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December 20, 2021

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

Honorable Jonathan Kanter
Assistant Attorney General, Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: Written Submission of Practicing Attorneys and Paralegals Concerning Potential Federal Regulation of Noncompetition Agreements and Other Restrictive Covenants

Dear Commissioners and Mr. Kanter:

Thank you for the opportunity to submit written comments for consideration in connection with the FTC's and DOJ's workshop on "Making Competition Work: Promoting Competition in Labor Markets" (the "Workshop"). Thank you also for all of the hard work that the Commission and Department of Justice have already done and continue to do toward investigating the current use and impacts (both pro and con) of noncompetition agreements and other restrictive covenants between employers and employees, as well as the need for, and appropriate scope of, any potential restrictions beyond those already addressed by the states.

This submission incorporates, resubmits, and supplements the attached July 14, 2021 letter (the "July Submission"[1]), originally submitted in response to President Biden's July 9, 2021, Executive Order on Promoting Competition in the American Economy. Accordingly, as set forth below, in this supplemental submission, we provide only additional information, address several issues raised during the Workshop, and add additional signatories to the combined submission.

We thank you for your consideration of the matters addressed in this letter.

[1] The July Submission is attached as *Appendix 1*.

Summary of This Supplemental Submission

This supplemental submission covers three topics:

1. A brief background of the additional signatories.[2]

2. New research and analysis that highlights gaps in prior research.

3. Issues raised during the Workshop.

Discussion

1. Our Background

In all, we have 73 signatories between the two submissions. The signatories are lawyers and paralegals from around the country with extensive experience representing clients (from Fortune 50 companies to "mom and pop" shops to individual employees) in countless trade secret and noncompete matters on all sides of these disputes. A brief biography of each of the 14 new signatories (with a link to the individual's full on-line biography) and updates to certain prior signatories' information are provided as *Attachment A*.

2. New Research and Analysis Highlights Gaps in Prior Research

In our July Submission, we observed that "[w]hile a number of helpful studies have been conducted, this area of research is still in many respects nascent."[3] Further, we identified that "the existing research suffers from certain inherent difficulties (including that it can be hard to

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[2] Information concerning the original signatories' background is not reproduced except to the extent that it has changed since the July Submission.

Please note that many of the signatories were also signatories to a letter dated March 20, 2020, submitted in connection with the Federal Trade Commission and Department of Justice's January 9, 2020 workshop, "Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues" (the "2020 Workshop"). A copy of that letter is available at https://www.regulations.gov/comment/FTC-2019-0093-0319.

As noted in the July Submission (at n.21), no signatory to this letter is endorsing any statement as to any specific company or product outside the context of this letter. Accordingly, nothing in this letter is an admission by any counsel, company, or party, and nothing described herein is understood or intended by any signatory to create a positional or other conflict in any particular present, contemplated, or future matter.

[3] July Submission, at 29 (footnote omitted).

isolate direct causal connections to noncompetes), reflects areas of (seeming) inconsistencies, and leaves open many areas in need of additional study."[4]

These observations were later reiterated in a short video played during the Workshop.[5]

They also now appear to be further supported by recent additional research, information, and analysis, as set forth below.

Noncompetes May Aid Startups, Not Suppress Them

First, a recently-updated study issued by the Federal Reserve Bank of Philadelphia[6] calls into question "the widely held view that enforcement of non-compete agreements negatively affects the entry rate of new firms or the rate of jobs created by new firms."[7] Like a seminal noncompete study from 2009,[8] the Federal Reserve Bank of Philadelphia study uses Michigan's 1985 elimination of a ban on noncompetes as a "natural experiment." Based on that change, the study found:

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

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[4] *Id.*

[5] The video was submitted by Russell Beck, and is available at https://doj-ftc-labor-issues-workshop-2021.videoshowcase.net/making-competition-work-day-1?category=191081, at 2:37:56, Transcript of the Workshop ("2021 Workshop Tr."), Day 1, at p. 44-45.

[6] Gerald A. Carlino, *Do Non-Compete Covenants Influence State Startup Activity? Evidence from the Michigan Experiment* (originally published 2017, updated July 2021) (available at https://www.philadelphiafed.org/-/media/frbp/assets/working-papers/2021/wp21-26.pdf).

[7] *Id.* at 1.

[8] Matt Marx, Deborah Strumsky, Lee Fleming, *Mobility, Skills, and the Michigan Non-Compete Experiment* (2009), available at https://doi.org/10.1287/mnsc.1080.0985.

