and geographic area; necessary to protect legitimate business interests; promisee's need outweighs promisor's hardship.</td>
<td>Broadcasters; anyone earning less than $150,000 (except for casual babysitters and government workers); physicians earning less than $250,000</td>
<td>Yes (if employment continued for sufficient duration)</td>
<td>Reformation</td>
<td>Undecided</td>
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<td>Florida</td>
<td>Yes. Fl. Stat. Ann. §§ 542.335</td>
<td>Trade secrets; confidential business information; substantial customer relationships and goodwill; extraordinary or specialized training.</td>
<td>Legitimate business interest; reasonably necessary to protect legitimate business interest. [Rebuttal presumptions exist.]</td>
<td>Mediators; physician specialists (where they are exclusive in a county)</td>
<td>Yes</td>
<td>Reformation (mandatory)</td>
<td>Likely</td>
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<td>Georgia</td>
<td>Yes. Ga. Const., Art. III, Sec. VI, Par. V(c), as amended; OCGA §§ 13-8-50-59. [NOTE: Pre-amendment law was more restrictive and applies to pre-amendment agreements]</td>
<td>Trade secrets (per OCGA § 10-1-761); valuable confidential information that does not otherwise qualify as a trade secret; substantial relationships with specific prospective or existing customers, patients, vendors, or clients; customer, patient, or client goodwill associated with: an ongoing business, commercial, or professional practice, a specific geographic location; or a specific marketing or trade area; and extraordinary or specialized training. [Statute anticipates additional legitimate business interests.]</td>
<td>Reasonable in time, space, and scope; justified by a legitimate business interest; applied to employees who regularly solicit customers, engage in sales, perform the duties of a key employee, or have the duty of managing a department and regularly direct the work of employees and have the authority to hire or fire them. [Statute provides presumptions for reasonableness of time and geography.]</td>
<td>-</td>
<td>Yes (Blue Pencil according to the Northern District).</td>
<td>Yes, but it’s a factor to consider.</td>
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<td>Hawai’i</td>
<td>Yes. Haw. Rev. Stat. § 480-4</td>
<td>Trade secrets; confidential information (though somewhat in doubt); special training that provides skills beyond those of a general nature (at least when combined with other factors such as protecting trade secrets, confidential information, or special customer relationships).</td>
<td>Employees in a technology business [effective as of 1/1/2015]</td>
<td>Yes, likely</td>
<td>Reformation</td>
<td>Undecided</td>
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</table>

**NOTE**: Pre-amendment law was more restrictive and applies to pre-amendment agreements. [Statute anticipates additional legitimate business interests.]

 statute anticipates additional legitimate business interests.
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<td>Idaho</td>
<td>Yes. Idaho Code §§ 44-2701-2704</td>
<td>Trade secrets; technologies; intellectual property; business plans; business processes and methods of operation; goodwill; customers; customer lists; customer contacts and referral sources; vendors and vendor contacts; financial and marketing information; potentially others.</td>
<td>Applicable to “key employee”; reasonable as to duration, geographical area, type of employment or line of business, and does not impose a greater restraint than is reasonably necessary to protect the employer’s legitimate business interests; reasonable as to covenantor, covenantee, and public. Rebuttable presumptions of reasonableness: 18 months; geographic area restricted to areas employee provided services or had significant presence or influence; limited to line of business in which employee worked. Presumption that employee is “key employee” if in highest paid 5% employees in company.</td>
<td>Non-“key employees.” (&quot;Key employees” are those who have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer’s legitimate business interests.)</td>
<td>Yes (but if no additional consideration, noncompete is limited to 18 months)</td>
<td>Reformation</td>
<td>Yes</td>
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<td>Illinois</td>
<td>Yes 820 I.L.C.S. §§ 90/1 et seq.</td>
