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Buffalo Law Review

THE DOCKET

VOLUME 67

DECEMBER 2019

NUMBER 2

Employee Mobility and The Low Wage Worker: The Illegitimate Use of Non-Compete Agreements

JACQUELINE A. CAROSA, ESQ.†

INTRODUCTION

Non-compete agreements (NCAs) are contracts made between an employer and employee that restrict the employee's postemployment opportunities.¹ These restraints on trade limit an employee's ability to take a position with a competitor, or start a competing business,² within a defined geographic area for a defined period of time.³ NCAs provide an employer the assurance that trade secrets, confidential information, client relationships, or a former employee's unique skills will not be unfairly used to benefit a

†This Paper was researched and written while the author was a student at the University at Buffalo School of Law. She served as a Note and Comment Editor of *The Buffalo Law Review*, graduated cum laude in 2019, and was admitted to the practice of law in New York and New Jersey in 2019.

The author thanks University at Buffalo School of Law Professor Lise Gelernter for her help with organizing and editing the content of this Paper.

1. Vanessa Maire Griffith, *Non-Compete Agreements with Employees*, Practical Law Practice Note 7-501-3409, Westlaw (last visited Nov. 11, 2018) [hereinafter Griffith Practice Note].

2. On Amir & Orly Lobel, *Driving Performance: A Growth Theory of Noncompete Law*, 16 STAN. TECH. L. REV. 833, 839 (2013) [hereinafter *Driving Performance*].

3. Griffith Practice Note, *supra* note 1.

competitor.⁴

Nearly one in five workers in the United States is employed under an NCA, with greater prevalence in more highly skilled sectors⁵ where trade secrets, confidential client information, and highly specialized skills are common. However, NCAs have found their way into the low wage sector where there is no legally recognized legitimate business interest to protect. In fact, approximately 12% of earners who do not have a bachelor's degree and make up to \$40,000.00 a year have signed NCAs.⁶

The public backlash against the use of NCAs for low wage workers has led to much discussion and many articles about why they should or should not be banned or regulated.

4. *Id.*; Rita Zeidner, *Rethinking Non-compete Agreements*, HR MAG., Dec. 2017/Jan. 2018, at 67, <https://www.questia.com/magazine/1P4-1975979529/rethinking-noncompete-agreements> [hereinafter "*Rethinking Non-compete Agreements*"].

5. Evan Starr et al., *Noncompetes in the U.S. Labor Force* 14 (U.Mich. Law & Econ. Research Paper No. 18-013, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 [hereinafter *Noncompetes in the U.S. Labor Force*] (18.1% of the U.S. labor force). This Paper relies heavily on the work of Evan Starr, an assistant professor at the University of Maryland Robert H. Smith School of Business. Prof. Starr has written and co-written a dozen scholarly papers on the use, enforceability, and effects of non-competes, six of which have been published at the time this Paper was originally submitted, and his work has been cited in U.S. DEP'T OF TREASURY, OFF. OF ECON. POL'Y, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS (2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> [hereinafter OEP REPORT], and WHITE HOUSE REPORT, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES, 6 (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [hereinafter WHITE HOUSE REPORT]. Post-submission, Starr co-wrote *Low-Wage Workers and the Enforceability of Non-Compete Agreements* with Michael Lipsitz (Sept. 10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3452240. The authors examined the effects of the 2008 ban against non-compete agreements for hourly and low-wage workers in the State of Oregon and concluded that the ban resulted in higher hourly wages on average, increased job mobility, increased the proportion of salaried worker, decreased the likelihood of being unemployed, without affecting hours worked. *Id.* at 26.

6. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 3.

Jimmy John's made the headlines and received a great deal of negative press when it came to light that their franchisees were requiring sandwich makers and delivery drivers to sign NCAs.⁷ The NCAs prevented departing employees from performing services for any company deriving "more than ten percent (10%) of its revenue from selling submarine, herotye, deli-style, pita and/or wrapped or rolled sandwiches" for a postemployment period of two years.⁸ The NCAs covered a geographic area of between two and three miles "of either [the Jimmy John's location in question] or any such other Jimmy John's Sandwich Shop."⁹ Investigations and lawsuits by the New York and Illinois State Attorneys General offices led the company to settle the suits and agree to halt the practice.¹⁰

E-commerce giant Amazon received sharp criticism for requiring its hourly employees, including warehouse and seasonal workers, to sign NCAs.¹¹ The NCAs were extremely broad in scope and stated that the employee could not:

directly or indirectly . . . engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold,

7. Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC, (June 22, 2016, 1:08 PM), <https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html> [hereinafter Whitten, *Jimmy John's Drops Noncompete Clauses*].

8. Dave Jamieson, *Jimmy John's Makes Low-Wage Workers Sign 'Oppressive' Noncompete Agreements*, HUFFPOST, (Oct. 13, 2014, 4:03 PM), https://www.huffingtonpost.com/2014/10/13/jimmy-johns-non-compete_n_5978180.html?1413230622 [hereinafter Jamieson, *Oppressive Noncompete Agreements*].

9. Whitten, *Jimmy John's Drops Noncompete Clauses*, *supra* note 7; Jamieson, *Oppressive Noncompete Agreements*, *supra* note 8.

10. Whitten, *Jimmy John's Drops Noncompete Clauses*, *supra* note 7; Jamieson, *Oppressive Noncompete Agreements*, *supra* note 8.

11. Jana Kasperkevic, *Amazon Removes Crazy Non-compete From Hourly Worker's Contracts*, BUS. INSIDER, (Mar. 29, 2015, 10:42 AM), www.businessinsider.com/amazon-removes-non-compete-clause-for-hourly-workers-2015-3.

offered, or otherwise provided by Amazon (or intended to be sold, offered, or otherwise provided by Amazon in the future) that employee worked on or supported, or about which employee obtained or received Confidential Information.¹²

Aside from requiring the gift of clairvoyance, the restraint theoretically prevented employment at companies that were not direct competitors of Amazon. The NCA's reach was so vast that the ordinary employee would find it difficult to avoid breaching the contract. Indeed, the contract states that the employee "recognizes that the geographic areas for many of Amazon's products and services . . . are extremely broad and in many cases worldwide."¹³ Given the breadth of Amazon's products and services, the scope of the limitation was potentially devastating to the livelihood of its employees. Ultimately, due to the negative publicity, Amazon agreed to stop the practice for its hourly employees.¹⁴

In addition to sandwich makers and warehouse workers, NCAs have also been used to tie other low wage workers to their jobs, such as labor hands,¹⁵ hairdressers, camp counsellors,¹⁶ and residential and commercial cleaners.¹⁷ The

12. *Id.*

13. *Id.*

14. Lauren C. Williams, *Amazon Gets Rid of Strict Non-Compete Clause for Contract and Temporary Employees*, THINKPROGRESS, (Mar. 30, 2015, 5:15 PM), <https://thinkprogress.org/amazon-gets-rid-of-strict-non-compete-clause-for-contract-and-temporary-employees-f7b12b94cfa9/>.

15. Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES, (May 13, 2017), <https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html> [hereinafter *How Noncompete Clauses Keep Workers Locked In*].

16. Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES, (June 8, 2014), https://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?_r=0.

17. Danny Westneat, *\$15-an-hour Job Comes With Noncompete Clause, Threat of Legal Action*, SEATTLE TIMES, (Nov. 11, 2014, 8:30 PM), <https://www.seattletimes.com/seattle-news/15-an-hour-job-comes-with-noncompete-clause-threat-of-legal-action/> (discussing the circumstances in which an employee of ServiceMaster Seattle found himself when he took a job with a rival company to make \$3 more an hour).

use of NCAs has gone beyond protecting businesses from unfair competition. They are now used to control employee turnover and manipulate free markets by limiting fair competition.

Focusing on the low wage sector, this paper discusses the pros and cons of using NCAs and argues that the benefits of banning NCAs outweigh the possible harm enough to justify legislation. Part I discusses the at-will employment relationship, the history of NCAs, and legally protectable legitimate business interests. Part II discusses the regulation of NCAs and includes a description of current state law and judicial interpretations.

Part III presents the incidence, benefits, and costs associated with the use of NCAs. The studies and statistics show that there is much to gain for both employer and employee in banning NCAs for low wage workers, but it is not without potential cost to the employer and possible detriment to the low wage employee.¹⁸ Nevertheless, because NCAs are intended to prevent *unfair* competition and protect *legitimate* business interests, it begs the question: Are low wage workers in a position to compete unfairly if they do not possess unique skills or have access to trade secrets and confidential information?

Part IV discusses recent litigation and legislative initiatives, includes a summary of reasons why NCAs should be banned in the low wage sector, and presents this author's conclusion that such action is justified because there is no recognized legitimate business interest to protect. Further, the benefits of banning NCAs in the low wage sector outweigh the harm so dramatically that states should continue to consider bills banning NCAs for low wage workers and imposing restrictions on and requirements for

18. OEP REPORT, *supra* note 5, at 3–4; Evan Starr, *Consider This: Training, Wages and the Enforceability of Covenants Not to Compete*, 72 INDUS. & LAB. REV. 783, 785–86 (2019).

the use of NCAs for all other workers. This paper touches on several current and proposed federal and state initiatives. However, to provide a legitimate basis to propose legislation in my home state of New York, this paper focuses primarily on current and proposed initiatives in New York. Because recent legislative efforts have failed in my state, Part IV includes a piece of proposed legislation for New York State, which is combination of the recently passed Massachusetts legislation and bills previously introduced in the New York State Assembly and Senate.

I. THE HISTORY OF NON-COMPETE AGREEMENTS

A. *At-Will Employment*

Most states in the United States are at-will employment states.¹⁹ At-will employment means that both employer and employee have the right to terminate the employment relationship at any time, for any reason, without notice.²⁰ This “right” can produce harsh results to both parties when the relationship is terminated without cause or notice. “The original purposes of the employment at-will doctrine were to afford employees the freedom to contract to suit their needs and to allow employers to exercise their best judgment regarding staffing matters.”²¹ Notwithstanding its harshness, the at-will rule gives businesses autonomy over hiring practices and promotes employee mobility.

Today, the average person changes jobs an average of 12

19. Nat'l Conf. of State Legislatures, NCSL, *At-Will Employment – Overview*, NCSL.ORG (Apr. 15, 2008) <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> [hereinafter NCSL].

20. *Id.* This assumes the employee is not part of a legally-protected class, or that the termination circumstances do not violate a law or regulation.

21. *Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329, 333 (1987); *see also* NCSL, *supra* note 19 (“Some reasons given for our retention of the at-will presumption include respect for freedom of contract, employer deference, and the belief that both employers and employees favor an at-will employment relationship over job security.”).

times during his or her career.²² Having the flexibility to make career moves encourages workers to find the best possible employment fit and gives employers a large pool from which to recruit the best possible employees for their business. It follows, then, that an employee needs a way out of an entry-level job in order to keep his or her career moving forward and upward. At-will employment is a reciprocal right that promotes both of those goals.

The most clear-cut exception to the presumption of at-will employment is a written employment contract demonstrating the parties' intent to modify the at-will relationship. For example, employment contract terms can be tailored to require progressive discipline prior to termination, termination for good cause, 30 or more days-notice prior to termination, and so on. In addition to written contracts signed by the parties, an employer with an express written policy modifying the at-will rule - such as a rule contained in an employee handbook - may well be bound by the policy's representations in the absence of a clear disclaimer if the employer induces reliance on the policy.²³ If a legally valid contract modifies the at-will rule, it will be viewed as the best representation of the parties' intent.²⁴

Having the flexibility to come and go at will leaves open the possibility that the employee will re-enter the job market

22. Alison Doyle, *How Often Do People Change Jobs?*, BALANCE CAREERS, (updated Jan. 29, 2019), <https://www.thebalancecareers.com/how-often-do-people-change-jobs-2060467>; see also Scott Marker, *How Many Jobs Will the Average Person Have in His or Her Lifetime?*, LINKEDIN, (Feb. 22, 2015), <https://www.linkedin.com/pulse/how-many-jobs-average-person-have-his-her-lifetime-scott-marker> (reporting 12-15 jobs according to the U.S. Bureau of Labor Statistics).

23. NCSL, *supra* note 19; *Lobosco v. New York Tel. Co.*, 96 N.Y.2d 312, 316 (2001). Note that "routinely issued employee manuals, handbooks, and policy statements should not lightly be converted into binding employment agreements." *Id.* at 317.

24. *Goldman v. White Plains Ctr. for Nursing Care, LLC*, 11 N.Y.3d 173, 176 (2008).

as a direct competitor of the former employer. Without a contract to the contrary, the employee is free to secure employment to best suit his or her needs. The line separating fair competition from unfair competition is crossed when a former employee absconds with trade secrets, client lists, key employees, or confidential information. Reasonable safeguards against unfair competition should be in place to protect businesses, business owners, and their employees from losses that result from unfair competition. Restrictive covenants—non-compete, non-disclosure, and non-solicit agreements—have been used to mitigate those losses.

B. *The Rise and Evolution of Non-Compete Agreements*

NCAs are a vehicle by which an employer can limit an employee's prospective employment opportunities.²⁵ Their use has been traced back to the 1400's when craftsmen tried to prevent their apprentices from starting a competing business in the same locale.²⁶ At that time, courts refused to enforce NCAs, in favor of free movement in the labor market.²⁷ The English court case of *Mitchel v. Reynolds* is credited with marking the shift toward judicial acceptance of the reasonableness of partial restraints on trade.²⁸ Mitchel leased a bakery from Reynolds for five years. The parties entered into an agreement, upon consideration, that should Reynolds compete with Mitchel's bakery during the term of

25. MARION G. CRAIN, ET AL., *WORK LAW: CASES AND MATERIALS*, 303 (3d ed. 2015); Griffith Practice Note, *supra* note 1.

26. Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 504 (2016); W. Andrew Arnold, *Non-Compete History*, SC NONCOMPETE LAWYER, <http://www.scnoncompetelawyer.com/short-history-of-non-competes/> (last visited Nov. 12, 2018).

27. Arnold, *supra*, note 26.

28. 24 Eng. Rep. 347 (Queens' Bench 1711). *Mitchel v. Reynolds* has also been cited by the dissent in United States Supreme Court as the "standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract . . ." *Bus. Elec. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 737 (1988) (Stevens, J., dissenting).

the parties' five-year lease, Reynolds would have to pay Mitchel on a bond for 50 pounds. Reynolds breached, Mitchel sued, and Reynolds countered that the restraint on his trade was unlawful. The court held that the contract was valid as a reasonable restraint on trade because it was limited in time and geographic scope and was necessary to protect Mitchel's business.²⁹

In an effort to prevent unfair competition, NCAs have traditionally been used to protect legitimate business interests such as: 1. trade secrets or confidential information; 2. customer relationships; 3. investment in the employee's reputation in the market; and 4. purchase of a business owned by the employee.³⁰ However, as industrial and global economies evolved, so too have employer motivations for using NCAs. In addition to preventing *unfair* competition, NCAs are now used to reduce the costs of employee turnover,³¹ increase the cost of competition,³² control free markets,³³ and depress wage growth.³⁴

NCAs may have seemed less necessary in the age of lifelong, stable employment relationships, where compensation packages were attractive enough to create a loyal workforce. Employers like Eastman Kodak, General Motors, Xerox, and Wegmans boast some of the lowest rates

29. Mitchel v. Reynolds, 24 Eng. Rep at 352; Arnold, *supra* note 26.

30. RESTATEMENT OF EMPLOYMENT LAW, § 8.07(b) (AM. LAW INST. 2015).

31. OEP Report *supra* note 5, at 3.

32. *Id.* at 4.