Id. at 1 (emphasis added).[9]

The study thus supports the serious concern that bans on noncompetes intended to help startups will in practice do precisely the opposite.[10]

Bundling Study Reveals Limitations in Other Studies

Second, more generally, recent scholarship by Professors Natarajan Balasubramanian,[11] Evan Starr,[12] and Shotaro Yamaguchi[13] further calls into question prior research about noncompetes. Specifically, the professors observe that because companies "bundle" multiple restrictive covenants, the results of the prior studies, which focus on just

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[9] It bears noting that because noncompetes are limited in duration, the noncompete may delay the timing of the startup, but not necessarily its creation. *See*, *e.g.*, *JetBlue's Founder is Starting a New US Airline With $100 Million and 60 Planes* (Dave Neeleman, founder of JetBlue, started another U.S. airline after his noncompete expired), available at https://viewfromthewing.com/jetblues-founder-is-starting-a-new-us-airline-with-100-million-and-60-planes/). This point is implicitly noted by University of Alabama School of Law Professor Mirit Eyal-Cohen, insofar as she explains that "[a] balance can be struck by limiting the ability of . . . employees to work on projects (not firms) with similar technology for a reasonable period of time." *Innovation Agents*, 76 Wash. & Lee L. Rev. 163 (2019), available at https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss1/6/. This is what most noncompetes are designed to do. Further, even if the noncompete were not available, owners of trade secrets could seek to prevent the startup through trade secret law, at least to the extent that the startup relies on their trade secrets. As noted previously, trade secret lawsuits "are far more involved, more costly, longer lived, and less predictable than noncompete litigation." July Submission, at 18 n.50.

[10] In contrast, a recent paper by Michael Lipsitz (Federal Trade Commission) and Mark Tremblay (Miami University) suggests that noncompetes prevent startups, ultimately harming consumers. *See Noncompete Agreements and the Welfare of Consumers* (Dec. 1, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3975864. This paper is consistent with various comments made during the Workshop that depend on a string of assumptions. Under this view, noncompetes prevent startups, which in turn prevents the creation of improved products that the startup would have (presumably) developed, made, and sold, which would have (presumably) in turn led to more competition, which would have (presumably) led to lower prices, and thus would result in harm to consumers. It is unclear how the analysis in the Federal Reserve Bank of Philadelphia's study applies to this new paper.

[11] https://whitman.syr.edu/directory/showInfo.aspx?nid=nabalasu.

[12] https://www.rhsmith.umd.edu/directory/evan-starr.

[13] https://www.rhsmith.umd.edu/directory/shotaro-yamaguchi.

noncompetes, turn out to be potentially "misleading" and "need to [be] carefully reconsider[ed]."[14]

Research is Not Sufficiently Granular

Third, a 2019 paper, *Innovation Agents*,[15] reinforces the notion that existing research suffers from a lack of granularity, as innovation in different industries responds differently to varying restrictions.[16] This paper is consistent with the views expressed by Professor Kurt Lavetti[17] (among others) during the 2020 Workshop about the "oversimplification" of certain conclusions in existing research concerning the wage effects of noncompetes.[18]

Correlation Does Not Necessarily Imply Causation

Fourth, one of the most fraught aspects of the noncompete debate remains that much of the analysis supporting potential regulation mistakes correlation for causation.[19] This

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[14] *Bundling Postemployment Restrictive Covenants: When, Why, and How It Matters* (2021) ("*Bundling Postemployment Restrictive Covenants*"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3814403.

[15] Mirit Eyal-Cohen, *Innovation Agents*, 76 Wash. & Lee L. Rev. 163 (2019), available at https://scholarlycommons.law.wlu.edu/wlulr/vol76/iss1/6/.

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

[17] http://kurtlavetti.com.

[18] *See* Final Transcript of the 2020 Workshop ("2020 Workshop Tr."), p. 152, available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf; July Submission, at 29.

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

correlation-implies-causation fallacy was specifically noted by Professors Balasubramanian, Starr, and Yamaguchi in *Bundling Postemployment Restrictive Covenants*, in which they caution that researchers cannot assess all of the variables at play in the analysis of the impacts of noncompetes, and therefore they determined to "refrain from making any strong causal claims" from the existing research.[20]

Indeed, the potential for mistaking causation for correlation was again highlighted during one of the discussions of no-poach agreements at the Workshop. Specifically, DOJ Assistant Chief & Special Counsel for Labor Doha Mekki identified an article[21] suggesting that no-poach agreements have anticompetitive effects that harm employees, in part by suppressing worker wages.[22] In the discussion, Rachel S. Brass, a partner at Gibson, Dunn & Crutcher LLP, who was personally involved in cases against two companies cited in the article (one in Florida involving McDonalds's use of no-poach agreements, and another in Washington against Jimmy John's for the same), stated that the evidence in those cases showed that precisely the opposite happened: wages were higher before the elimination of no-poach agreements, and lower after.[23] This difference in theory and practice appears to be yet another real-world example of the aphorism that in theory, theory and practice are the same; in practice, they are not.