<td>For agreements pre-January 1, 2022: Legitimate business interests are based on the totality of the facts and circumstances of the case. Trade secrets, confidential information, and near permanent business relationships are factors. For agreements entered on or after January 1, 2022: &quot;the employee's exposure to the employer's customer relationships or other employees, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, the time restrictions, the place restrictions, and the scope of the activity restrictions.&quot; The bill is also express that &quot;[n]o factor carries any more weight than any other&quot; and that the &quot;factors are only non-conclusive aids in determining the employer's legitimate business interest, which in turn is but one component in the 3-prong rule of reason, grounded in the totality of the circumstances.&quot;</td>
<td>For agreements pre-January 1, 2022: No greater than required to protect a legitimate business interest; does not impose undue hardship on the employee; not injurious to the public; and reasonable in time, space, and scope. [May require two years of employment before any noncompete can be enforced.] For agreements entered on or after January 1, 2022: Noncompete &quot;is illegal and void unless (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public,&quot; and the employee (a) is advised &quot;in writing to consult with an attorney&quot; and (b) provided with the covenant at least 14 calendar days’ notice (though the notice is waivable): Adequate consideration is defined as: &quot;(1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete . . . or (2) the employer otherwise provided consideration adequate to support an agreement to not compete . . . , which consideration can consist of the period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves.&quot; [Illinois venue and choice of law. Attorney's fees to prevailing employee.]</td>
<td>Broadcasters; government contractors; physicians; low-wage workers; certain nurses and certified nurse aides. For agreements entered on or after January 1, 2022: The &quot;low-wage&quot; exemption changes to a wage threshold (all earnings from the employer) of $75,000 (increasing to $80,000 by 2027, $85,000 by 2032, and $90,000 by 2037); individuals covered by collective bargaining agreements under the Illinois Public Labor Relations Act or the Illinois Educational Labor Relations Act or employed in construction (unless they &quot;primarily perform management, engineering or architectural, design, or sales functions for the employer or . . . are shareholders, partners, or owners in any capacity of the employer&quot;). For agreements entered on or after January 1, 2022: Yes (if employment continued for sufficient duration)</td>
<td>For agreements entered on or after January 1, 2022: Yes</td>
<td>For agreements pre-January 1, 2022: No, if the employer enters a noncompete with an employee who is terminated, furloughed or laid off &quot;as the result of business circumstances or governmental orders related to the COVID-19 pandemic,&quot; unless the employee is paid the equivalent of their base salary (less earnings from new employment).</td>
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<td>Indiana</td>
<td>Yes</td>
<td>Trade secrets; confidential information; goodwill. Reasonably necessary to protect the employer, not unreasonably restrictive of the employee and not against public policy. Clear and specific (not general) restraint must be reasonable in light of the legitimate interests to be protected; reasonableness is measured by totality of interrelationship of the interest, and the time, space, and scope of the restriction, judged by the needs for the restriction, the effect on the employee, and the public interest. Physician noncompetes entered into on or after July 1, 2020, must contain specific provisions concerning communications with patients, access to patient information, and a &quot;buy-out&quot; option. See Ind. Code § 25-22.5-5.5.</td>
<td>-</td>
<td>Yes</td>
<td>Blue Pencil</td>
<td>Yes</td>
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<td>Iowa</td>
<td>Yes Iowa Code § 135Q.1-2 (concerns healthcare employment agency workers only, eff. 7/1/2022)</td>
<td>Trade secrets; goodwill; special training or peculiar knowledge that would unjustly enrich an employee at the expense of the former employer. Whether the restriction is reasonably necessary to protect the employer's business, unreasonably restrictive (time and space), and prejudicial to the public interest. Franchisees (where franchisor does not renew); healthcare employment agency workers (effective July 1, 2022)</td>
<td></td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes, but it's a factor to consider.</td>
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<td>Kansas</td>
<td>Yes</td>
<td>Trade secrets; confidential business information; loss of clients; goodwill; customer contacts; referral sources; reputation; special training. Reasonable under the circumstances: protects a legitimate business interest; no undue burden on the employee; not injurious to public interest or welfare; reasonable in time and space.</td>