33. *How Noncompete Clauses Keep Workers Locked In*, *supra* note 15 (explaining non-competes are used to "prevent the forces of competition"). Such a restraint would be unenforceable on public policy grounds if it is unreasonably "determinantal to the smooth operation of a freely competitive private economy." RESTATEMENT (SECOND) OF CONTRACTS § 186 comment (a), (AM. LAW INST. 1981).

34. *Consider This*, *supra* note 18, at 18, 19, 24, 25.

of turnover.³⁵ Low turnover employers enjoy not only better employee morale and higher productivity, but need to spend much less on training and recruitment than their high-turnover counterparts.³⁶ However, the numbers show that lifelong employment is not the norm, resulting in increased costs related to employee turnover and training.³⁷

The costs associated with employee turnover vary from business to business, but the cost may be as much as twice the employee's annual salary, especially for those at the higher end of the compensation spectrum.³⁸ A study by the Society for Human Resource Management estimates that six to nine months of an employee's earnings are spent finding and hiring a replacement.³⁹ A study by the Center for American Progress (CAP) found that the cost to replace a \$10/hour employee would be \$3,328.00, or 16% of the employee's annual earnings.⁴⁰ For employees earning between \$30-50,000.00, the cost rises to 20%.⁴¹ These replacement costs typically include the costs of hiring, onboarding, and lost productivity.⁴² Notwithstanding the

35. Vivian Giang, *A New Report Ranks America's Biggest Companies Based on How Quickly Employee Jump Ship*, BUSINESS INSIDER, (July 25, 2013, 8:41 PM), <http://www.businessinsider.com/companies-ranked-by-turnover-rates-2013-7>; Max Nisen, *Wegmans is a Great Grocery Store Because it's a Great Employer*, QUARTZ, (May 13, 2015), <https://qz.com/404063/new-york-city-is-getting-a-great-grocery-store-in-wegmans-and-an-even-better-employer/>.

36. Christina Merhar, *Employee Retention—The Real Cost of Losing an Employee*, PEOPLE KEEP, (Feb. 4, 2016), <https://www.zanebenefits.com/blog/bid/312123/employee-retention-the-real-cost-of-losing-an-employee> [hereinafter "*Employee Retention*"].

37. *Id.*

38. *Id.*

39. Julie Kantor, *High Turnover Costs Way More Than You Think*, HUFFPOST, (updated Feb. 11, 2017), https://www.huffingtonpost.com/julie-kantor/high-turnover-costs-way-more-than-you-think_b_9197238.html.

40. *Employee Retention*, *supra* note 36.

41. *Id.*

42. *Id.* The 2014 Training Industry Report from Training Magazine sets the annual training budgets for small businesses at \$1,200.00 per employee. Tess C.

high cost of turnover, most companies do not know how much turnover costs their company and don't even try to figure it out.⁴³

Controlling turnover and limiting postemployment opportunities has the effect of maintaining a stable workforce, thus reducing turnover and the costs associated with it.⁴⁴ However, controlling turnover is not recognized by most courts in the United States as a protectable legitimate business interest that would justify the use of NCAs.⁴⁵ Without a judicially recognized protectable business interest, the use of NCAs is neither legitimate nor in good faith under current law. In fact, the recent phenomenon of using NCAs to tie low wage workers to a job has even been described as a form of modern-day slavery and violative of Thirteenth Amendment rights against involuntary servitude.⁴⁶

II. HOW NON-COMPETES HAVE BEEN REGULATED

A. Antitrust Laws and Regulation at the Federal Level

Taylor, *The Costs of Training New Employees, Including Hidden Expenses*, FORBES, (June 2, 2017, 5:09 PM), <https://www.forbes.com/sites/adp/2017/06/02/the-costs-of-training-new-employees-including-hidden-expenses/#6f6be1bbafb2>.

43. Jack Altman, *How Much Does Employee Turnover Really Cost?*, HUFFPOST, (updated Jan. 19, 2017), https://www.huffingtonpost.com/entry/how-much-does-employee-turnover-really-cost_us_587fbaf9e4b0474ad4874fb7 [hereinafter *How Much Does Employee Turnover Really Cost?*].

44. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 10.

45. BDO Seidman, 93 N.Y.2d at 389–93. In fact, a review of Russell Beck's *Employee Noncompetes, A State by State Survey* does not indicate a single state that recognizes controlling turnover as a legitimate business interest, although AL, AK, AR, CO, DC, FL, GA, IN, KS, KY, LA, PA, RI, TN, TX, UT, VT recognize some investments in training. Russell Beck, Beck, Reed Riden LLP, *Employee Noncompetes, A State By State Survey*, FAIR COMPETITION LAW (Oct. 21, 2019), <https://www.faircompetitionlaw.com/2019/10/21/50-state-noncompete-chart-updated-october-2019-fl-me-md-nh-or-ri-wa/> [hereinafter *Beck's State By State Survey*].

46. See, e.g., Ayesha Bell Hardaway, *The Paradox of the Right to Contract: Non-compete Agreements as Thirteenth Amendment Violations*, 39 SEATTLE U. L. REV. 957 (2016).

There is no current federal law that prohibits or places restrictions on the use of NCAs. However, there have been efforts to use antitrust laws to defeat the enforceability of NCAs, though they have not been widely accepted. For example, Jonathan Pollard, a Florida attorney specializing in litigating complex non-compete, trade secret, trademark and unfair competition cases, believes that “virtually all non-compete agreements [are] illegal restraints on trade”⁴⁷ and that the agreements should be evaluated as restraints on trade subject to antitrust scrutiny.⁴⁸ He has tried to use Florida state antitrust law to defeat enforceability, but finds that antitrust arguments have not gained traction in Florida state trial courts. Pollard asserts that “the vast majority of judges are completely unfamiliar with the antitrust principles that underlie Florida law” and “simply do not understand the law’s origins.”⁴⁹ Indeed, in response to Pollard’s antitrust arguments, one federal judge stated: “You might have something with this antitrust but I don’t know.”⁵⁰

In *Newburger, Loeb & Co., Inc. v. Gross*,⁵¹ the United States Court of Appeals for the Second Circuit had this to say about the use of the Sherman Act⁵² in non-compete cases:

In affirming the district court, we need not pass upon the general applicability of the federal antitrust laws to postemployment restraints. Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper

47. Jonathan Pollard, *Non-Compete News & Notes—August 2018*, THE NON-COMPETE BLOG, (Aug. 24, 2018) <https://thenoncompeteblog.com/2018/08/24/non-compete-news-notes-august-2018/>.

48. Jonathan Pollard, *9th Circuit: Non-Competes Subject to Antitrust Analysis*, THE NON-COMPETE BLOG, (Apr. 2, 2017), <https://thenoncompeteblog.com/2017/04/02/9th-circuit-non-competes-subject-to-antitrust-analysis/>.

49. Jonathan Pollard, *Monopolists & Non-Compete Agreements*, THE NON-COMPETE BLOG, (Apr. 6, 2017), <https://thenoncompeteblog.com/2017/04/06/monopolists-non-compete-agreements/>.

50. *Id.*

51. *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082 (2d Cir. 1977).

52. 15 U.S.C. §§ 1–7 (2012).

subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired.⁵³

Moreover, employee-noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry.

The Court explained that “[r]estraints on postemployment competition that serve no legitimate purpose at the time they are adopted would be per se invalid” under the Sherman Act and that “even if the clause is not overbroad per se, it might still be scrutinized for unreasonableness... Restraints that fail this balancing test might be struck down under a rule of reason.”⁵⁴ However, the balancing test can be difficult for courts to administer and lead to inconsistent results. The complex nature of this judicial analysis has been recently criticized by the Federal Trade Commission (FTC).

In his Comment on Competition and Consumer Protection in the 21st Century, Federal Trade Commissioner Rohit Chopra provides an illustrative and informative discussion on the role of the FTC in promoting fair competition and the current state of antitrust law.⁵⁵ He explains that antitrust law today is “developed exclusively through adjudication,” which requires judges to perform analyses that call for speculation and the application of “complex antitrust standards” that are difficult to administer.⁵⁶ This yields unpredictable and inconsistent

53. See Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 627 (1960).

54. Newburger, 563 F.2d at 1082.

55. See Comment of Rohit Chopra, Comm’r, Fed. Trade Comm’n, *Comment on Competition and Consumer Protection in the 21st Century*, Docket ID FTC-2018-0074 (Sept. 6, 2018), https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf.

56. *Id.* at 2.

results.⁵⁷ In addition, antitrust litigation is “protracted and expensive, requiring extensive and costly expert analysis,”⁵⁸ and “lacks adequate democratic participation”⁵⁹ because “broad swaths of market participants” are left on the sidelines.⁶⁰

To address these shortcomings, Chopra suggests that FTC rulemaking (1) allows the FTC to provide clear notice to market participants that respects due process considerations; (2) helps alleviate issues tied to adjudication, such as the protracted and costly nature of a legal remedy; and (3) facilitates a process that gives the public a voice and mechanism by which to be heard before any rule is issued.⁶¹ To support FTC rulemaking, Chopra posits that there are “areas where private litigation is unlikely to discipline anticompetitive conduct” and he uses the example of NCAs to make his point.⁶² The Commissioner argues:

In theory, workers could bring a lawsuit alleging that certain noncompete clauses are anticompetitive under the Sherman Act. In practice, however, private litigation in this area is effectively nonexistent . . . Any challenges must be pursued in isolation Given the paucity of private litigation challenging noncompete agreements as antitrust violations, the FTC might consider engaging in rulemaking on this issue. A rule could remove any ambiguity as to when noncompete agreements are permissible or not. Pursuing this through rulemaking might be far speedier—and fair—than engaging in enforcement activities.”⁶³

Chopra concludes that “the status quo suffers from

57. *Id.* at 5.

58. *Id.* at 2.

59. *Id.* at 4.

60. *Id.*

61. *Id.* at 5. Chopra explains that this would advance Congress’ intention that the FTC collect data regarding business practices from market participants, use the data to identify market trends, and “establish market-wide standards clarifying what practices constitute[] an “unfair method of competition.”

62. *Id.* at 10.

63. *Id.*

ambiguity, resource burden, and a deficit of democratic participation”⁶⁴ and “urge[s] interested parties to explore whether and how rulemaking might lead to antitrust policy that is more predictable, efficient, and participatory.”⁶⁵ FTC rulemaking may, in the future, have favorable results for employees and provide much needed guidance to employers. In the meantime, the bulk of NCA regulation has been left to the states.

B. *States as Regulators*

Like most contract issues, NCAs have largely been left to the states to regulate.⁶⁶ The employment relationship is fundamentally contractual because employment terms are fixed by an agreement between the parties.⁶⁷ Because contract law rules apply, the agreement must be supported by adequate consideration.⁶⁸ In most states, the offer of at-will employment is sufficient consideration for an enforceable contract,⁶⁹ but some states require additional consideration.⁷⁰ Depending on the state, additional consideration might be a promise to provide confidential information or specialized training, stock options, or garden leave.⁷¹ A garden leave provision is an agreement that an employer will continue to pay an employee after termination of the employment relationship so long as the employee

64. *Id.* at 2.

65. *Id.* at 11.

66. J.J. Prescott, et al., *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 393 (2016).

67. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 380 (Dec. 2016).

68. Griffith Practice Note, *supra* note 1.

69. *Id.*

70. *Id.*

71. *Id.*; Angie Davis, et al., *Developing Trends in Non-Compete Agreements and Other Restrictive Covenants*, 30 A.B.A J. LAB. & EMP. L. 255, 267 (2015).

provides notice of termination in accordance with the agreed upon terms and refrains from working for a competitor during the payment period.⁷² Additional consideration is one tool that can be used to attract candidates to open positions and provide compensation for forfeited postemployment opportunities.

To protect employees from the harsh results of limited postemployment opportunities, some states have passed a variety of legislation limiting or prohibiting the use of NCAs.⁷³ For example, Connecticut, Maine, Massachusetts, New York and Washington have laws restricting use of NCAs in the broadcast industry.⁷⁴ Connecticut prohibits the use of NCAs for security guards.⁷⁵ Tennessee and New Mexico are two states that have placed restrictions on the use of NCAs for health care providers.⁷⁶ Laws in New Hampshire require disclosures of NCAs prior to acceptance of an offer of employment, while Oregon requires disclosure at least two weeks before the first day of employment.⁷⁷ Laws in North Dakota and Montana prohibit the use of NCAs except in regard to the sale or dissolution of a business.⁷⁸

There has also been some successful recent state legislation limiting non-compete use. For example, Illinois successfully passed legislation banning the use of NCAs for low wage earners. The Freedom to Work Act applies to NCAs entered into on or after Jan. 1, 2017 and prohibits private employers for entering into NCAs with low wage workers

72. Davis, et al, *supra* note 71, at 267.

73. For a summary of the current law in each state, see Non-Compete Agreements, 0060 SURVEYS 23, 50 *State Statutory Surveys: Employment: Private Employment*, (Nov. 2017) Westlaw; see also Beck's *State By State Survey*, *supra* note 48.

74. Non-Compete Agreements, *supra* note 73.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

making less than \$13 per hour or minimum wage, whichever is greater.⁷⁹

On October 1, 2018, the Massachusetts Noncompetition Agreement Act went into effect, placing limitations and requirements on the use of NCAs, including prohibiting the agreements for employees classified as nonexempt under the Fair Labor Standards Act,⁸⁰ undergraduate or graduate student internships, employees laid off or fired without cause and employees under 18 years of age.⁸¹ There is no specific prohibition for low wage workers, but there is a requirement that a NCA be supported by garden-leave or other agreed upon consideration.⁸²

79. Illinois General Assembly, Illinois Compiled Statutes, Illinois Freedom to Work Act (820 Ill. Comp. Stat. Ann. 90/1), <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3737&ChapterID=68>.

80. 29 U.S.C. §§ 213(a)(1)–(19) (2012) delineate the classes of employees that are exempt from the protections under the FLSA, such as, for example, “any employee employed in a bona fide executive, administrative, or professional capacity,” or “in the capacity of outside salesman,” or “any employee employed in connection with the publication of any . . . newspaper” with a limited circulation. Most employees are non-exempt and are entitled to paid overtime. Employees paid less than \$23,600.00 per year, hourly employees, and employees that do not work in the areas delineated under the FLSA are non-exempt.