In a similar vein, while some studies correlate enforcement of noncompetes to lower wages, other variables may be at work. For example, as discussed during the Workshop, there are many factors and frictions that affect wages and job mobility. While corporate mergers and consolidation have been a focus, their prevalence may skew the research on the wage effects of noncompetes. Likewise, training repayment agreements, which were also a focus of some of the discussion during the Workshop, may have an impact that can be difficult to separate from the

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[20] *Bundling Post Employment Restrictive Covenants*, at 22, 30.

[21] Herbert Hovenkamp, *Antitrust and the FTC: Franchise Restraints on Worker Mobility* (Dec. 1, 2021), available at https://promarket.org/2021/12/01/antitrust-ftc-franchise-worker-mobility-labor/.

[22] *Id.*

[23] *See* 2021 Workshop Tr., Day 1, p. 20. Note that the written transcription is likely preliminary, given that it includes a number of transcription errors. In particular, it incorrectly transcribed the statement, "wages were higher before the provision was removed" as "we just were hired before the provision was removed." *See* video recording, available at https://doj-ftc-labor-issues-workshop-2021.videoshowcase.net/making-competition-work-day-1?category=191081, at 1:03:49-1:03:52.

impact of noncompetes,[24] especially if they are bundled together for low-wage, low-skilled workers.[25]

Workers Are Leaving Jobs in Record Numbers

Fifth, one of the chief concerns identified by proponents of federal regulation is that noncompetes stop workers from leaving their jobs.[26] These concerns seem to persist even amid the unprecedented period of worker mobility known as the "Great Resignation," during which U.S. employers have faced record numbers of voluntarily resignations in 2021.

The most recent available data from the U.S. Department of Labor, Bureau of Labor Statistics showed that all ten of the states with the highest "quit rates" in September 2021 enforce noncompetes (with varying state-specific regulations).[27] Further, the data suggest that most employees who quit do not remain unemployed for long. For each job opening in September 2021, there were only 0.74 unemployed people available, the lowest ratio on record.[28] Indeed,

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[24] At the 2020 Workshop, Professor Starr explained in this regard, "[W]hen you compare workers who have signed a non-compete to those who haven't, you have to worry that there are other differences between those workers, not just whether they have signed the non-compete, which could be driving any outcomes you observe . . . . And it makes it really tricky, and I don't think we really have any great studies so far that really isolate random variation in the use of non-competes . . . ." 2020 Workshop Tr., p. 158-59.

[25] Terri Gerstein (director of the State and Local Enforcement Project at the Harvard Law School Labor and Worklife Program and a senior fellow at the Economic Policy Institute) commented that, in some ways, training repayment agreements are "even more insidious than non-competes" because they can effectively lock employees into a company, as opposed simply to preventing them from working for a competitor. 2021 Workshop Tr., Day 1, p. 67. A similar perspective was also expressed by LMU Loyola Law School Professor Jonathan Harris in his recent paper, *Unconscionability in Contracting for Worker Training*, 72 Alabama Law Review 723, 726, 749 (2021), available at https://ssrn.com/abstract=3642017.

[26] We addressed this misconception in the July Submission. *See* July Submission, at 14.

[27] Aimee Picchi, *Americans are quitting their jobs at record rates — here are the 10 states leading the trend* (Dec. 3, 2021), available at https://www.cbsnews.com/news/great-resignation-workers-quit-jobs-states-trend/.

[28] *Id.*

the unemployment rate in the United States fell to 4.2% in November 2021, with eight states achieving record-low unemployment.[29]

The reasons for the Great Resignation are varied and complex, and it will take years of research to understand it fully. But one thing is clear: American workers are enjoying the greatest period of mobility (and bargaining power) in recent memory, without federal regulation of noncompetes.

Noncompetes Are Not Free

Sixth, although noncompetes are often challenged as suppressing wages, as discussed in the July Submission, "when advance notice is provided, people subject to noncompetes tend to have *higher* wages than people not similarly bound."[30] Another recent paper discussing the legal and practical aspects of noncompetes[31] is consistent with that conclusion insofar as noncompetes are contracts and, as such, must be supported by consideration (*i.e.*, something of value). Indeed, several states require employers to give some additional consideration on top of continued at-will employment when requiring current employees to sign noncompetes.[32] In these situations, and with advance notice, employees have the ability to decide if the consideration is worth the restriction.