<td></td>
<td>Accountants (limited)</td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes</td>
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<td>Kentucky</td>
<td>Yes KRS § 216.724 (concerns healthcare services agency direct staff only, eff. 7/1/2022)</td>
<td>Confidential business information; customer lists; competition; investment in training.</td>
<td>Reasonable in scope and purpose; reasonableness determined by the time, space, and “charter” of the restriction; no undue hardship; does not interfere with public interest.</td>
<td>Direct care staff of a healthcare services agency (effective July 14, 2022; a violation is an unfair trade practice)</td>
<td>Yes, if employment is continued for “an appreciable length of time.”</td>
<td>Reformation</td>
<td>Yes, but it can be a factor.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Yes. La. Rev. Stat. Ann. § 23:921</td>
<td>Trade secrets; financial information; management techniques; extensive training (if such training is unrecouped through employee’s work).</td>
<td>No more than two years; specifies the specific geographic reach (by parishes, municipalities, or their respective parts); defines employer’s business; strict compliance with statute, including that employee-employer relationship must exist at the time the agreement is executed.</td>
<td>Automobile salesmen; real estate broker’s licensees (procedural requirements)</td>
<td>Yes</td>
<td>Blue Pencil, if allowed by the noncompete</td>
<td>Yes, likely</td>
</tr>
<tr>
<td>Maine</td>
<td>Yes Me. Rev. Stat. Ti. 26, c. 7, § 599-A</td>
<td>Trade secrets; confidential information; goodwill.</td>
<td>No broader than necessary to protect the employer’s legitimate business interest; reasonable as to time, space, and interests to be protected; no undue hardship to employee. In addition, for agreements signed on or after September 18, 2019: employee must receive notice of noncompete prior to an offer of employment and a copy of the agreement 3 business days in advance of the deadline to sign; and the employee (except certain physicians) must be employed at least a year or remain employed for at least six months after signed, whichever is longer.</td>
<td>Broadcast industry (presumption); low-wage workers (earning less than or equal to 400% of the federal individual poverty level - $58,320 (est.) as of 2023)</td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes, likely</td>
</tr>
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<tr>
<td>Maryland</td>
<td>Yes. Md. Code, Lab. &amp; Empl. § 3-716</td>
<td>Trade secrets; routes; client lists; established customer relationships; goodwill; unique services.</td>
<td>Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.</td>
<td>Maryland Code, Lab. &amp; Empl. § 3-716: Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.</td>
<td>Effective 10/1/2020: Low-wage employees, i.e., employees earning less than $15 per hour or $31,200 annually.</td>
<td>Yes</td>
<td>Blue Pencil</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Yes. Mass. Gen. Laws c. 149, § 24L (applies only to agreements signed on or after October 1, 2018)</td>
<td>Trade secrets; confidential information; goodwill.</td>
<td>Narrowly tailored to protect legitimate business interest; limited in time, space, and scope; consonant with public policy. Additional requirements added by 2018 statute: must be signed by both parties; provided to employee 10 business days in advance (or prior to a formal offer, if earlier); state that the employee has the right to consult counsel; and satisfy consideration requirements. Presumptions of necessity of the agreement and reasonableness as to place and scope apply. Venue and choice of law are limited.</td>
<td>Massachusetts Code, Lab. &amp; Empl. § 3-716: Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.</td>
<td>Additional exemptions added by 2018 statute: Broadcasters; physicians; nurses; social workers; psychologists.</td>
<td>No (per new statute; yes before)</td>
<td>Reformation</td>
</tr>
<tr>
<td>Michigan</td>
<td>Yes. Mich. Comp. Laws § 445.774a</td>
<td>Trade secrets; confidential business information; goodwill.</td>
<td>Must have an honest and just purpose and to protect legitimate business interests; reasonable in time (no more than one year), space, and scope or line of business; not injurious to the public.</td>
<td>Michigan Code, Lab. &amp; Empl. § 3-716: Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.</td>
<td>-</td>
<td>Yes</td>
<td>Reformation</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Yes</td>
<td>Trade secrets; confidential business information; goodwill; prevention of unfair competition.</td>