81. MGL c.149, § 24L, (added by St. 2018, c.228, § 21) <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter228>; Erik J. Winton and Colin A. Thakkar, *Massachusetts Legislature (Finally) Passes Non-Compete Law*, (Aug. 1, 2018), <https://www.jacksonlewis.com/publication/massachusetts-legislature-finally-passes-non-compete-law>; see also Melissa L. McDonagh and Kevin E. Burke, *Massachusetts Legislature Passes Comprehensive Noncompete Reform*, (Aug. 2, 2018), <https://www.littler.com/publication-press/publication/massachusetts-legislature-passes-comprehensive-noncompete-reform>. Massachusetts also has laws prohibiting the use of non-compete agreements for certain professions. See <https://www.mass.gov/info-details/massachusetts-law-about-noncompetition-agreements>.

82. MGL c.149, § 24L, (added by St. 2018, c.228, § 21) <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter228>; See also Beck, Reed, Riden, LLP, *Massachusetts Noncompete and Trade Secret Reform Has Arrived: What You Need to Know*, FAIR COMPETITION LAW, (Aug.1, 2018), <https://www.faircompetitionlaw.com/2018/08/01/massachusetts-noncompete-and-trade-secret-reform-has-arrived-what-you-need-to-know/>.

C. *General Trends and Judicial Doctrines*

In addition to a variety of state-specific legislative approaches to the issue, state courts have adopted their own state-specific interpretations of the law on NCAs. For example, some states are “high enforcing” states, which means the courts in the state are more likely to enforce the NCA, and others are “low” or “nonenforcing” states.⁸³ Some courts will reform an unreasonable contract and others will find it unenforceable or void.⁸⁴

The judicial decision to enforce an agreement that contains an unreasonable covenant depends on which doctrine the state court has adopted. Courts have three options when dealing with terms they deem unreasonable: (1) throw the entire contract out, including reasonable terms and provisions (red-pencil rule); (2) strike out only the offensive provisions of the contract (blue-pencil rule); or (3) reform the contract to make the terms reasonable⁸⁵ (the reformation or “purple-rule” doctrine).⁸⁶ While the red-pencil rule is a harsh remedy, it would encourage employers to draft only reasonable agreements for fear that the entire contract would be voided if any part is found invalid. The other rules do not serve to discourage employers from including unreasonable terms in an NCA, but they ensure employer

83. *Consider This*, *supra* note 18, at 9-10, 51, 53. For example, Florida, Kansas, and Connecticut are considered high enforcement states while California, North Dakota, and New York are considered low enforcement states.

84. *Beck's State By State Survey*, *supra* note 45 (providing a comprehensive list of states and the applicable restrictions).

85. Andrew P. Torrez, *Of Red and Blue Pencils: Three Ways in Which States Can Respond to Defective Noncompete Clauses*, (May 1, 2014), <https://www.zuckerman.com/news/blog/red-and-blue-pencils-three-ways-which-states-can-respond-defective-noncompete-clauses>.

86. Hannesson Murphy, *How the 50 States Differ on Revising Non-Competes: Different Strokes for Different Folks (or Red, Blue and Purple-Pencil America)*, (Jan. 5, 2014), THE NATIONAL LAW REVIEW, <https://www.natlawreview.com/article/how-50-states-differ-revising-non-competes-different-strokes-different-folks-or-red->.

protection in cases where an NCA has been poorly drafted.

More than 30 states have adopted the practice of contract reformation, including Massachusetts, New York, New Jersey, and Tennessee.⁸⁷ About a dozen states strike out the unreasonable provisions while leaving the remainder of the contract intact, under the blue-pencil rule, while the red-pencil rule remains largely unapplied by state courts.⁸⁸

An employee can challenge the validity and enforceability of an NCA and there are a variety of causes of action available to do so. For example, courts may consider various claims such as tortious interference,⁸⁹ intentional infliction of emotional distress, breach by the employer, fraudulent misrepresentation, unconscionability, bad faith, duress, lack of capacity, or coercion.⁹⁰ While employees do have causes of action available to them, many lack the resources to fund a lawsuit.

D. *The New York Example*

With each state taking its own unique approach to NCAs, it may be helpful to take a closer look at how one state has attacked the issue. Since it is my intention to present a proposed bill for New York State, the following is a picture of the existing state of non-compete law in New York.

Currently, New York State has taken limited steps to restrict the use of NCAs. New York Labor Law Sec. 202-k prohibits the use of NCAs for employees in the broadcast industry,⁹¹ but legislation was proposed in the 2017 session to amend Section 202-k to allow the agreements for “key”

87. *Beck's State By State Survey*, *supra* note 45.

88. *Beck's State By State Survey*, *supra* note 45.

89. *NBT Bancorp, Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 N.Y.2d 614, 621 (1996).

90. Griffith Practice Note, *supra* note 1. This is not an exhaustive list of available defenses.

91. N.Y. Lab. Law § 202-k (McKinney 2019).

employees in the industry.⁹² There is currently no state law that prohibits the use of NCAs in the low wage sector.

In New York courts, NCAs “are not favored and thus are strictly construed”⁹³ because of the “powerful considerations of public policy which militate against sanctioning the loss of a [person’s] livelihood.”⁹⁴ Indeed, courts in the State are at the lowest end of the enforcement spectrum out-ranked only by California and North Dakota.⁹⁵ New York courts have ruled against enforceability of terms that are onerous⁹⁶ or overbroad,⁹⁷ but they have not considered the specific issue of the enforceability of a non-compete against a low wage earner.

BDO Seidman v. Hirshberg is the often-cited New York Court of Appeals case on the standards of enforcing NCAs in New York.⁹⁸ In *BDO*, the Defendant was employed by the Plaintiff as an accountant and was required to sign an NCA as a condition of promotion.⁹⁹ The NCA contained a provision requiring the Defendant to pay BDO “1 ½ times the last annual billing for any such client” in the event that the Defendant provided services for any BDO client within 18 months of termination of employment.¹⁰⁰ Approximately four

92. A5102/S521 would amend 202-k to allow non-competes for employees making \$250,000.00 or more from an employer licensed in a city with a population in excess of 1 million, or an employee making \$100,000.00 or more from an employer licensed in a city with a population of less than 1 million. <https://assembly.state.ny.us/leg/?bn=+a5102>.

93. *Goodman v. N.Y. Oncology Hematology, P.C.*, 101 A.D.3d 1524, 1526 (N.Y. App. Div. 2012).

94. *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 370 (2015), (quoting *Gramercy Park Animal Ctr. v. Novick*, 41 N.Y.2d 874, 874).

95. *Consider This*, *supra* note 18, at 51.

96. *Goodman*, 101 A.D.3d at 1528.

97. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388 (1999).

98. *Id.* at 382.

99. *Id.* at 387.

100. *Id.*

months after signing the NCA, the Defendant resigned and allegedly took with him 100 BDO clients.¹⁰¹ BDO attempted to recover lost revenue pursuant to the NCA, but the Defendant denied serving some of the clients and argued that a “substantial number of them were personal clients he had brought to the firm through his own outside contacts.”¹⁰² When the Defendant refused to pay the allegedly lost revenue, BDO sued to recover under the contract.¹⁰³

Referring to the standard of reasonableness for NCAs announced in the English court case *Mitchel v. Reynolds*, the Court of Appeals discussed the “modern, prevailing common-law standard of reasonableness in determining the validity of employee agreements not to compete.”¹⁰⁴ The Court explained that an employment restraint is reasonable “only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.”¹⁰⁵ Reasonableness “focuses on the particular facts and circumstances” of each case.¹⁰⁶ If a contract violates any prong of the reasonableness test, it is rendered invalid.¹⁰⁷

New York courts require the employer to prove all three prongs of the test before the burden shifts to the employee to show that the restraint is overbroad or unnecessary.¹⁰⁸

101. *Id.*

102. *Id.* at 388.

103. *Id.* at 387.

104. *Id.* at 388.

105. *Id.* at 388–89. These criteria are used by other courts as well, for example, Illinois, New Hampshire, New Jersey, Ohio, Tennessee, Vermont, and Wyoming. *Beck’s State By State Survey*, *supra* note 45.

106. *BDO Seideman*, 93 N.Y.2d at 390.

107. *Id.* at 388–89.

108. *Brown & Brown, Inc. v. Johnson*, 25 N.Y.3d 364, 369–70 (2015). This case points out the difference between the burden shift in New York and Florida, with New York’s standard being the more employee-friendly of the two. The Court also

Under the first prong, legitimate employer interests are limited to: (1) protection from competition by a former employee whose services are unique or extraordinary; (2) protection against the misappropriation of trade secrets or confidential customer lists; and (3) protection against appropriating the goodwill of clients or customers.¹⁰⁹

In *BDO*, the Court of Appeals reversed the Appellate Division's decision voiding the entire covenant and declining partial enforcement and dismissed concerns that "employers will use their superior bargaining position to impose unreasonable anti-competitive restrictions, uninhibited by the risk that a court will void the entire agreement."¹¹⁰ The Court rejected a per se rule invalidating an overbroad agreement,¹¹¹ adopting, instead, a case-by-case approach focusing on the conduct of the employer in which partial enforcement could be justified if the employer "demonstrates an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing."¹¹² The *BDO* Court held that the facts justified partial enforcement, finding no coercion, a "general plan to forestall competition," or bad faith.¹¹³

found the agreement's choice of Florida law as contrary to New York public policy and unenforceable.

109. *BDO Seidman*, 93 N.Y.2d at 389–93.

110. *Id.* at 394.

111. *Id.*

112. *Id.*

113. *Id.* at 395; *see also* *Mister Softee, Inc. v. Tsirkos*, 14 Civ. 1975 (LTS)(RLE), 2014 WL 2535114, at *9 (S.D.N.Y. 2014) ("Under New York law, a court may partially enforce an overly broad non-compete covenant if plaintiff sought to protect a legitimate business interest . . . New York has rejected strict divisibility, or "blue-pencil" requirement, instead embracing flexible partial enforcement of restrictive covenants. However, a court should not attempt to partially enforce a non-compete provision where its infirmities are so numerous that the court would be required to rewrite the entire provision.") (internal quotations and citations omitted).

The issue of employer bad faith resurfaced recently in *Long Is. Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hosp.*, where the New York Supreme Court, Appellate Division, Second Department affirmed a Nassau County Supreme Court decision to invalidate an employment covenant rather than modify it.¹¹⁴ In *St. John's*, an action was commenced to recover damages for breach of an employment contract.¹¹⁵ Plaintiff, a medical practice, and Defendant, Dr. Andrade, entered into a three-year employment contract that contained a non-compete clause barring Andrade from performing any kind of surgery for two years within 10 miles of any of Plaintiff's offices and affiliated hospitals.¹¹⁶ The Plaintiff failed to demonstrate that a 10-mile restriction was necessary to protect its interests.¹¹⁷ Rather than modify the covenant, the lower court opted to throw it out.¹¹⁸ The Appellate Court acknowledged that courts have "given greater weight to the interests of the employer"¹¹⁹ when considering contracts between professionals, yet found the restriction unreasonable and questioned the Plaintiff's good faith in attempting to enforce it.¹²⁰ The court found that applying "the factors set forth in *BDO Seidman* militates against partial enforcement" where plaintiff failed to demonstrate anticompetitive misconduct, was seeking to impose an overbroad covenant and used its superior bargaining position in refusing to negotiate terms while compelling the employee to sign the contract.¹²¹

114. *Long Is. Minimally Invasive Surgery, P.C. v. St. John's Episcopal Hosp.*, 164 A.D.3d 575 (N.Y. App. Div. 2018).

115. *Id.*

116. *Id.* at 576.

117. *Id.* at 577.

118. *Id.* at 578.

119. *Id.* at 577.

120. *Id.* at 578.

121. *Id.*

The necessity of demonstrating a legitimate business interest and reasonable postemployment limitations was recently discussed in *Hoffman v. Raftopol*.¹²² The Plaintiff, a dermatologist, moved for an injunction against a former physician's assistant (P.A.) for violating an NCA that prohibited the P.A. from taking a position within 2 years from termination in a 15 mile radius from Plaintiff's office.¹²³ The court considered use of NCAs in the health care industry, but found "the more difficult question" to be whether the restriction protects "the legitimate interest of the employer."¹²⁴ Quoting from the New York Court of Appeals case *Columbia Ribbon & Carbon Mfg.*, the court acknowledged that NCAs will be enforced "only if reasonably limited temporally and geographically, and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists."¹²⁵ In *Hoffman*, the Plaintiff failed to demonstrate a legitimate interest in preventing her former employee from working within a 15 mile radius of her office. Consequently, the Court limited injunctive relief to enjoining the P.A. from soliciting Plaintiff's clients for 2 years.¹²⁶

These 2018 cases did not involve low wage employees, but they offer insight regarding the necessity of the employer to act in good faith and demonstrate a legitimate interest in preventing the employee's competition. These cases illustrate the uphill battle employers face in New York courts and other low-enforcement states should they either try to enforce an NCA against an employee who poses no risk of

122. 2018 NY Slip Op 50020(U), 58 Misc.3d 1209(A) (N.Y. Sup. Ct. Jan. 10, 2018).

123. *Id.* at *1-2.

124. *Id.* at *6.

125. *Id.* at *7, (quoting *Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.*, 42 N.Y.2d 496, 499 (1977)) (emphasis added).

126. *Id.* at *11.

unfair competition or impose overreaching restrictions that are not necessary to protect legitimate business interests.

For those who elect to challenge the validity of an NCA in New York, the first line of offense is to attack the contract itself by reading its plain language. Has the employee in fact violated the terms of the contract or is the employer trying to expand the scope or purposely misinterpret the terms? Is the restrictive covenant reasonable in scope as to time and geography or is it overreaching as in the Amazon and Jimmy John's cases? Is it unduly burdensome to the employee or harmful to the public as in *St. John's* and *Hoffman*? Is the employer trying to protect a legitimate business interest or merely preventing fair competition and reduce training costs? Will enforcement create a bar to employment for the employee or will the employee still be able to make a living in his or her area of expertise? The terms of the NCA should be no more restrictive than necessary to protect the employer's *legitimate* business interests from *unfair* competition.

III. INCIDENCE, BENEFITS AND COSTS OF NON-COMPETE AGREEMENTS

A. *Incidence of Non-Compete Use*

The use of NCAs has flourished since the 1400's. Research conducted by Evan Starr, JJ Prescott, and Norman Bishara ("Starr U.S. Labor Force Report") suggests that nearly one in five workers in the U.S. (18.1%) are employed under NCAs.¹²⁷ While more prevalent in certain high-skilled occupations, NCAs are commonly found in many other industries. The Starr U.S. Labor Force Report breaks down the incidence of NCAs by occupation, annual earnings, and education.¹²⁸ The occupational analysis reveals the

127. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 14.