Conclusions to be Drawn

As the above reflects, the body of research and analysis continues to expand, and, as it does, significant gaps in the prior research are continuing to emerge. Given this evolving understanding, the presence of conflicting information (as well as continued reliance on misplaced assumptions, such as the assumed increase in use of noncompetes[33]), and the high

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[29] Reade Pickert, *Unemployment Rate Falls in Nearly All States, 8 at Record Low* (December 17, 2021), available at https://www.bloomberg.com/news/articles/2021-12-17/unemployment-rate-falls-in-nearly-all-states-8-at-record-low.

[30] July Submission, at 16. As noted in the July Submission, the wage premium appears to be reduced as the laws permit greater noncompete enforcement, although other benefits persist. *Id.*, at 16 n.42.

[31] Harrison Frye, *The Ethics of Noncompete Clauses* (2020), available at http://www.harrisonfrye.com/uploads/8/0/4/6/80469840/frye.ncc.online.pdf.

[32] See July Submission, *Attachment B*.

[33] *See Time for an Honest Policy Discussion*, *supra* n.19 (observing that comparing data from certain timeframes suggests that there has been no growth, and even a slight dip, in the use of noncompetes in the 2014-2018 timeframe).

stakes of regulation (including the potential for a significant adverse impact on the U.S. economy[34]), regulators should proceed with extreme caution. These issues are plainly more complicated than they might appear on superficial analysis, and there seems to be general agreement (including among some of the leading researchers themselves) that additional research is required.

3. INPUT CONCERNING ISSUES RAISED DURING THE WORKSHOP

Although there were many opinions, criticisms, and positive aspects of noncompetes discussed during the hearing, three comments bear specific consideration because of who made them.

First, FTC Chair Lina Khan characterized noncompetes as "take-it-or-leave-it agreements."[35] This is quite often accurate and, when it is, is a very fair criticism, not of noncompetes themselves, but of how they are distributed to employees.

As a threshold matter, "take-it-or-leave-it" agreements (or "contracts of adhesion" as they are often called) are not inherently harmful. For example, stock option agreements, long-term incentive bonuses, and stock awards (among others) are typically presented as "take-it-or-leave-it" agreements, but they can be extremely lucrative for the employee. More to the point, as previously noted, when noncompetes are rolled out with advance notice, some studies suggest that they can have positive implications for workers.[36]

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[34] The Defend Trade Secrets Act of 2016, P.L. 114–153 (codified at 18 U.S.C. § 1836), recognized the importance of trade secrets to the economy, companies, and employees, and specifically anticipated that it would supplement existing contractual protections. 114th Congress, 2nd Session, House of Representatives, Report 114-529, at 3-4 ("Companies have taken a number of measures to combat [trade secret misappropriation], including . . . employing strong contractual protections to safeguard their trade secrets in business relationships . . . ."); 114th Congress, 2nd Session, Senate, Report 114-220, at 2-3 ("By improving trade secret protection, the Defend Trade Secrets Act of 2016 will incentivize future innovation while protecting and encouraging the creation of American jobs."); Defend Trade Secrets Act, § 5 ("trade secret theft, wherever it occurs, harms the companies that own the trade secrets and the employees of the companies").

[35] 2021 Workshop Tr., Day 1, p. 8.

[36] *See* Evan Starr, J.J. Prescott, and Norman Bishara, *Noncompete Agreements in the U.S. Labor Force* (2020) (identifying various positive effects of noncompetes when advance notice is provided, including higher earnings, more access to information, more training, and more job satisfaction), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. Instructively, according to that study, more than half (52 percent) of people presented with a noncompete chose to "forgo[] the

Second, Assistant Chief Karina Lubell[37] stated that, like "other vertical restrictions," noncompetes are harmful, "especially for low income and other workers who are ill positioned to negotiate" the restrictions "or later challenge them in court."[38] Like Chair Khan's observation, Assistant Chief Lubell's observation identifies very real concerns.[39]

Typically, the indiscriminate use of noncompetes for low-income, low-skilled workers for whom the justifications for noncompetes rarely apply or are generally outweighed by countervailing considerations (including those noted by Assistant Chief Lubell) reflect an improper use of noncompetes. It is for that reason that ten states have already imposed bans on their use for such workers,[40] and we identified it as an area for suggested regulation in the July

opportunity to negotiate [because] the terms were reasonable," while 41 percent assumed they were not negotiable, *id*. at p. 9, the latter of which could be addressed with advance notice and written notice of the right to discuss the contract with counsel (a requirement in Massachusetts and, effective January 1, 2022, in Illinois as well). Indeed, 55 percent of people presented with a noncompete before they accepted the offer thought it was reasonable and 48 percent thought they could negotiate it. *Id*. Similarly, Professor Matt Marx has observed that, "[i]f it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so, *these agreements could be valuable for both workers and firms*." *See The Chilling Effect of Non-Compete Agreements*, by Matt Marx and Ryan Nunn (May 20, 2018) (emphasis added), available at https://econofact.org/the-chilling-effect-of-non-compete-agreements. *See also* Harrison Fry*, The Ethics of Noncompete Clauses* (discussing the exchange of benefits reflected in noncompete agreements), available at http://www.harrisonfrye.com/uploads/8/0/4/6/80469840/frye.ncc.online.pdf.