<td>No broader than necessary to protect the employer’s legitimate business interest; does not impose unnecessary hardship on employee.</td>
<td>Minnesota Code, Lab. &amp; Empl. § 3-716: Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.</td>
<td>Employees of supplemental nursing services agencies.</td>
<td>No</td>
<td>Reformation (though called “blue pencil”)</td>
</tr>
</tbody>
</table>
## Employee Noncompete

### A State-by-State Survey

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<tr>
<td>Mississippi</td>
<td>Yes</td>
<td>Trade secrets; confidential business information; goodwill; ability to succeed in a competitive market.</td>
<td>Reasonableness and specificity of restriction, primarily, in time and space; hardship to employer and employee; public interest.</td>
<td>Yes (though questioned if employee terminated shortly after)</td>
<td>Reformation</td>
<td>Yes, absent bad faith or arbitrary basis for termination</td>
<td></td>
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<tr>
<td>Missouri</td>
<td>Yes. 28 Mo. Stat. Ann. § 431.202 (related)</td>
<td>Trade secrets; confidential business information; customer or supplier relationships, goodwill, or loyalty; customer lists; protection from unfair competition; stability in the workforce.</td>
<td>Reasonably necessary to protect legitimate interests; reasonable in time and space; not an unreasonable restraint on employee; purpose served; situation of the parties; limits of the restraint; specialization of the business.</td>
<td>Secretaries (limited); clerks (limited)</td>
<td>No</td>
<td>Reformation</td>
<td>Yes, but it can be a factor.</td>
</tr>
<tr>
<td>Montana</td>
<td>Yes. Mont. Code Ann. §§ 28-2-703-05</td>
<td>Trade secrets; proprietary information that would provide an employee with an unfair advantage; goodwill; customer relationships.</td>
<td>Partial or restricted in its operation by being limited in operation either as to time or place; supported by “some good consideration”; protects a legitimate business interest; reasonable, affording only a fair protection to the interests of the party in whose favor it is made, and not so large in its operation as to interfere with (or impose an unreasonable burden upon) the employer, the employee, or the interests of the public.</td>
<td>-</td>
<td>No</td>
<td>Blue Pencil, likely</td>
<td>No</td>
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[Table continues...]

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Russell Beck  
Beck Reed Riden LLP  
155 Federal Street  
Boston, MA 02110  
rbeck@beckreed.com

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February 11, 2023  
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Not Legal Advice
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<td>Nebraska</td>
<td>Yes</td>
<td>Trade secrets; confidential information; goodwill.</td>
<td>Reasonably necessary to protect legitimate interests; not unduly harsh or oppressive to employee; not injurious to the public. Considerations include: inequality in bargaining power; risk of loss of customers; extent of participation in securing and retaining customers; good faith of employer; employee's job, training, health, education, and family needs; current employment conditions; need for employee to change his calling or residence; relation of restriction to legitimate interest being protected. True noncompetes are rarely, if ever, permitted.</td>
<td>-</td>
<td>Yes, likely</td>
<td>Red Pencil</td>
<td></td>
<td></td>
<td>Undecided</td>
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<tr>
<td>Nevada</td>
<td>Yes. Nev. Rev. Stat. § 613.195-200 [effective June 3, 2017]</td>
<td>Trade secrets; goodwill.</td>
<td>Void unless: (a) supported by valuable consideration; (b) not greater than required to protect employer; (c) no undue hardship on employee; and (d) appropriate in relation to the consideration. Cannot restrict employee from providing service to customer/client if (a) customer/client was not solicited; (b) customer/client voluntarily chose to leave or seek services from employee; and (c) employee otherwise complies with time, geographical area, and scope of noncompete. [Effective 10/1/2021: Attorney’s fees for the employee if the employer ignored the exemption or used the noncompete to prevent solicitation of customers in violation of the statute.] Pre-10/1/2021: none Effective 10/1/2021: employees &quot;paid solely on an hourly wage basis, exclusive of any tips or gratuities&quot;</td>
<td>Yes (pre-amendment)</td>
<td>Pre-10/1/2021: Reformation (mandatory)</td>
<td>Effective 10/1/2021: Reformation (mandatory), and revised noncompete must &quot;not impose undue hardship on the employee&quot;</td>
<td></td>
<td></td>