128. *Id.*

percentage of employees in a given industry who have signed an NCA: engineering and architectural (36%), computer and mathematical (35%), business and financial (23%), and managerial (30%). Yet even employees in occupations such as office support (14%), food preparation (11%), production (16%), and legal occupations (10%) sign NCAs.¹²⁹

The annual earnings analysis reveals that 13.5% of low wage earners making no more than \$40,000.00 per year are currently bound by an NCA.¹³⁰ That means approximately 5.5 million American low wage workers have signed an NCA.¹³¹ Notwithstanding the millions of workers bound by non-competes, this author could find no litigated case filed by a low wage employee to challenge the legitimacy of an NCA. This author speculates that this is the case because (1) employees lack the incentive or financial resources to risk legal action and (a) are sufficiently chilled when served with a cease and desist letter or (b) negotiate a settlement with their employer, even if the agreement is not legally enforceable. The paucity of cases filed by employers to enforce NCAs against low wage workers leads this author to the conclusion that employers have no intention of taking legal action NCAs against low-wage employees and rely on the agreements solely as a scare tactic to control turnover or limit fair competition.¹³²

The education analysis finds that 12% of respondents without a bachelor's degree and earning less than \$40,000.00

129. *Consider This*, *supra* note 18, at 40.

130. *Id.* at 15.

131. SOC. SEC. ADMIN., SOCIAL SECURITY WAGE STATISTICS FOR 2018, <https://www.ssa.gov/cgi-bin/netcomp.cgi?year=2018>. Approximately 40,794,371 workers fall in the \$20–40,000.00 income bracket. This figure is 13.5% of that number.

132. I speculate this is because employers have no intention of enforcing the agreements, possibly because (1) their legal counsel has advised against it; (2) legal fees and costs make enforcement impracticable; (3) for fear of public backlash or judicial admonition; or (4) because the chilling effect created by use obviates the need for litigation.

annually have signed an NCA,¹³³ while 34.7% of respondents without a four-year degree reported to having signed an NCA at some point in the past and 14.3% reported currently being bound by an NCA.¹³⁴ A 2016 Report from the U.S. Department of the Treasury, Office of Economic Policy, (“2016 OEP Report”) found that the percentage of employees working under an NCA is nearly the same for those without a four-year degree as it is for all other workers.¹³⁵

The 2016 OEP Report also discusses the incidence of NCAs.¹³⁶ The Report offers explanations for why NCAs are used in sectors where trade secrets are not at issue: (1) the agreements provide assurance to an employer that “workers are unlikely to leave for some period of time, allowing the firm to capture more of the increased productivity from costly training it provides, and workers receive more training than they would otherwise;” (2) the agreements allow employers to hire employees who do not expect to leave imminently; (3) employees do not pay attention to non-compete agreements and are not aware of the rights they are giving up; (4) employees were not presented with the agreement until they accepted the job offer.¹³⁷

With nearly 20% of all workers bound by an NCA and over 10% of low wage workers restricted by the agreements, the question is whether employers are using them to protect legitimate business interests or if employers are using them to control turnover and fair competition.

B. *Benefits of Non-Compete Use*

In addition to serving their original purpose of protecting

133. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 3.

134. *Id.* at 15.

135. OEP Report, *supra* note 5, at 11.

136. *Id.*

137. *Id.* at 8–9.

an employer against direct competition by a former employee, NCAs can also protect an employer's trade secrets, confidential information, and investments in specialized training.¹³⁸ This willingness to allocate company assets to training may be due to the assurance that the employee will be either unlikely to leave the company,¹³⁹ or, if the employee does leave he or she will be contractually barred from accepting employment with a competing firm.¹⁴⁰

The 2016 OEP Report focuses on the economic effects of non-compete contracts on individual workers and society as a whole.¹⁴¹ The Report acknowledges the potential social benefits of the agreements: 1. protection of trade secrets; 2. greater employer incentive to provide costly training; and 3. identification of workers looking for long-term employment opportunities.¹⁴²

In some cases, NCAs may also benefit an employee through additional training, higher wages, and might even include compensation after termination of the employment relationship.¹⁴³ A low wage worker with access to trade

138. Griffith Practice Note, *supra* note 1; see also Bridget Miller, *Pros and Cons of Noncompete Agreements*, HR DAILY ADVISOR, (Apr. 30, 2014), <https://hrdailyadvisor.blr.com/2014/04/30/pros-and-cons-of-noncompete-agreements/>.

139. OEP Report, *supra* note 5, at 8. "In general, firms are reluctant to pay for training that improves a worker's 'general' skills and makes her more valuable to it and other firms alike. Economists usually think of general training as occurring when workers accept wage cuts to compensate their employer for its expenses in providing training. For various practical reasons, however, workers may be unwilling to pay for training."

140. Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 Or. L. Rev. 1163, 1203–04 (2001) ("[D]espite the strategic importance of cultivating internal talent, employers may not make such investments for fear that their efforts will merely aid the competition.").

141. OEP Report, *supra* note 5, at 3–8.

142. *Id.* at 3.

143. Griffith Practice Note, *supra* note 1; see also Bridget Miller, *Pros and Cons of Noncompete Agreements*, HR DAILY ADVISOR, (Apr. 30, 2014), <https://hrdailyadvisor.blr.com/2014/04/30/pros-and-cons-of-noncompete-agreements/>;

secrets, if such an employee exists, may benefit from additional training because an employer with some guaranteed return on their investment is more motivated to expend resources on training.¹⁴⁴ Professor Evan Starr explains that research shows employees in high enforcing states are more likely to receive firm sponsored training.¹⁴⁵ However, this is affected by timing. According to data gathered by Starr, employees who signed an NCA prior to taking a job reported an 11% increase in training over employees who signed after taking a job.¹⁴⁶ Approximately 6% of respondents indicated that they were promised training in exchange for signing an NCA¹⁴⁷ and the data suggests that NCAs entered into in highly enforceable states are associated with more training.¹⁴⁸ However, in the absence of equal bargaining power, employee-respondents reported that they received no compensation in wages or training for signing the agreement.¹⁴⁹

Starr concludes that firms respond to the increased protection of their confidential information by providing more training to their employees.¹⁵⁰ While employees in highly enforceable or “high use” states have a higher probability of training opportunities (30%), so too do “low use” employees see a rise in training, but at a lower rate

According to Starr’s data, when non-compete agreements are signed before accepting a job offer, respondents reported 9.7% higher wages. *Noncompetes in the U.S. Labor Force*, supra note 5, at 3. However, when signed after taking the job, employees did not receive a training benefit. *Id.* By contrast, the OEP Report found lower wage growth and lower wages in highly enforcing states. OEP Report, supra note 5, at 19.

144. OEP Report, supra note 5, at 3.

145. *Consider This*, supra note 18, at 26–27.

146. *Noncompetes in the U.S. Labor Force*, supra note 5, at 3.

147. *Id.* at 27.

148. *Id.* at 29.

149. *Id.* at 32.

150. *Consider This*, supra note 18, at 8, fn13.

(16%).¹⁵¹ In addition, low use employees see more basic training (32%) than their high use counterparts (25%), and see less training to upgrade skills (69%) than their high use counterparts (74%).¹⁵²

Another benefit of NCAs is that they may add value to a company considering a sale, merger, or acquisition.¹⁵³ However, some courts have held that changes in ownership change the identity of the employer, which requires a new agreement and renders the original NCA void.¹⁵⁴

Finally, in addition to additional training and fostering client confidence,¹⁵⁵ NCAs can provide a sense of job security and reassurance to co-workers who do not have to worry about fellow employees unfairly competing against them. Some employees take comfort in knowing that their coworkers' postemployment opportunities will not endanger their jobs.

C. Costs Associated with Non-Compete Agreements

151. *Id.* at 41.

152. *Id.*

153. Michael R. Greco, *8 Reasons Why Small Businesses Should Use Non-Compete Agreements*, TLNT, (June 5, 2012), <https://www.tlnt.com/8-reasons-why-small-businesses-should-use-non-compete-agreements/> [hereinafter "*8 Reasons*"]. For example, in *Pino v. Spanish Broad. Sys of Fla., Inc.*, 564 So.2d 186, 189, (Fla. Dist. Ct. App. 1990), the court held that an assignable or transferrable employment contract that includes a non-compete can be enforced by the purchaser against the employee. In *Great American Opportunities, Inc. v. Cherrydale Fundraising, LLC*, the court held that that "absent specific language prohibiting assignment, noncompete covenants, even though part of a personal service contract, remain enforceable by an assignee when transferred to the assignee as part of a sale or transfer of business assets regardless of whether the employment contract contains a clause expressly authorizing such assignability, so long as the assignee engages in the same business as the assignor." No. 3718-VCP, 2010 WL 338219 (Del. Ch. Jan. 29, 2010).

154. For example, Massachusetts law requires a new agreement when the employment relationship undergoes a "material change." Griffith Practice Note, *supra* note 1.

155. *8 Reasons*, *supra* note 151.

1. Bargaining Power Forfeited, Lower Wages, and Reduced Job Satisfaction

Also identified in the 2016 OEP Report are the costs associated with NCAs. For example, agreements not to compete forfeit an employee's bargaining power¹⁵⁶ and can result in lower wages.¹⁵⁷ This is because an employee who is bound by an NCA may have limited prospective employment opportunities and the agreement may effectively tie him or her to a current position for which the employee is overqualified. Having no good employment options in his or her field of expertise, an employee lacks the leverage necessary to negotiate better employment terms with the employer, such as a wage increase or a better benefit package.¹⁵⁸

Timing can limit an employee's bargaining position. One survey cited in the 2016 OEP Report found that in 70% of cases, the employee was asked to sign the NCA *after* declining other offers of employment, and in almost 50% of cases, the agreement was not disclosed until or after the employee's first day on the job.¹⁵⁹ This lack of transparency has a direct impact on the employer/employee relationship. Employees asked to sign an NCA after accepting an employment offer are 12.5% less satisfied with their job and experience no wage and training benefits.¹⁶⁰ By contrast, employees who sign prior to accepting a job offer and have alternative employment options earn 9.7% higher wages, are

156. OEP Report, *supra* note 5, at 9.

157. *Id.* at 19.

158. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 18–19. Starr reports that negotiation over noncompetes is rare, with 10% of those surveyed attempting to negotiate terms. He finds, however, a difference in negotiating depending on timing, with more employees attempting to negotiate if the agreement is presented prior to accepting a job offer than after acceptance.

159. Compare OEP Report, *supra* note 5, at 12–13, with *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 18 (61% of individuals with non-competes first learned they would be asked to sign before accepting job offer).

160. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 3.

11% more likely than average to receive training and are 6.6% more likely to be satisfied in their employment.¹⁶¹

In addition, there are other situations in which NCAs lead to lower wages, depressed wage growth, less disposable income, and fewer opportunities to improve one's social-economic station.¹⁶² For instance, an employee bound by an NCA may be forced to take a job outside his or her area of expertise, to comply with contract terms or to err on the side of caution by declining a job opportunity in order to avoid a breach. Or, he or she may be willing to take a position at a much lower wage than other prospective candidates.¹⁶³ Aside from the obvious negative impact this has on the affected employee and his or her family, it also has a negative impact on other employees in that field by keeping wages in that industry lower than they otherwise would be. Further, prospective candidates who refuse to agree to an NCA will be eliminated from the job pool, reducing the number of qualified candidates to "bid up" wages.¹⁶⁴

2. Impact on Job Creation, Recruitment & Mobility

Non-compete agreements may reduce job creation and result in fewer available jobs, thus reducing a worker's chance to find the best possible employment match.¹⁶⁵ This affects the whole of society because preventing workers from taking jobs that best suit their career goals reduces "job

161. *Id.* at 2, 25.

162. White House Report, *supra* note 5, at 6 (suggesting that high enforcement states "see lower wages in general, and that wage disparities between high and low enforcement states actually grow as workers age.").

163. Noah Smith, *Noncompete Agreements Take a Toll on the Economy*, BLOOMBERG OPINION, (Mar. 22, 2018), <https://www.bloomberg.com/view/articles/2018-03-22/noncompete-agreements-take-a-toll-on-the-economy>.

164. *Id.* See also *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 30 ("[W]ith early notice, employees may also be more careful in accepting the job from among their set of alternatives, thereby encouraging firms to compete for their services by offering better employment packages.").

165. OEP Report *supra* note 5, at 3–4.

churn” and lowers productivity.¹⁶⁶ Further, when an employee is prevented from working in his or her chosen field, which allows the employee to collect a paycheck and contribute to the tax base, he or she may have no alternative other than to file for unemployment or utilize other public support programs.

Additionally, recruiting efforts may be hampered because an employer is prevented from recruiting the best possible candidates to fill open positions.¹⁶⁷ This can happen when the very best candidates refuse to interview with a company that requires an NCA. Therefore, employers may be forced to hire less qualified or experienced workers leaving businesses with increased training expenses. Indeed, it is for these very reasons that some employers have never used or have eliminated use of non-competes.¹⁶⁸ Some companies have used their opposition to the agreements as a recruiting tool to entice interviewees with the ability to move their careers in a new direction at a time of interviewee’s choosing.¹⁶⁹

The importance of employee mobility cannot be understated. Allowing the employee to move on to better employment conditions benefits her as well as the employer and the worker who takes his or her place. This makes employee mobility a valuable commodity because it allows workers an opportunity to better their lives, creates employment opportunities for other workers, improves employee morale, keeps the employment pool fluid, helps employers fill ordinary positions, benefits society because skills are being used to their maximum potential, and works

166. *Id.* at 4. “Job churn helps to raise labor productivity by achieving a better matching of workers and firms.”

167. *Rethinking Non-compete Agreements*, *supra* note 4, at 63–64 (discussing the perspective of Josh James, CEO of Domo, that the agreements undercut his company’s ability to attract qualified workers).

168. *Id.* at 66.

169. *Id.* at 65.

well with at-will employment principles, which favor the ability of the parties to terminate employment at any time, for any reason.

Freedom of movement may be even more important to low wage workers than to their higher wage counterparts. A low wage worker may be quite willing to change jobs for a very small increase in his or her compensation as compared to higher wage workers who may be less likely to start over with a new employer. Consider a mere \$40/week raise. A highly compensated employee would likely see the raise as not substantial enough to justify changing jobs and starting over with a new employer. However, to the lower wage worker making \$25,000.00 annually, a \$2,080.00 annual increase is a significant raise (almost 10%) and could serve as sufficient motivation to change employment.¹⁷⁰

Some low wage workers may be especially vulnerable to the harsh realities of employment restraints. For example, school-aged employees and recent graduates paying off student loans need the ability to move from job to job without restraint and may not understand the implications of signing NCAs. If a student has loans, he or she may take the first job offer in retail or fast food that comes along just to save money for school or pay bills. A full-time student may be limited to sectors that offer part-time employment and needs the flexibility of changing jobs if a more lucrative opportunity presents itself.

3. The Chilling Effect and Unrealized Potential

Non-competes have the potential of forcing an employee to forgo using an acquired skill set or give up his or her chosen occupation under threat of legal action.¹⁷¹ This threat

170. This assumes 52 paid work weeks.

171. *How Noncompete Clauses Keep Workers Locked In*, *supra* note 15; Stephanie Russell-Craft, *I Learned the Hard Way Why Non-competes are Bad for Journalists*, COLUMBIA JOURNALISM REVIEW (June 16, 2017), https://www.cjr.org/business_of_news/non-compete-agreement-journalism.php

creates a chilling effect,¹⁷² causing an employee to remain in a job where he or she may be unhappy, unchallenged, and overqualified. Consequently, another employer is deprived of the employee's skill set, while the current employer retains an unhappy employee who may lack the proper motivation to perform to his or her potential. Dissatisfied and unhappy employees take a toll on a company by cultivating a negative work environment, discouraging co-workers from achieving their maximum potential, wasting management's time, and reducing profit margins.¹⁷³ Chilling also affects an employee's co-workers. When an employer litigates against a former employee in bad faith, co-workers can become fearful that they too will be sued if they resign their position even if the contract is unenforceable.

The chilling effect created by companies threatening to enforce an NCA is real and can be devastating. In an article about her own experience involving a non-compete that cost her a job with Reuters, Stephanie Russell-Kraft, a journalist, discusses the use of the non-compete by her former employer, Law360, a subsidiary of LexisNexis.¹⁷⁴ According to Russell-Craft, she was assured on her first day of work in 2013 that Law360 had never used the agreement to prevent an employee from taking another job.¹⁷⁵ Notwithstanding verbal representations, when she left Law360 in 2015 for a position at Reuters, Law360 sent a warning letter to Reuters, which prompted her termination.¹⁷⁶ Russell-Craft was told the NCA was probably illegal, but she lacked the funds to

[hereinafter "*I Learned the Hard Way*"].

172. *How Noncompete Clauses Keep Workers Locked In*, *supra* note 15; White House Report, *supra* note 5, at 11.

173. Richard Trevino II, *A Few Disgruntled Employees Can Destroy Your Company Culture*, *THE ENTREPRENEUR*, (Sept. 14, 2018), <https://www.entrepreneur.com/article/319065>.

174. *I Learned the Hard Way*, *supra* note 169.

175. *Id.*

176. *Id.*

prove it in court.¹⁷⁷ This is a clear example of the chilling effect that even unenforceable non-competes can have on employees. In her article, Russell-Kraft identified other media outlets that used the agreements, such as the social and video news company NowThis News,¹⁷⁸ the conservative website Independent Journal Review, and global media company Mashable.¹⁷⁹ Law360 reached an agreement in 2016 with the New York State Attorney General's Office, agreeing to stop the use of the agreements for its editorial employees.¹⁸⁰ This was of little help to Russell-Kraft, who had to settle for a much less attractive benefit package as a freelancer.¹⁸¹ Again, her experience provides a relatable example of the damaging effects of non-competes on employees and the whole of society.

For employees who have the funds to avail themselves of a legal remedy, it is important to keep in mind that, in most cases, the employee will have to retain an attorney and absorb the expense of fees and costs related to such legal action. An employee lacking the financial resources to commence an action or defend against one, like Russell-Craft, may likely be forced to cease and desist and forfeit her legal remedy. Even NCAs that are clearly overreaching and unenforceable can cause a chilling effect because employees simply lack the resources to obtain a declaratory judgment either striking the agreement entirely or modifying the unreasonable terms.

177. *Id.*

178. *Id.*; See also Cora Lewis, Steven Perlberg, *Now This Forbids Staff From Taking Jobs at Other News Outlets*, BUZZFEED NEWS, (updated June 9, 2017, 4:17 PM), <https://www.buzzfeednews.com/article/coralewis/nowthis-news-noncompete>.

179. *I Learned the Hard Way*, *supra* note 169.

180. Eric T. Schneiderman, *New York's attorney general has gotten Law360 to stop requiring non-compete agreements for its journalists* <https://www.niemanlab.org/reading/new-yorks-attorney-general-has-gotten-law360-to-abandon-non-compete-agreements-for-its-journalists/> (2016).

181. *I Learned the Hard Way*, *supra* note 169.

In other words, low wage workers who are the most likely workers to lack the financial means, support, or motivation obtain no benefit from available legal remedies because they lack the funds to consult and retain with counsel, or because they do not know there is a legal remedy available to them. In addition, taking offensive legal action against a former employer is risky for the employee because prospective employers may be discouraged from hiring the applicant for lack of references, for fear of future litigation, or due to a reputation damaged through rumors.¹⁸² Employees need to consider the public nature of a lawsuit and must weigh the risks against the benefits.¹⁸³

4. Unjust Enrichment

In the low wage sector, where NCAs are more often used to control turnover costs rather than protect legitimate business interests, there is the possibility that the agreement can unjustly enrich the employer. This is because at some point during the employment relationship the employer may be sufficiently compensated for the costs of training but the NCA remains in force resulting in a windfall to the employer.¹⁸⁴

In his article, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, Brandon Long discusses investments in training and how best to

182. Janice Harper, *What to Expect if You Sue Your Employer*, HUFFPOST, (updated Mar. 11, 2012), https://www.huffingtonpost.com/janice-harper/what-to-expect-when-you-s_b_1194955.html.

183. See Howard Levitt, *These Lawsuits Against an Employer Will Make it Hard to Land a New Job*, FINANCIAL POST, (Aug. 25, 2015, 1:36 PM), <http://business.financialpost.com/executive/management-hr/these-lawsuits-against-an-employer-will-make-it-hard-to-land-a-new-job>; Hal Lancaster, *What Are the Risks You Face When You Sue Your Employer?*, THE WALL STREET JOURNAL, (Apr. 15, 1997, 12:01 AM), <https://www.wsj.com/articles/SB8610536538328000>.

184. Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 Duke L.J. 1295, 1315 (Mar. 2005).

protect those investments. He acknowledges that NCAs are not widely recognized as the proper tool for controlling turnover and training costs,¹⁸⁵ but are, nevertheless, used for that purpose. Rather than bind an employee by an NCA, Long suggests the use of a repayment agreement that would reimburse the employer for the cost of training should the employee quit before the cost of training is recouped by the employer.¹⁸⁶ By allowing the company to calculate “the cost of training and the revenue generated from the employee’s use of training, the employer can [] determine when it has broken even” and training costs have been recouped.¹⁸⁷ Long finds this approach more favorable, in part, because most NCAs are valid for the entire duration of an employee’s tenure, yet an employer may recoup costs associated with training well before the employment relationship is terminated.¹⁸⁸ This overprotection gives the employer a windfall at the employee’s expense because the employer remains protected long after the training investment has been repaid.¹⁸⁹

Long’s approach has the potential of protecting employees against employer overreach, but it requires businesses to ascertain the amounts allocated for training. As discussed above, most companies do not know how much turnover costs their company and don’t even try to figure it out.¹⁹⁰ Calculating cost and recoupment time could cost employers money and find them allocating assets for a task that benefits the employee more than employer. In addition, policing the method of calculating recoupment costs would

185. *Id.* at 1311 (“A survey of 105 noncompete cases did not even find the employer’s investment in training significant enough to warrant discussion.”).

186. *Id.* at 1311–20.

187. *Id.* at 1319.

188. *Id.* at 1315–16.

189. *Id.*

190. *How Much Does Employee Turnover Really Cost?*, *supra* note 43.

require the enforcement agency or court to conduct complex case-by-case analyses that may result in inconsistent and unpredictable rulings.

5. Deprivation of Critical Goods and Services

Non-competes can also prevent consumers from obtaining critical goods and services, like health care.¹⁹¹ For example, preventing a health care worker from practicing medicine or working as a health aide deprives the whole community of necessary medical care and possibly life-saving treatments, notwithstanding the legitimate business interests potentially at stake.¹⁹² To address this issue, some states have passed laws banning the use of NCAs for employees in the health care industry.¹⁹³ Restricting the ability of a medical professional, health care worker, or other provider of critical services to move from one employer to another deprives the public of that worker's skill and expertise and results in injury to the community.

6. Use of Non-Competes in Terminations Without Cause

Using an NCA to protect legitimate business interests allows an employer to use the agreement as a shield against unfair competition. However, sometimes employers use the agreements as a sword to control free markets and fair competition. For example, imagine an employer who hires a skilled employee under an NCA knowing he or she cannot afford to retain the employee long-term. The employer hires the candidate under a NCA and then subsequently terminates the employee without cause and for no reason other than to prevent competing businesses from hiring the employee and benefitting from his or her skill set and to

191. White House Report, *supra* note 5, at 14–15.

192. *Id.* at 14–15.

193. For example, Delaware, Colorado, Texas, New Mexico have passed legislation. *See id.* at 7, 15.

prevent the employee from working in his or her area of expertise.¹⁹⁴ While this scenario involving a highly skilled employee may not play out in the low-wage sector, the idea of hiring an employee under an NCA and then terminating the employee without cause is certainly a scenario that can affect the low wage worker.

According to the 2016 OEP Report, approximately half of the states in the U.S. find, or are likely to find, NCAs enforceable against employees who are fired without cause.¹⁹⁵ The knowledge that an employer could use an NCA offensively discourages prospective employees from accepting a position with an employer who requires a non-compete. More importantly, vesting this degree of power in the employer can have devastating effects on an employee who has done nothing to deserve termination, not to mention the potentially devastating effect on area businesses and fair competition. As discussed earlier, at-will employment gives the employer and employee the same rights to terminate the employment relationship without notice or cause, allowing the employer to manage his staffing issues and giving the employee the freedom to keep his or her career moving forward and upward. Using at-will employment in tandem with a non-compete restraint interferes with the purposes that justify the at-will relationship by preventing the employee from exercising control over his or her career.

New York is an interesting state to look at because there appears to be either a real or perceived judicial split regarding whether non-competes remain in effect after an involuntary termination without cause.¹⁹⁶ In *Post v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, the New York Court of

194. *E.g.*, *How Noncompete Clauses Keep Workers Locked In*, *supra* note 15.

195. OEP Report, *supra* note 5, at 16; *Beck's State By State Survey*, *supra* note 45 (providing a comprehensive list of states, including AL, CT, DE, GA, ID, IL, IN, KS, LA, ME, MI, MN, MS, MO, NJ, NC, OH, PA, SD, TN, TX, UT VA, WA).

196. *Beck's State By State Survey*, *supra* note 45. According to this chart, courts in New York are split.

Appeals dealt with a situation in which the Plaintiffs, two employees of Merrill Lynch, were fired without cause and, thereafter, entered into competition against their former employer.¹⁹⁷ Plaintiffs' pension plan was tied to a non-compete provision in their employment contracts.¹⁹⁸ By competing with the Defendant, Merrill Lynch argued that the Plaintiffs had forfeited their rights to their pension plan.¹⁹⁹ The Court held that “[a]n employer should not be permitted to use offensively an anticompetition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.”²⁰⁰

Some New York courts have interpreted *Post* as voiding NCAs if an employee is terminated without cause, while others draw a distinction because the *Post* noncompete was tied to a forfeiture of pension rights. In *Wise v. Transco, Inc.*, the appellate court distinguished the holding in *Post*, and explained that “while plaintiff [in *Wise*] was involuntarily discharged, th[e] restrictive covenant does not involve a forfeiture of rights under an “employee pension benefit plan” that would be covered by ERISA.”²⁰¹ By contrast, in *SIFCO Indus., Inc. v. Advanced Plating Tech., Inc.*, the federal District Court adopted a different interpretation of *Post*, holding that “New York courts will not enforce a non-competition provision in an employment agreement where the former employee was involuntarily terminated [without

197. *Post v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 48 N.Y.2d 84 (1979).

198. *Id.* at 87.

199. *Id.* at 87.

200. *Id.* at 89. “In *Post*, the New York Court of Appeals held that an employee discharged without cause has the right to challenge the reasonableness of a noncompetition forfeiture clause, not that such an employee is automatically excused from adhering to the clause.” Peter L. Altieri, David J. Clark, *After Termination “Without Cause”: Restrictive Covenants*, EPSTEIN BECKER GREEN (Feb. 8 2007), <https://www.ebglaw.com/news/after-termination-without-cause-restrictive-covenants/>.

201. *Wise v. Transco, Inc.*, 73 A.D.2d 1039, 1039 (N.Y. App. Div. 1980).

cause].”²⁰² In finding that the defendants were involuntarily terminated, the court held the agreements unenforceable.²⁰³ Because there appears to be some disagreement in interpreting *Post*,²⁰⁴ the legislation proposed in Part IV makes clear that offensive use of NCAs is prohibited.

7. Brain Drain

In addition to lower wage growth and lower initial wages, the 2016 OEP Report disclosed that stricter enforcement of NCAs is tied to “brain drain,” which is supported by data showing that highly skilled workers move from enforcing states to non-enforcing states.²⁰⁵ Silicon Valley is often cited as the “poster child” for economic growth in a strongly non-enforceable state.²⁰⁶ Analysts have suggested that because California does not generally enforce non-compete agreements, Silicon Valley benefited from “knowledge spillovers,” a byproduct of “rapid employee movement between employers and to startups.”²⁰⁷ This freedom of movement results in “brain-gain” for the non-enforcing state and brain drain for the enforcing state.²⁰⁸ Enforcing states suppress innovation because “knowledge

202. *SIFCO Indus., Inc. v. Advanced Plating Tech., Inc.*, 867 F. Supp. 155, 158 (S.D.N.Y. 1994).

203. *Id.* at 158–59.

204. *See also* *Greystone Funding Corp. v. Kutner*, 137 A.D.3d 427, 427 (N.Y. App. Div. 2016) (calling attention to opposing holdings in *Post* and *Wise*); Griffith Practice Note, *supra* note 1 (recognizing disagreement by federal courts in interpreting New York’s position on termination without cause).

205. OEP Report, *supra* note 5, at 23.

206. *See generally* Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); OEP Report, *supra* note 5, at 3–6.

207. Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 575 (1999).

208. *Driving Performance*, *supra* note 2, at 860–61.

spillover” is reduced and diverted to other states.²⁰⁹ While brain drain may not be a problem in the realm of low wage, low-skilled workers, it is another potential cost associated with the use of NCAs because the agreements can have a negative impact on entrepreneurship and impede innovation.²¹⁰

IV. RECENT LITIGATION AND LEGISLATIVE INITIATIVES

A. *Using Existing Law to Investigate Violations of Law*

State Attorneys General (“A.G.s”) have taken an active role in identifying employment covenants that restrict a company’s ability to recruit or hire competitors’ employees.²¹¹ At least eight fast-food restaurants, notorious for hiring low-wage workers, are under investigation in ten states and the District of Columbia for their use of non-compete and non-poaching agreements.²¹² The A.G.s are

209. *Driving Performance*, *supra* note 2, at 861 (“The positive cycle appears geographically bound: worker mobility is a primary vehicle of knowledge spillovers, which in turn enhances regional innovation and growth, leading to increased opportunities and job mobility.”).

210. *Driving Performance*, *supra* note 2, at 861.