<td>Undecided, except with reduction in force, &quot;reorganization or similar restructuring of the employer,&quot; in which case employee must be paid &quot;salary, benefits or equivalent compensation,&quot; including severance.</td>
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<td>New Hampshire</td>
<td>Yes. RSA 275:70, 275:70-a</td>
<td>Trade secrets; confidential business information; goodwill; employee’s special influence over the employer’s customers; contacts developed during employment.</td>
<td>Not greater than necessary to protect the employer’s legitimate business interests; no undue or disproportionate hardship to employee; not injurious to public interest; new employees must be given a copy of the noncompete prior to acceptance of offer for employment.</td>
<td>Physicians (effective 8/5/2016); nurses and podiatrists (effective 6/25/2018); low-wage employees, i.e., those earning less than or equal to 2x federal minimum wage (i.e., $14.50/hour) or tipped minimum wage, whichever applies (effective 9/8/2019).</td>
<td>Yes</td>
<td>Reformation</td>
<td>Undecided</td>
<td></td>
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</tr>
<tr>
<td>New Jersey</td>
<td>Yes</td>
<td>Trade secrets; confidential business information; goodwill in existing customers; preventing employee from working with customer at lower cost than working through employer.</td>
<td>Protects a legitimate business interest; not undue burden on employee; not injurious to the public; not overbroad in time, space, and scope.</td>
<td>In-house counsel; psychologists</td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes, but it’s a factor to consider.</td>
<td></td>
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</tr>
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Physicians (effective 8/5/2016); nurses and podiatrists (effective 6/25/2018); low-wage employees, i.e., those earning less than or equal to 2x federal minimum wage (i.e., $14.50/hour) or tipped minimum wage, whichever applies (effective 9/8/2019).
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<td>New Mexico</td>
<td>Yes. N.M.S.A. 1978, §§ 24-11-1-5 (creates healthcare practitioner exemption only)</td>
<td>Maintaining workforce; limitation of competition (but not to stifle competition); customer relationships.</td>
<td>Reasonable as applied to the employer, employee, and public; not great hardship to employee in exchange for small benefits to employer.</td>
<td>Healthcare practitioners (dentists, osteopathic physicians, physicians, podiatrists, certified registered nurse anesthetists) to the extent they are providing clinical health care services. [Exemption has limits (including that it does not apply to a covered medical professional if they are a shareholder, owner, partner, or director of a healthcare practice) and is effective only to agreements from 7/1/2015 and after.]</td>
<td>Yes, likely</td>
<td>Undecided</td>
<td>Undecided</td>
</tr>
<tr>
<td>New York</td>
<td>Yes</td>
<td>Trade secrets; confidential information; goodwill; on-air persona of broadcasters; employee's unique or extraordinary services.</td>
<td>Reasonable in time and space, and no greater than is required for the protection of the legitimate interest of the employer; does not impose undue hardship on the employee; not injurious to the public.</td>
<td>Broadcast industry employees (except &quot;management employees&quot;)</td>
<td>Yes</td>
<td>Reformation</td>
<td>Cases are split</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Yes. N.C. Gen. Stat. § 75-4</td>
<td>Trade secrets; confidential business information; goodwill.</td>
<td>In writing; part of an employment contract; reasonably necessary to protect legitimate business interest; reasonable in time and space; not against public policy.</td>
<td>Physicians, possibly (in underserved areas)</td>
<td>No</td>
<td>Blue Pencil</td>
<td>Yes, likely</td>
</tr>
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<td>North Dakota</td>
<td>No. N.D. Cent. Code § 9-08-06</td>
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<tr>
<td>Ohio</td>
<td>Yes</td>
<td>Trade secrets; confidential information; customer relationships; prevention of the use of proprietary customer information to solicit customers.</td>
<td>Not greater than necessary to protect the employer's legitimate business interests; no undue hardship to employee; not injurious to public interest. Considerations: absence or presence of limitations as to time and space; whether employee is sole contact with customer; employee's possession of trade secrets or confidential information; purpose of restriction (elimination of unfair competition vs. ordinary competition and whether seeks to stifle employee's inherent skill and experience); proportionality of benefit to employer as compared to the detriment to the employee; other means of support for employee; when employee's talent was developed; whether forbidden employment is merely incidental to the main employment.</td>