211. Steve Sbraccia, *Several States Investigating Non-Compete Clauses In Fast-Food Jobs*, CBS (Updated July 13, 2018, 5:12 AM), <https://www.cbs17.com/news/investigators/several-states-investigating-non-complete-clauses-in-fast-food-jobs/1298896501> [hereinafter “*Non-Compete Clauses In Fast-Food Jobs*”]; Michael L. Diamond, *State Attorneys General Want to Know More About Fast-Food ‘No Poach’ and Noncompete Agreements*, USA TODAY NETWORK (July 9, 2018, 6:37 PM), <https://www.usatoday.com/story/money/nation-now/2018/07/09/fast-food-no-poach-agreements/769560002/>.

212. *Id.*; *see also* Press Release, New Jersey Attorney General’s Office, AG Grewal Seeks Records From Eight Fast Food Companies About Use of Employee Non-Compete Agreements (Jul 9, 2018), <https://nj.gov/oag/newsreleases18/pr20180709a.html>. Non-poaching agreements are agreements between businesses in which they agree not to hire or solicit each other’s employees. These agreements can raise antitrust issues “if they are not reasonably tailored to support a broader, legitimate business collaboration.” Kevin R. Miller & Colin A. Thakkar, *State Attorneys General Step Up Antitrust Probes of Franchise Industry Hiring Practices*, JACKSONLEWIS (Aug. 22, 2018), <https://www.noncompete-report.com/2018/08/state-attorneys-general-step-up-antitrust-probes-of->

spearheading the investigations amid concerns for employee mobility as well as possible antitrust violations for the use of non-poaching agreements.²¹³

Another example of legal action by state A.G.s is the 2016 settlement with Jimmy John's, in which the New York and Illinois A.G.s obtained agreements from Jimmy John's to halt the use of NCAs for their franchise employees.²¹⁴ In 2018, the New York and Illinois A.G.s coordinated their efforts to obtain a settlement with WeWork Companies, Inc., which released over 1,400 employees from their NCAs.²¹⁵ The agreements applied broadly to all employees regardless of job duties and access to confidential information and included cleaners, mail associates and baristas, some

franchise-industry-hiring-practices/. For more discussion on non-poaching agreements, see Gauri Punjabi, *Are Anti-Poaching Agreements Enforceable in New York? Not in the Absence of a Protectable Interest Says One New York Federal Court* (Feb. 13, 2014), <https://www.employmentmattersblog.com/2014/02/are-anti-poaching-agreements-enforceable-in-new-york-not-in-the-absence-of-a-protectable-interest-says-one-new-york-federal-court/> (last visited 11-13-18); Jeff John Robert, *Tech Workers Will Get Average of \$5,770 Under Final Anti-Poaching Settlement*, FORTUNE (Sept. 3, 2015), <http://fortune.com/2015/09/03/koh-anti-poach-order/> (discussing the trouble Adobe Systems, Apple Inc., Google Inc., Intel Corp., Pixar, Lucasfilm, and Intuit ran into in using these agreements).

213. Kevin R. Miller & Colin A. Thakkar, *State Attorneys General Step Up Antitrust Probes of Franchise Industry Hiring Practices*, JACKSONLEWIS (Aug. 22, 2018), <https://www.noncompetereport.com/2018/08/state-attorneys-general-step-up-antitrust-probes-of-franchise-industry-hiring-practices/>; Michael L. Diamond, *State Attorneys General Want to Know More About Fast-Food 'No Poach' and Noncompete Agreements*, USA TODAY NETWORK (Jul 9, 2018 6:37 PM), <https://www.usatoday.com/story/money/nation-now/2018/07/09/fast-food-no-poach-agreements/769560002/>.

214. *Jimmy John's Drops Noncompete Clauses*, *supra* note 7; *Oppressive Noncompete Agreements*, *supra* note 8; *Rethinking Non-compete Agreements*, *supra* note 4 at 66. NY BUS. JOURNAL, *Jimmy John's Settles Non-Compete Case with A.G.'s Office* (June 22, 2016) <https://www.bizjournals.com/newyork/news/2016/06/22/jimmy-johns-settles-non-compete-case-with-a-g.html>.

215. Press Release, Illinois Attorney General's Office, Attorney General Madigan Reaches Settlement with WeWork to End Use of Overly Broad Non-Competes (Sept. 18, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_09/20180918.html.

making as little as \$15/hour.²¹⁶

The New York State A.G. has secured additional settlements that have released employees from their NCAs. On August 4, 2016, the Attorney General announced a settlement with EMSI (Examination Management Service, Inc.) to cease use of non-competes for most of its New York employees.²¹⁷ The agreements prohibited employees from working for a competitor located within fifty miles of any EMSI location at which the employee worked for a period of nine months after leaving EMSI.²¹⁸ On June 15, 2016, the Attorney General announced a settlement with Law360, a subsidiary of LexisNexis, which required its editorial employees to sign non-competes that prevented them from working for any media outlet providing news for a period of one year.²¹⁹ The A.G. was able to negotiate settlements by arguing that the agreements exceeded the scope of protection recognized by New York courts.²²⁰ Companies that attempt to protect interests that are not recognized as ‘legitimate’ run the risk of investigation by the A.G.

Attorneys General across the U.S. have brokered the release of NCAs for thousands of employees and have

216. Press Release, New Jersey Attorney General’s Office, *supra* note 212.

217. Mark Iandolo, *EMSI to Stop Using Non-Compete Agreements in New York State*, LEGAL NEWSLINE (Aug. 5, 2016), <https://legalnewsline.com/stories/510986488-ems-i-to-stop-using-non-compete-agreements-in-new-york-state>

218. *Id.*

219. Kelley Drye & Warren, LLP, *NY Attorney General Sends a Message: Rethink Non-Compete Agreements*, LEXOLOGY, (July 19, 2016), <https://www.lexology.com/library/detail.aspx?g=852495d7-7040-404c-a0cb-d4610478c901>.

220. Courts in the state require that terms be no greater in scope and duration than necessary to protect legitimate business interests, such as trade secrets and confidential information. Lisa C. Sullivan & Matthew T. McLaughlin, *New York and Illinois AGs Crack Down on Use of Noncompetes in Settlement with WeWork and Release Guidance on Use of Noncompetes*, NIXON PEABODY (Sept. 20, 2018), <https://www.nixonpeabody.com/en/ideas/articles/2018/09/20/new-york-and-illinois-ags-release-guidance-on-use-of-non-competes> [hereinafter “*New York and Illinois AG’s Crack Down*”].

conducted investigations into the illegal use of the agreements.²²¹ This commitment should send a message to state legislatures and employers that the use of non-competes should be limited to the protection of legitimate business interests and that failure to do so will result in legal action by state A.G.s. Unfortunately, A.G. offices lack the resources to uncover every violation of law in the state. Companies that have the foresight to restrict non-compete use to the protection of legitimate business interests can avoid legal scrutiny, but others use the agreements to bind all employees without consideration of protectable, legitimate business interests or include terms that are not limited in scope and duration. Such agreements run afoul of state laws that allow protection of only legitimate business interests and could trigger investigation or legal action. The fear of public backlash has certainly been useful in securing releases.²²² However, investigating and exposing abuse takes time and employees can suffer severe financial consequences before help arrives on the scene. In addition, some companies may elect to roll the dice if the courts in their state reform unreasonable terms rather than void the agreement.

B. *Legislative Proposals*

1. Federal Level

To date, action at the federal level against the use of

221. *Non-Compete Clauses In Fast-Food Jobs*, *supra* note 209; *New York and Illinois AGs Crack Down*, *supra* note 220. In 2019, NY A.G. James joined a multi-state coalition of Attorneys General to reach a settlement in which Arby's, Dunkin', Five Guys and Little Caesars agreed to cease using non-poach agreements to restrict employee mobility. Press Release, New York Attorney General's Office, Attorney General Letitia James Joins Multistate Settlement To Cease Fast Food Usage Of No-Poach Agreements, (Mar. 12, 2019).

222. E.g., Robert M. Isackson, *Backlash Against Jimmy John's Non-Compete Agreement Highlights Risks of Overzealous Business Protection Measures*, MONDAQ (Jan. 12, 2015), <http://www.mondaq.com/unitedstates/x/365698/Trade+Secrets/Backlash+Against+Jimmy+Johns+NonCompete+Agreement+Highlights+Risks+Of+Overzealous+Business+Protection+Measures>.

employment restraints has been in the form of presidential recommendations and proposed legislation. While employment contract law is one area that has traditionally been left to the states, “that fact alone does not immunize state employment laws from preemption if Congress in fact contemplated preemption.”²²³

Recent non-compete legislative proposals do not contain preemption clauses and may allow the states to regulate non-competes as well. In 2015, Senate Bill 1504, the Mobility and Opportunity for Vulnerable Employees (MOVE) Act was introduced to prohibit the use of non-competes for low-wage workers and establish rules requiring disclosure to prospective employees prior to employment. However, the bill failed after being introduced in the Senate.²²⁴ The attention on non-competes was not lost on the Obama White House and the administration advocated for legislation to limit or ban the agreements.²²⁵

Senate Bill 2782, the Workplace Mobility Act of 2018, was introduced to create a nationwide ban prohibiting any company engaged in interstate commerce from requiring its employees to execute non-compete agreements.²²⁶ The bill

223. Dilts v. Penske Logistics, LLC, 769 F.3d 637, 643 (9th Cir. 2014).

224. MOVE Act, S. 1504, 114th Cong. (2015). The bill defined low wage employees as making less than \$15/hour or \$31,200.00 annually.

225. *Id.* The administration published *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses* in May, 2016 in an effort to “identify policies that could be used to promote a fair and dynamic labor market.” 3, https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf. In addition, the administration called the states to action, encouraging the states to pass reformative legislation banning non-competes for specific categories of workers, improving transparency of use, and incentivizing employers to write enforceable contracts. Christopher Steif, *Senators Introduce Bill for Nationwide Non-Compete Ban*, FISHER PHILLIPS (May 14, 2018), <https://www.fisherphillips.com/Non-Compete-and-Trade-Secrets/senators-introduce-bill-for-nationwide-ban-on-non-competes>, citing State Call to Action on Non-Competes, (October 25, 2016), <https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf>.

226. Workforce Mobility Act of 2018, S. 2782, 115th Cong. (2018),

would allow the Secretary of Labor to investigate and prosecute violations and impose civil fines up to \$5,000.00. In addition, a private right of action would be established and the ability to contractually protect trade secrets would be preserved.²²⁷

On January 15, 2019, Senator Marco Rubio introduced S.124, otherwise known as The Freedom to Compete Act.²²⁸ The Bill proposes an amendment the Fair Labor Standards Act of 1938, and would retroactively eliminate the use of non-compete agreements for certain non-exempt employees.²²⁹

The state-to-state disparity of enforceability of NCAs argues in favor of federal legislation resolving the issue.²³⁰ However, the flat ban in the 2017 version of the MOVE Act hurts businesses because it abandons the defense of legitimate business interests currently recognized by state courts. For example, New York courts currently permit non-competes if they are intended to provide: (1) protection from competition by a former employee whose services are unique or extraordinary; (2) protection against the misappropriation of trade secrets or confidential customer lists; and (3) protection against appropriating the goodwill of clients or customers.²³¹ Courts in Arizona, Connecticut, Delaware,

<https://www.congress.gov/bill/115th-congress/senate-bill/2782/text?r=6>; see also Christopher Steif, *Senators Introduce Bill for Nationwide Non-Compete Ban*, FISHER PHILLIPS (May 14, 2018), <https://www.fisherphillips.com/Non-Compete-and-Trade-Secrets/senators-introduce-bill-for-nationwide-ban-on-non-competes>. The House version of the bill is H.R. 5631.

227. Workforce Mobility Act of 2018, S. 2782, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2782/text?r=6>.

228. Freedom to Compete Act, S. 124, 116th Congress (2019), <https://www.congress.gov/bill/116th-congress/senate-bill/124>. This Bill remains in Committee at the time this Paper was re-submitted.

229. *Id.*

230. *Driving Performance*, *supra* note 2, at 839–41 (discussing the varied court interpretations and the uncertainty that results).

231. *BDO Seidman*, 93 N.Y.2d at 389–93; *Beck's State By State Survey*, *supra* note 45.

Missouri, Ohio, and Wisconsin permit non-competes if they are intended to provide (1) protection against the misappropriation of trade secrets or confidential information; and (2) protection of customer relationships.²³² A flat ban on non-competes disregards the states' recognized protectable business interests.

Moreover, the proposed federal legislation's one-size-fits-all approach fails to address the diversity and unique needs of the states, which is better left to the individual states to determine through their state-level elected officials. In contrast, the 2015 MOVE Act that bans non-competes for low wage workers would be a better place to start by providing protection to all low wage workers country-wide and removing any disparity that is currently present between the states.

Another suggestion for federal legislation would be a bill that creates general rules for use of NCAs, such as required disclosure during the application process and a prohibition of enforcement against employees terminated without cause. Nevertheless, it is this author's opinion that, given the diversity among the socio-economic landscapes of the states, state legislators are in the best position to define a low wage worker and design legislation that reflects the needs of the state and the best interests of their constituents.²³³

2. State Level

Recent public exposure of non-compete misuse has encouraged state legislators to introduce bills banning or placing limitations and restrictions on their use. As

232. *Beck's State By State Survey*, *supra* note 45.

233. For example, in their article *Non-Compete Clauses in Physician Employment Contracts are Bad for Our Health*, Hazel Beh and Ramsey Ross discuss the unique issue faced by Hawaii in recruiting and retaining physicians, such as the high cost of living in Hawaii and the geographic isolation of the state. Hazel G. Beh & Ramsey Ross, *Non-Compete Clauses in Physician Employment Contracts are Bad for Our Health*, 14 *Hawaii Bar J.* 79, 90 (2011).

previously discussed, both Massachusetts and Illinois have recently passed non-compete laws. The 2018 Massachusetts law carries a requirement that the non-compete agreement be presented at the time the offer of employment is made. Further, it requires “fair and reasonable consideration independent from the continuation of employment,” when the non-compete is signed after employment. These provisions promote transparency and require some benefit to the employee in exchange for signing the contract. The Massachusetts law also wisely prohibits non-competes for employees who do not likely encounter trade secrets or confidential information: employees under 18 years old and students engaged in short-term employment. In addition, the law prohibits enforcement against an employee terminated without cause, which limits an employer to defensive use rather than offensive use of the agreement. Nonetheless, there is no prohibition against the use of non-competes in the low-wage sector.

While the 2016 Illinois Freedom to Work Act prohibits non-competes for low-wage workers, it is not nearly as comprehensive as the Massachusetts law and does not contemplate any other class of vulnerable worker, nor establish rules for use in other sectors that could promote transparency.²³⁴ The Act provides protection to low-wage earners but goes no further. That said, it smartly limits coverage to employees making minimum wage. Expanding the income threshold beyond the low-wage sector is a dangerous proposition to businesses trying to protect legitimate interests. While the low-wage income threshold may seem arbitrary, workers in this sector are not likely to possess specialized skills or have access to trade secrets or confidential client information. If an employer has a legitimate business interest to protect, it will have to offer a salary in excess of the minimum wage.