<td>-</td>
<td>Yes</td>
<td>Reformation</td>
<td>Yes</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>No. OK Stat. § 15-219A</td>
<td>-</td>
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## Employee Noncompete
### A State-by-State Survey

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<td>Oregon</td>
<td>Yes. Or. Rev. Stat. § 653.295</td>
<td>Trade secrets; confidential business or professional information; investment in certain on-air broadcasters; customer contacts and goodwill.</td>
<td>Noncompete must be provided at least two weeks before employment or with a bona fide advancement; employee is in an executive, administrative, or professional role and meets minimum compensation threshold; restricted in time or space; application of restriction should afford only a fair protection of the employer's interests; must not interfere with public interest. As of January 1, 2016, noncompete are limited to 18 months. [Qualifying garden leave clauses are enforceable.] Effective January 1, 2020, a signed, written copy of the employee's noncompete must be sent within 30 days following termination of employment. Noncompete entered on or after January 1, 2022, cannot be longer than 12 months, and employees subject to them must have &quot;annual gross salary and commissions&quot; exceeding $100,533 (adjusted annually for inflation ($108,575.64 as of January 1, 2023)); failure to satisfy the statutory requirements renders the noncompete void.</td>
<td>Home healthcare workers. Though not listed as exemptions, a salary threshold applies. For agreements entered into before January 1, 2022: an &quot;employee's annual gross salary and commissions&quot; must &quot;exceed[] the median family income for a four-person family&quot; applies; for agreements entered on or after January 1, 2022, the &quot;employee's annual gross salary and commissions&quot; must &quot;exceed[] $100,533, adjusted annual for inflation&quot; ($108,575.64 as of January 1, 2023).</td>
<td>No</td>
<td>Reformation</td>
<td>Undecided</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Trade secrets; confidential information; goodwill; investment in specialized training; unique or extraordinary skills; patient referral base.</td>
<td>Reasonably necessary to protect the employer's legitimate interests; reasonable in time and space.</td>
<td>-</td>
<td>No</td>
<td>Reformation</td>
<td>Yes, but it's a factor to consider.</td>
</tr>
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Not Legal Advice
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<td>Rhode Island</td>
<td>Yes R.I. Gen. Laws §§ 28-59-1–3</td>
<td>Trade secrets; confidential information; customer lists; goodwill; training in unique or special services.</td>
<td>Narrowly tailored to protect a legitimate business interest; reasonably limited in activity, geography, and time; does not impose undue burden on employee in light of the need to protect the employer's legitimate business interests; not likely to harm the public interest.</td>
<td>Physicians. Effective 1/15/2020 (with retroactive effect): employees who are 18 years old or younger; student interns/short-term student employees; FLSA nonexempt employees and other low-wage employees, i.e., employees earning no more than 2.5x the federal poverty level ($36,450 est.) as of 2023 – based on the employee’s “regular” hours, i.e., non-overtime, non-weekend, non-holiday hours.</td>
<td>Undecided, but likely</td>
<td>Reformation</td>
<td>Undecided</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Yes</td>
<td>Business and customer contacts; existing employees; existing payroll deduction accounts.</td>
<td>Necessary to protect legitimate business interest; reasonably limited in time and space; not unduly harsh and oppressive to employee’s efforts to earn a living; reasonable from standpoint of public policy.</td>
<td>-</td>
<td>No</td>
<td>Blue pencil, likely. (SC S.Ct rejected blue pencil doctrine by name, but case involved reformation; SC Ct. App. has since permitted step-down provisions.)</td>
<td>Undecided</td>
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## Employee Noncompetes
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<td>South Dakota</td>
<td>Yes. S.D. Codified Laws §§ 53-9-8, et seq.</td>
<td>Trade secrets; protection from unfair competition; existing customers.</td>
<td>Restriction in the same business or profession as that carried on by employer and does not exceed two years and in a specified geographic area; reasonableness in time, space, and scope is a factor in certain circumstances.</td>
<td>Physicians, physician assistants, certified nurse practitioners, certified nurse midwives, certified registered nurse anesthetists, registered nurses, licensed practical nurse (all effective July 1, 2021).</td>
<td>Yes</td>
<td>Reformation, likely</td>
<td>Yes, but it’s a factor to consider.</td>
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<td>Tennessee</td>
<td>Yes</td>
<td>Trade secrets; confidential information; retention of existing customers; specialized training.</td>
<td>Reasonable in time and space and necessary to protect legitimate interest; public interest not adversely affected; no undue hardship to the employee.</td>
<td>Yes (if employment continued for appreciably long period)</td>
<td>Reformation</td>
<td>Yes, but it’s a factor to consider.</td>
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<td>Texas</td>
<td>Yes. Tex. Bus. &amp; Com. Code §§ 15.50-.52</td>
<td>Trade secrets; confidential or proprietary information; goodwill; specialized training.</td>
<td>Reasonable in time, space, and scope; does not impose a greater restraint than necessary to protect legitimate business interest. *In December 2011, the Texas Supreme Court withdrew its June 2011 landmark decision, but still eliminated the requirement that the consideration given by the employer in exchange for the noncompete must give rise to the interest protected by the noncompete, and held that the consideration for the noncompete agreement must be reasonably related to the company’s interest sought to be protected.</td>
<td>Physicians (in certain circumstances)</td>
<td>No</td>
<td>Reformation (mandatory)</td>
<td>Yes</td>
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<td>Utah</td>
<td>Yes. Utah Code Ann. §§ 34-51-101-301 [Certain changes apply to agreements starting May 10, 2016 and others May 14, 2019]</td>
<td>Trade secrets; goodwill; extraordinary investment in training or education.</td>
<td>Carefully drawn to protect only the legitimate interests of the employer, reasonable based on geography, duration, and nature of the employee's duties in light of the legitimate business interests to be protected. One year limit for agreements entered on or after May 10, 2016.</td>
<td>Broadcasters (under certain circumstances)</td>
<td>Yes</td>
<td>Undecided</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes. If properly drafted.</td>
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<td>Vermont</td>
<td>Yes</td>
<td>Trade secrets; confidential information; goodwill; relationships with customers.</td>
<td>Necessary to protect legitimate business interest; not unnecessarily restrictive to employee; limited in time, space, and/or industry; not contrary to public policy.</td>
<td>Beauiticians and cosmetologists by their school.</td>
<td>Yes</td>
<td>No, but possibly if contract provides.</td>
<td>Undecided</td>
<td>Red Pencil, but severable portions can be enforced if remaining restrictions are otherwise enforceable.</td>
<td>Yes</td>
</tr>
<tr>
<td>Virginia</td>
<td>Yes Virginia code § 40.1-28.7:8</td>
<td>Trade secrets; confidential information; knowledge of methods of operation; protection from detrimental competition; customer contacts.</td>
<td>Narrowly drawn (no greater than necessary) to protect the employer's legitimate business interest; reasonable in time, space, and scope; not unduly harsh or oppressive (or burdensome on the employee) in curtailing the employee's ability to earn a livelihood; not against, and reasonable in light of, sound public policy. Effective 7/1/2020: a notice must be posted.</td>
<td>Effective 7/1/2020: “Low-wage” employees, i.e., employees earning less than approximately $52,000 annually; likely not applicable to salespersons. (As for 2022, the amount is approximately $69,836 annually.)</td>
<td>Yes</td>
<td>Red Pencil, but severable portions can be enforced if remaining restrictions are otherwise enforceable.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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<td>Washington</td>
<td>Yes</td>
<td>Customer information and contacts; goodwill.</td>
<td>Restriction is necessary to protect employer's business or goodwill; restriction is no greater than reasonably necessary to secure employer's business or goodwill; reasonable in time and space; injury to public does not outweigh benefit to employer.</td>
<td>Broadcasters (under certain circumstances). Effective 1/1/2020: Employees earning less than or equal to $100,000 and independent contractors earning less than or equal to $250,000 (both adjust for inflation; as of 2023, the amounts are $116,593.18 and $291,482.95, respectively); employees who are laid off (unless paid base salary, less new earnings). Also effective 1/1/2020: cannot prohibit moonlighting for low-wage workers, i.e., those earning less than 2x minimum hourly rate.</td>