234. Illinois Freedom to Work Act, 2015 Ill. Laws 860 (effective Jan. 1, 2017).

In other states, bills have been introduced but have not become law. Pennsylvania introduced a series of bills in the 2017 session, one of which would ban non-competes entirely, another that would ban them for low wage workers, and another that would ban them for health care workers.²³⁵ In 2018, Vermont introduced a bill to prohibit non-compete agreements with some narrow exceptions.²³⁶ New Jersey reintroduced a bill in 2018 that places limitations on restrictive covenants and contains employee exempt classifications.²³⁷ In 2015, New York Assemblyman Jeffrey Dinowitz introduced a bill banning the use of non-competes for low wage workers.²³⁸ The bill, known as the Mobility and Opportunity for Vulnerable Employees (MOVE) Act targeted employees making less than \$15.00 an hour, but it never reached a vote.²³⁹

In January 2017, New York Senator Diane Savino reintroduced the “MOVE Act” as S4610, a bill prohibiting employers from requiring low-wage employees to enter into non-compete agreements.²⁴⁰ A low wage employee was

235. Pennsylvania H.B. 1938, (2017), would prohibit non-compete agreements and provides for an award of attorneys’ fees and punitive damages to the prevailing employee, (<http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=h&type=b&bn=1938>), while H.B. 1590 (2017) would prohibit non-compete agreements for low wage workers and imposes penalties in the form of fines (<http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=h&type=b&bn=1590>), and H.B. 788 (2017) would prohibit non-competes in health care practitioner employment agreements (<http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=h&type=b&bn=788>).

236. H.B. 556, (2018), (<https://legislature.vermont.gov/bill/status/2018/H.%20556>).

237. A. 1769, S. 2872, 2018 Leg., 218th Sess. (N.J. 2018), reintroduced from last session proposed bills A. 5261, S. 3518, https://www.njleg.state.nj.us/2018/Bills/A2000/1769_I1.PDF.

238. A. 8108, S. 6797, 2015 Leg., Reg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/a8108/amendment/original>.

239. A. 8108, S. 6797, 2015 Leg., Reg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/a8108/amendment/original>.

240. S. 4610, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s4610>.

defined as an employee who, excluding overtime compensation, makes the greater of (1) \$15 per hour; or (2) state or local minimum wage; or (3) an annual compensation that is equal to or less than \$31,200.00.²⁴¹ The bill was introduced in the Assembly by Assemblyman Dinowitz under A1139, but died in committee.²⁴²

In June 2017, Senator Catharine Young introduced S6554, a bill amending the labor law to prohibit the use of noncompete agreements for employees earning less than \$75,000.00 per year.²⁴³ The bill was also introduced in the Assembly by Assemblyman Dinowitz,²⁴⁴ but it was never voted on.²⁴⁵ For employees making more than \$75,000.00, the bills required agreements to be in writing and signed by both employer and employee.²⁴⁶ In addition, the bill would require employers to provide non-compete agreements to employees by the earlier of an offer of employment or thirty

.gov/legislation/bills/2017/s4610/amendment/original.

241. S. 4610, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s4610/amendment/original>; By the end of 2018, the minimum wage for NYC fast food workers and hospitality food service employees at businesses with 11 or more employees will be \$15.00, which, at 40 hours/week translates to \$31,200.00. <https://www3.swipeclock.com/blog/minimum-wage-changes-2018-state-state-guide/>.

242. S. 4610, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/A1139>.

243. S. 6554, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s6554>.

244. A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>.

245. A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>. See also Judah L. Rosenblatt's article discussing the New York City legislation introduced that targets low wage workers and implements rules for use in other sectors. *Which States are Likely to Enact Laws Restricting Non-Compete Agreements in 2018?*, THE NATIONAL LAW REVIEW, (Feb. 8, 2018) <https://www.natlawreview.com/article/which-states-are-likely-to-enact-laws-restricting-non-compete-agreements-2018>.

246. S. 6554, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s6554>; A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>.

days before the agreement effective date.²⁴⁷ If a current employee is not bound by a non-compete, his or her employer would be required to provide notice at least thirty days before the effective date of the agreement.²⁴⁸ Significantly, the bill provides that if an employee subject to a non-compete is discharged without cause, the non-compete is no longer enforceable.²⁴⁹ The provision resolves the current state of uncertainty in New York courts regarding the use of non-competes as a sword rather than a shield. Unfortunately, New York's proposed law, S6554, setting the threshold at \$75,000.00, is simply too heavy handed and is far more likely to prevent employers from protecting legitimate business interests.²⁵⁰

3. Pros and Cons of Current Initiatives

There are some protections in both enacted and proposed legislation that promote transparency and the protection of only legitimate business interests. Industry-specific laws and initiatives can address local needs or preserve valued rights. For example, laws prohibiting non-competes in the broadcasting sector promote free speech and public access to news. Restrictions on use in the healthcare sector ensure availability of medical treatment and providers. Prohibitions in technology fields promote innovation and knowledge spillover. However, the decision to protect certain industries

247. S. 6554, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s6554>; A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>.

248. S. 6554, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s6554>; A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>.

249. S. 6554, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/s6554>; A. 7864A, 2017 Leg., Reg. Sess. (N.Y. 2017), <https://www.nysenate.gov/legislation/bills/2017/a7864/amendment/a>.

250. Since submission of this Paper, Assemblyman Dinowitz re-introduced the Bill under A 7193, which currently remains on the Floor Calendar. A. 7193A, 2019 Leg. Reg. Sess. (N.Y. 2019), <https://www.nysenate.gov/legislation/bills/2019/A7193>.

should be left to the individual states that can best determine how to protect their citizens.

Federal Trade Commission rulemaking would be consistent with Congress' goal that the FTC define and identify "unfair methods of competition." FTC guidance and rulemaking relative to NCAs, especially their use in the low wage sector, could prove very helpful in putting employers on notice of what constitutes an unfair method of competition. It would also provide information that is currently lacking because of the lack of adjudication and judicial guidance in this area. However, there is no private cause of action under Section 5 of the FTC Act, which prohibits unfair methods of competition, leaving enforcement in the hands of the FTC or attorneys general.²⁵¹

If an employee has the funds and motivation to commence an action against an employer or defend against one, case-by-case adjudication can lead to unpredictable results because judges must apply complex standards and balancing tests. This results in disparate rulings that make it difficult for employees to predict whether they will succeed on the merits. In addition, the expense and protracted nature of litigation could dissuade employees from commencing such actions.

4. Legislative Proposal for New York State

Notwithstanding the variety of proposed and active legislation and initiatives, protections against the improper use of non-competes in the low wage sector are severely inadequate in New York State. While there are arguments that NCAs can lead to more training opportunities,²⁵² many positions in the low wage sector simply do not involve the kind of costly training contemplated by employers of highly

251. FTC Act Section 5: Overview, Practical Law Practice Note Overview 7-586-7865 (Westlaw) (last visited Nov. 26, 2018).

252. OEP Report, *supra* note 5, at 3.

skilled, educated, and compensated employees. Nor do such positions involve services that are unique or extraordinary, trade secrets, or confidential information that would justify the use of the agreement. In other words, in the low-wage sector, there is simply no risk of *unfair* competition sufficient to warrant the use of NCAs. Any proposed legislation should prohibit non-competes for low-wage workers while reserving rights of employers to protect trade secrets, confidential client information, and investments in innovation and highly specialized training in other income brackets. The legislation should clarify that controlling turnover costs is not a protectable legitimate business interest in any income bracket.

It is true that permissive use of NCAs is reflective of the traditional respect for the right to contract. Theoretically, if the parties agree to an NCA, their contract should indicate an intent to be bound and a meeting of the minds. However, the playing field is not always level, particularly for low wage workers, and the parties do not all have equal negotiating power. Studies show that the majority of workers presented with a non-compete do not negotiate the terms of the agreement.²⁵³ Many employees sign non-competes because they believe the terms are reasonable, assume the terms are not negotiable, don't want to create tension with their new employer, are afraid of being terminated,²⁵⁴ or didn't think the agreement would be enforced after taking a new job.²⁵⁵ In most cases, jobs in the lower wage sector come with take-it-or-leave-it terms and are not open to negotiation.²⁵⁶

Evan Starr's research has also shown that in many cases, the agreements were not presented until the first day

253. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 19.

254. *Id.* at 19, 45.

255. *Noncompetes in the U.S. Labor Force*, *supra* note 5, at 45.

256. *Id.* at 19 (61.6% of respondents believed that they had no choice but to sign and would not have been hired without the non-compete).

of employment or later.²⁵⁷ When NCAs are not discussed or disclosed at the interview stage, the lack of transparency leaves employees at the mercy of the new employer with few or no good options.²⁵⁸ This failure to disclose could be tempered by requiring non-competes to be disclosed during the interview process or no later than at the time of a job offer. However, such a requirement could be difficult to police and enforce. Offering a waiting period for a prospective employee to consider the terms before taking the job is also a possibility, but this may delay the hiring process for the employer and could be quite costly when time is lost waiting to bring a new hire on board. Nevertheless, proposed legislation should contain a notice provision allowing current and prospective employees a short time to consider any rights they may be forfeiting by signing a non-compete.

Even if trade secrets or confidential information and client lists were involved, New York courts require that employment restraints be no greater than necessary to protect the employer's legitimate interests. It may be possible to protect such interests by using a more limited restraint that does not restrict postemployment opportunities.²⁵⁹ For example, a Confidentiality or Nondisclosure Agreement, may accomplish the employer's objective of preventing the disclosure of confidential and proprietary information.²⁶⁰ If an employer is concerned with losing clients, a Non-Solicitation or Nondealing Agreement might address the issue by prohibiting an employee from

257. *Id.* at 45 (nearly 30% of respondents were presented with the non-compete after accepting the job offer).

258. *Id.* at 18 (26% of those presented with agreement after taking the job would have thought twice about accepting the position).

259. Griffith Practice Note, *supra* note 1 (discussing use of alternatives to non-competes in the form of non-solicit, non-poaching, and confidentiality agreements, as well as garden leave and assignment of invention agreements).

260. Susan M. Heathfield, *Confidentiality Agreement, How Does a Confidentiality Agreement Affect the Employment Relationship?*, THE BALANCE (Jan. 6 2018), <https://www.thebalance.com/confidentiality-agreement-1918086>.

soliciting his or her former employer's clients after taking a new job.²⁶¹ Again, this type of agreement would offer protection to the employer while maintaining the employee's freedom of movement.²⁶² Each of these agreements, like non-competes, must be reasonable in scope, necessary to legitimate business interests, not harmful to the public and not unreasonably burdensome on the employee.²⁶³

In addition, New York courts allow restraints provided they do not impose undue hardship on the employee and are not injurious to the public. Preventing a low wage employee from working in his or her area of expertise could impose hardship by forcing the employee to take a position outside his or her skill set that pays much less. Using the example of the health care aide, not only would restraining postemployment opportunities hurt the employee, it would also injure the community by depriving patients of necessary medical care. While there is much focus on determining legitimate business interests, attention should be paid to employee hardship and injury to the public.

One could argue that since New York is a highly unenforceable state, or because New York courts are willing to reform contract terms, there's no harm in maintaining the status quo. However, leaving resolution solely to the courts is an inefficient solution. First, the lack of litigated cases involving low wage workers indicates that unreasonable and unenforceable non-competes in the low wage sector are not

261. Jean Murray, *Non-Solicitation Agreements in Business Contracts*, THE BALANCE (Jan. 30, 2017), <https://www.thebalance.com/non-solicitation-agreements-in-business-contracts-398359>.

262. The drawback here is that once the agreement is violated, judicial relief may come too late and the employer may have already suffered a loss. It would be necessary for employers to move quickly for injunctive relief to mitigate any losses and demand payment for damages.

263. *Ashland Mgmt. Inc. v. Altair Invests. NA*, 59 A.D.3d 97, 102 (N.Y. App. Div. 2008); *TBA Global, LLC v. Proscenium Events, LLC*, 114 A.D.3d 571, 572 (N.Y. App. Div. 2014); *Reed Elsevier Inc. v. Transunion Holding Co.*, 2014 WL 97317, at *7 (S.D.N.Y. 2014).

being adjudicated in court, in part because employers have no intention of taking legal action and use the agreements for their chilling effect. Further, employees lack the funds to defend against or commence a lawsuit making them inclined to settlements. Secondly, because New York courts are willing to reform contract terms, employees will have difficulty predicting judicial outcomes and determining if litigation is worth the cost, time, and trouble. Judicial outcomes are also uncertain because there appears to be some disagreement in interpreting *Post*.²⁶⁴ Therefore, proposed legislation should make clear that NCAs cannot be used offensively against employees terminated without cause.²⁶⁵

In sum, proposed legislation should allow businesses to protect legitimate interests while preserving employment mobility in the low wage sector. A bill targeting low-wage and other particularly vulnerable workers could:

- (1) give employees leverage to negotiate better wages because they are not tied to their employer;
- (2) allow for wage growth and better benefit packages because more employees are competing for the same position, which in turn leads to increased job satisfaction and lower turnover;
- (3) protect vulnerable categories of workers, such as school-aged children, young adults and recent graduates;
- (4) prevent employers from failing to disclose non-competes until a

264. See also *Greystone Funding Corp. v. Kutner*, 137 A.D.3d 427, 427 (N.Y. App. Div. 2016) (calling attention to opposing holdings *Post* and *Wise*); Griffith Practice Note, *supra* note 1 (recognizing disagreement by federal courts in interpreting New York's position on termination without cause).

265. "The general rule [in New York] is that restrictive covenants may be enforced against former employees terminated 'without cause' provided that the employer had not materially breached the contract containing the restrictive covenant and provided the covenant passes the 'reasonable' tests traditionally applied in cases where employees voluntarily quit and engage in forbidden competitive activities." Peter L. Altieri & David J. Clark, *After Termination "Without Cause": Restrictive Covenants*, (Feb. 8, 2007), <https://www.ebglaw.com/news/after-termination-without-cause-restrictive-covenants/>.

job offer has been accepted;

(5) prevent employers from using non-competes offensively in combination with the right to terminate an employee at-will;

(6) place all qualified available candidates in the job pool allowing employers to hire the best candidate;

(7) increase the availability of experienced workers which allows employers to avoid paying training costs that they may not recoup;

(8) ensure employees have the freedom to control their professional careers and improve their personal lives;

(9) encourage judicial efficiency and prevent litigation that attempts to protect an interest not recognized by New York courts as a legitimate business interest;

(10) discourage workers from leaving the state to move into other non-enforcing states;²⁶⁶

(11) reduce the chilling effect that NCAs can have on employees who are threatened with enforcement and cannot afford or do not wish to defend a lawsuit;

(12) prevent employers from attempting or threatening to litigate an agreement that is unenforceable because it does not protect a legitimate business interest;

(13) reduce the possibility that critical services will be unavailable to consumers;

(14) reduce or eliminate unjust enrichment resulting from overcompensation for training costs recouped in full before termination;

(15) prohibit the enforcement of non-compete agreements against employees fired without cause;

(16) protect employees by requiring additional consideration for non-compete agreements required after employment has commenced;

(17) be consistent with the basic tenets of competition and

266. Although New York is on the lowest end of the enforcement spectrum, interviewees may not want to risk the possibility of legal action and, instead, may elect to move to a state that does not enforce non-competes in their sector at all or has legal protections already in place that guarantee early disclosure.

capitalism by prohibiting employers from depriving competing firms of qualified candidates; and

(18) reduce the number of low wage out-of-work employees on public assistance due to an inability to find suitable employment in their field.