<td>No</td>
<td>No</td>
<td>Reformation (but employee will be entitled to &quot;actual damages&quot; or a $5,000 statutory penalty, &quot;plus reasonable attorneys' fees, expenses, and costs&quot;)</td>
<td>No, unless, during the restriction, the employee is paid &quot;compensation equivalent to the employee's base salary . . . minus compensation earned&quot; at another job.</td>
<td></td>
</tr>
<tr>
<td>West Virginia</td>
<td>Yes</td>
<td>Trade secrets; confidential or unique information; customer lists; direct investment in employee's skills; goodwill.</td>
<td>Ancillary to a lawful contract; not greater than reasonably necessary to protect legitimate business interest; reasonable in time and space; no undue hardship on employee; not injurious to public.</td>
<td>-</td>
<td>No</td>
<td>Reformation</td>
<td>Undecided generally, but no against physicians</td>
<td></td>
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Washington RCW §§ 49.62.005–900

Effective 1/1/2020: notice must be provided before acceptance of offer or before agreement becomes effective (whichever applies); independent consideration for mid-employment agreements; and presumption (rebuttable by clear and convincing evidence to the contrary) that noncompetes with a duration longer than 18 months are unreasonable and unenforceable; must not avoid Washington law; must not require adjudication outside of Washington; attorney's fees to employee if noncompete violates the statute.

Effective 1/1/2020: notice must be provided before acceptance of offer or before agreement becomes effective (whichever applies); independent consideration for mid-employment agreements; and presumption (rebuttable by clear and convincing evidence to the contrary) that noncompetes with a duration longer than 18 months are unreasonable and unenforceable; must not avoid Washington law; must not require adjudication outside of Washington; attorney's fees to employee if noncompete violates the statute.
# Employee Noncompete

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<td>Wisconsin</td>
<td>Yes. Wis. Stat. Ann. § 103.465</td>
<td>Trade secrets; confidential business information; customer relationships.</td>
<td>Necessary to protect legitimate business interest; reasonable in time and space; not harsh or oppressive to the employee; not contrary to public policy.</td>
<td>-</td>
<td>Yes, if continued employment is conditioned on signing the agreement.</td>
<td>Red pencil, but, courts (and legislature) may be moving toward a more tolerant approach.</td>
<td>Undecided</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>Yes</td>
<td>Trade secrets; confidential information; special influence of employee over customers to the extent gained during employment.</td>
<td>Restraint must be &quot;(1) in writing; (2) part of a contract of employment; (3) based on reasonable consideration; (4) reasonable in duration and geographical limitations; . . . (5) not against public policy&quot; and no greater than &quot;necessary to protect the employer's legitimate business interests.&quot;</td>
<td>-</td>
<td>No</td>
<td>Red Pencil (reflecting a change by the Supreme Court of Wyoming on February 25, 2022)</td>
<td>Yes, likely.</td>
<td></td>
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</tr>
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*Chart covers employee noncompetes only. It does not cover noncompetes arising from the sale of a business or in other contexts.*

Consideration for a noncompete is always required, as is the requirement that a noncompete be ancillary to an otherwise lawful agreement. These requirements are typically satisfied when the agreement is entered into at the inception of an employment relationship.

Attorneys (outside counsel and in-house counsel) and certain persons in the financial services industry are subject to industry regulations not addressed in this chart. However, while outside counsel are exempt in all states, in-house counsel rules vary by state. The continued employment issue addresses only at-will employment relationships.

Reformation is sometimes called "Judicial Modification," the "Rule of Reasonableness," the "Reasonable Abortion Approach," or the "Partial-Enforcement" rule. Red Pencil is sometimes called the "All or Nothing" rule. "Purple pencil" is a made-up term for the reformation approach with an express good faith (of the drafter) requirement grafted on. Addresses only not-for-cause terminations and assumes no breach or bad faith by the employer.

Originally drafted in 2010, this chart is updated periodically and is current as of the date indicated. Please contact Russell Beck (rbeck@beckreed.com) if you would like to receive updates.