To that end, the bill I propose for New York is based on the bills previously introduced in New York State as well as the recent law passed in Massachusetts. I include what I consider to be the best provisions of each: (1) prohibiting use of non-compete agreements for low wage workers as well as workers under the age of 18, students, and employees terminated without cause or laid off; (2) establishing notice and disclosure requirements for all other employees; (3) defining protectable legitimate business interests that allow for the protection of trade secrets, confidential information, and client relationships and unique skills acquired at the employer's expenses; (4) providing an enforcement mechanism under the New York State Department of Labor; and (5) providing a private cause of action for employees. The proposed bill and explanatory memorandum follow the conclusion of this paper.

CONCLUSION

Non-competes can serve a useful purpose in protecting companies from unfair competition and have a place in highly skilled and compensated sectors where employees perform unique services or where the loss of trade secrets, confidential information, or client relationships are legitimate business concerns. However, "when entry level workers at fast food restaurants are asked to sign two-year non-competes, it becomes less plausible that legitimate business interests are the primary motivation for such agreements."²⁶⁷ Although employees can pursue legal remedies, they need the resources and motivation to take

267. OEP Report, *supra* note 5, at 11.

legal action and must be willing to accept the consequences of such action on future employment opportunities.

When non-competes are misused, they become a sword against individual freedom and fair trade, rather than a shield against unfair competition. “Indeed, our economy is premised on the competition engendered by the uninhabited flow of service, talent and ideas.”²⁶⁸ If employers wish to control the flow of talent by reducing turnover, they should not rely on an NCA to accomplish that goal. Instead, employers can offer incentives such as quarterly bonuses and paid time off to reward longevity and reduce turnover. They can improve work environments, eliminate hostility, and promote a culture of mutual respect. Employers should not be permitted to use NCAs in tandem with at-will employment or take the easy way out by using non-competes to tie employees to a job, rather than invest in programs that encourage employee longevity and loyalty. When used properly, Nondisclosure and Non-Solicitation Agreements can protect employers’ legitimate business interests while promoting fair and free trade, encouraging innovation, and maintaining respect for low wage earners’ rights to control their destiny.

268. *Reed, Roberts Assoc., Inc. v. Strauman*, 40 N.Y.2d 303, 307 (1976).

APPENDIX A. LEGISLATIVE MEMORANDUM FOR PROPOSED BILL

Legislative Memorandum

The following legislation should be introduced to promote free market competition and employee mobility in New York State. Non-compete agreements have been used in employment relationships that do not involve legitimate business interests recognized by the courts in this State: protecting trade secrets, confidential client information or relationships, or unique and specialized skills. This is evident from detailed study evidence, extensive scholarly writings, existing case law, and the numerous settlements obtained by the New York State Attorney General. The Legislature should take steps to protect employees from the illegitimate use of non-compete agreements. This proposed bill can do that.

Employees frequently sign non-competes. The prevalence of postemployment restraints prevents businesses from hiring the best possible candidates and prevents employees from controlling their livelihoods, improving their lives, and maximizing their talents. Depriving employees of these choices hurts the economy and free market competition.

This legislation protects employees from illegitimate non-compete use while allowing businesses to guard against unfair competition. It prohibits non-compete agreements for employees age 18 and under, employees terminated without cause, students who participate in an internship or other short-term employment, and low wage workers. In doing so, the proposed legislation resolves any real or perceived judicial inconsistency in the state regarding non-compete use when an employee is terminated without cause.

In addition, in cases where non-compete agreements are permissible, the proposed legislation creates rules of use, which require non-competes to be presented in writing during the interview process and grant candidates time to

consider the terms of the agreement. If a current employee is asked to sign a non-compete, he or she will have at least 30 days before the agreement becomes effective and is entitled to separate consideration independent of continued employment.

The proposed legislation requires that permissible non-compete agreements be no broader in scope and duration than necessary to protect an employer's legitimate business interests, which are limited to the protection of trade secrets and confidential information, protection against the appropriation of client relationships formed at the employer's expense, and protection against competition by a former employee whose unique and extraordinary skills were acquired at the employer's expense.

Finally, the proposed legislation creates an enforcement mechanism, granting the New York State Commissioner of Labor the power to investigate and prosecute violations of law. In the event the commissioner elects not to prosecute a claim, individual rights to sue are granted. This provision gives injured employees an administrative remedy that does not require them to hire counsel and pay attorneys' fees. While the proposed bill does not currently include a section for funding this enforcement mechanism, it is presumed that the bill is contingent on the legislature adopting language that provides the funding necessary to carry out this initiative.

The proposed legislation acknowledges that employees in some sectors should be protected from non-compete use altogether and that other employees are entitled to certain protections regarding the permissible use of non-competes. It respects the right of employers to protect legitimate business interests. It will have a positive impact on New York's economy by spurring innovation and competition, while respecting contract rights.

APPENDIX B. PROPOSED BILL

STATE OF NEW YORK

AN ACT to amend the labor law, prohibiting employers from requiring covered employees to enter into covenants not to compete and imposing disclosure and consideration requirements for non-covered employees.

Section 1. This act shall be known and may be cited as the “New York State mobility and opportunity for vulnerable employees act” or the “NY MOVE act”.

Section 2. The labor law is amended by adding a new article 33 to read as follows:

ARTICLE 33

NEW YORK STATE MOBILITY AND OPPORTUNITY FOR
VULNERABLE EMPLOYEES ACT

Section 950. Definitions.

Section 951. Prohibiting covenants not to compete for Covered Employees

Section 952. Disclosure requirement for covenants not to compete.

Section 953. Enforcement.

Section 950. Definitions. For purposes of this article, the following terms shall have the following meanings:

1. “Commerce” has the meaning given such term in section three of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203).
2. “Covenant not to compete” means an agreement or clause contained in an employment contract:
 - (a) between an employee and employer that prohibits or restricts such employee from performing:
 - (i) any work for another employer for a specified period of time;
 - (ii) any work in a specified geographical area; or

- (iii) work for another employer that is similar to such employee's work for the employer included as a party to the agreement; and
 - (b) that is entered into after the effective date of this article;
 - (c) that does not include:
 - (i) covenants not to solicit employees of the employer;
 - (ii) covenants not to solicit or transact business with customers clients, or vendors of the employer;
 - (iii) noncompetition agreements made in connection with the sale of a business entity or partnership, or otherwise disposing of the ownership interest of a business entity or partnership (or division or subsidiary thereof), when the party restricted by the noncompetition agreement is a significant owner of, or member or partner in, the business entity who will receive significant consideration or benefit from the sale or disposal;
 - (iv) noncompetition agreements outside of an employment relationship;
 - (v) nondisclosure or confidentiality agreements;
3. "Covered Employee":
- (a) means
 - (i) any employee age 18 years or younger;
 - (ii) any employee who has been laid off or terminated without cause;
 - (iii) undergraduate or graduate students who partake in an internship or other short-term employment relationship, whether paid or unpaid, while enrolled in a full-time or part-time undergraduate or graduate institution;
 - (iv) any employee who, excluding any overtime compensation required under section seven of the Fair Labor Standards Act of 1938 (29 U.S.C. § 207) or under an applicable state law, receives from the applicable employer:
 - (A) an hourly compensation that is less than the livable hourly rate, as defined in subdivision 5 of this section, or
 - (B) an annual compensation that is equal to or less

than:

- 1) for the fiscal year of the effective date of this article, thirty-one thousand two hundred dollars per year; and
- 2) for each succeeding fiscal year, the adjusted amount described in subdivision three of section nine hundred fifty-one of this article; and

(b) does not include:

(i) any salaried employee who receives from the applicable employer compensation that, for two consecutive months, is greater than:

(A) for the fiscal year of the effective date of this article, five thousand dollars; and

(B) for each succeeding fiscal year, the adjusted amount described in subdivision three of section nine hundred fifty-one of this article.

4. “Employee”, “employer”, “enterprise”, “enterprise engaged in commerce or in the production of goods for commerce”, and “goods” have the meanings given such terms in section three of the Fair Labor Standards Act of 1938 (29 U.S.C. § 203).

5. “Livable hourly rate” means:

(a) for the fiscal year of the effective date of this article, the greater of:

(i) fifteen dollars per hour; or

(ii) the hourly rate equal to the minimum wage required by the applicable state or local minimum wage law; and

(b) for each succeeding fiscal year, the greater of:

(i) the adjusted amount described in subdivision three of section nine hundred fifty-one of this article; or

(ii) the hourly rate equal to the minimum wage required by the applicable state or local minimum wage law.

6. “Misappropriation” means:

(a) an act of acquisition of a trade secret of another by a person who knows or who has reason to know that the trade secret was acquired by improper means; or

(b) an act of disclosure or of use of a trade secret of another without that person’s express or implied consent by a

person who

- (i) used improper means to acquire knowledge of the trade secret or
 - (ii) at the time of the actor's disclosure or use, knew or had reason to know that the actor's knowledge of the trade secret was
 - (A) derived from or through a person who had utilized improper means to acquire it;
 - (B) acquired under circumstances giving rise to a duty to limit its acquisition, disclosure, or use; or
 - (C) derived from or through a person who owed a duty to the person seeking relief to limit its acquisition, disclosure, or use; or
 - (iii) before a material change of the actor's position, knew or had reason to know that it was a trade secret and that the actor's knowledge of it had been acquired by accident, mistake, or through another person's act described in subsections 6(a) or (6)(b)(i) or (ii).
7. "Trade Secret" means specified or specifiable information, whether or not fixed in tangible form or embodied in any tangible thing, including but not limited to a formula, pattern, compilation, program, device, method, technique, process, business strategy, customer list, invention, or scientific, technical, financial or customer data that
- (a) at the time of the alleged misappropriation, provided economic advantage, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, others who might obtain economic advantage from its acquisition, disclosure or use; and
 - (b) at the time of the alleged misappropriation was the subject of efforts that were reasonable under the circumstances, which may include reasonable notice, to protect against it being acquired, disclosed or used without the consent of the person properly asserting rights therein or such person's predecessor in interest.

Section 951. Prohibiting covenants not to compete for Covered Employees

1. A covenant not to compete shall not be entered into by any employer with any Covered Employee of such employer, who in

any work week is engaged in commerce or in the production of goods for commerce (or is employed in an enterprise engaged in commerce or in the production of goods for commerce).

2. An employer who employs any Covered Employee, who in any work week is engaged in commerce or in the production of goods for commerce (or is employed in an enterprise engaged in commerce or in the production of goods for commerce), shall post notice of the provisions of this article in a conspicuous place on the premises of such employer.
3. (a) For each fiscal year after the fiscal year of the effective date of this article, the commissioner shall adjust each amount in effect under
 - (i) subparagraph (i) of paragraph (b) of subdivision five of section nine hundred fifty of this article,
 - (ii) subsection (2) of clause (B) of subparagraph (iv) of paragraph (a) of subdivision three of section nine hundred fifty of this article, or
 - (iii) clause (A) of subparagraph (i) of paragraph (b) of subdivision three of section nine hundred fifty of this article for inflation by increasing each such amount, as in effect for the preceding fiscal year, by the annual percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (United States city average, all items, not seasonally adjusted), or its successor publication, as determined by the Bureau of Labor Statistics.
- (b) The amounts adjusted under paragraph (a) of this subdivision shall be rounded to the nearest multiple of \$0.05.

Section 952. Disclosure requirement for covenants not to compete.

In order for an employer to require an employee, who in any work week is engaged in commerce or in the production of goods for commerce (or is employed in an enterprise engaged in commerce or in the production of goods for commerce) and is not a Covered Employee, to enter into a covenant not to compete, the covenant must meet the following requirements:

- (a) It shall be provided to a prospective employee by the earlier of a formal offer of employment or thirty days before the non-compete agreement goes into effect.
- (b) It shall be provided to a current employee:

- (i) at least thirty days before the agreement becomes effective and
- (ii) be supported by fair and reasonable consideration independent from continued employment;
- (c) It shall be in writing and signed by the employer and employee;
- (d) It shall expressly state that the employee has the right to consult with counsel prior to signing.
- (e) It must be no broader in scope and duration than necessary to protect one or more of the following limited legitimate business interests:
 - (i) the employer's trade secrets;
 - (ii) the employer's confidential information that otherwise would not qualify as a trade secret;
 - (iii) the appropriation of clients serviced by a former employee where the relationship was created and maintained at the employer's expense;
 - (iv) competition by a former employee whose services are unique or extraordinary and whose unique and extraordinary skills were acquired at the employer's expense;
- (f) It must not impose an undue hardship on the employee;
- (g) It must not be injurious to the public;

Section 953. Enforcement.

1. The commissioner of labor shall have the power to receive, investigate, attempt to resolve, and enforce a complaint of a violation of sections nine hundred fifty-one and nine hundred fifty-two of this article, subject to subdivision two of this section.
2. (a) The commissioner shall impose a civil fine:
 - (i) on any employer who violates subdivision one of section nine hundred fifty-one or section nine hundred fifty-two of this article, an amount not to exceed five thousand dollars for each employee who was the subject of such violation; and
 - (ii) with respect to any employer who violates subdivision two of section nine hundred fifty-one of this article, an amount not to exceed five thousand

dollars.

- (b) In determining the amount of any civil fine under this section, the commissioner shall consider the appropriateness of the fine to the size of the employer subject to such fine and the gravity of the applicable violation.
3.
 - (a) In the event the commissioner elects not to enforce a complaint of a violation of sections nine hundred fifty-one and nine hundred fifty-two of this article, an employee, including a Covered Employee, may bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated this section.
 - (b) An employee shall bring such action within two years of the later of:
 - (i) when the prohibited non-compete agreement was signed;
 - (ii) when the employee learns of the prohibited non-compete agreement;
 - (iii) when the employment relationship is terminated; or
 - (iv) when the employer takes any step to enforce the non-compete agreement.
 - (c) The court shall have jurisdiction to void any such non-compete agreement and to order all appropriate relief, including enjoining the conduct of any person or employer; ordering payment of liquidated damages; and awarding lost compensation, damages, reasonable attorneys' fees and costs.
 - (d) For the purposes of this subdivision, liquidated damages shall be calculated as an amount not more than ten thousand dollars. The court shall award liquidated damages to every employee affected under this section, in addition to any other remedies permitted by this section.
 - (e) The court shall also award a consideration payment if the employer did not provide such payment when due.
4. The provisions of this section shall not apply to employees covered under section two hundred two-k of this chapter.

Section 3. Severability clause. If any clause, sentence, paragraph, subdivision, section or part of this act shall be

adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

Section 4. This act shall take effect immediately and shall apply to employees hired on and after such date.