[37] Ms. Lobell is the Assistant Chief of the Competition Policy & Advocacy Section, Antitrust Division at U.S. Department of Justice.

[38] 2021 Workshop Tr., Day 2, p. 79.

[39] We neither address nor necessarily agree with the characterization of noncompetes as "vertical restrictions," nor do we address (beyond the discussion above at n.10) or necessarily agree with the extrapolations made by several speakers during the Workshop that, through a presumed chain of ill effects, noncompetes have adverse impacts on consumers (in the traditional sense), which could arguably bring their regulation within the FTC's purview. We do note, however, that the predicate for one such extrapolation – *i.e.*, that noncompetes prevent startups, which in turn prevents the creation of (assumed) improved products that the startup would have (presumably made and sold), which would have led to more competition, which would have led to lower prices, and thus harms the consumer – has (as noted above) been called into question by the Philadelphia Federal Reserve's recent study. *See above* n.6.

[40] *See* July Submission, at 22 (chart).

Submission.[41] However, while low-wage, low-skilled workers present special concerns, there are many instances in which noncompetes have positive effects for all parties involved – the company that used them, the workers bound by them, and the employees that remain at the company.[42]

Finally, Chair Khan expressed her view that the antitrust laws can protect workers, and therefore the FTC is examining whether it has the power to regulate noncompetes[43] and other "take it or leave it agreements."[44] Although we generally support some regulation of noncompetes, we believe that the states are the appropriate source for such regulation, especially because the impacts of those restrictions can be tested in the smaller markets of the states (the laboratories of democracy) and evaluated over time. Indeed, at this point, approximately 3/4 of all states have considered amending their noncompete laws in recent years, with 24 states (and D.C.) making changes, three (and D.C.) this year alone (Illinois, Nevada, and Oregon).[45]

Further, if regulation were to happen at the federal level, Congress already has three bills specifically focused on employee noncompetes: two to ban them outright and one to prohibit them for nonexempt workers under the Fair Labor Standards Act.[46] As noted during the Workshop, however, there is legitimate concern that any action by the federal government would be "too heavy a hand"[47] and not allow for flexibility to accommodate state-by-state variations or distinguish among different industries, different jobs, or even different parts of the country (rural versus urban and suburban), all of which may have different implications that need to be addressed differently. For example, these differences might warrant variations in the length, scope, or propriety of noncompetes when these issues are considered on a more granular level.

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[41] *See* July Submission, at 32.

[42] *See*, *e.g.*, July Submission, at 16 & n.42, 20, 23 & n. 60, 27-28, 32 n.89.

[43] There is little doubt that the FTC has authority to regulate intercompany transactions (*e.g.*, noncompetes in the context of a merger). The question about its authority really relates to regulation of *intra*company transactions (*e.g.*, noncompetes with its employees).

[44] 2021 Workshop Tr., Day 1, p. 8.

[45] *See* Beck, *A Brief History of Noncompete Regulation* (Oct. 11, 2021), available at https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/.

[46] *Id*. Congress also has a recently-filed bill (the Employment Freedom for All Act) that would "void existing non-compete agreements for any employee who is fired for not complying with an employer's COVID-19 vaccine mandate, and for other purposes." Information about the bill is available at https://www.congress.gov/bill/117th-congress/house-bill/5851/all-info.

[47] 2021 Workshop Tr., Day 1, at p. 57.

Again, noncompetes have been permitted and used in the vast majority of states across the entire arc of the country's rise to economic power. A drastic change in how American firms protect themselves against unfair competition (like a total ban or substantial additional restrictions on noncompetes) could have tremendous unforeseen, adverse consequences.

For all points not specifically addressed above, including recommended regulations (in the event the Commission seeks to regulate noncompetes or other restrictive covenants[48]), we incorporate our attached July Submission.

The signatories below wish to again express their great appreciation for your consideration of this submission and for taking on such an important and fraught issue. We are prepared to appear and testify live before the Commission and to offer any other assistance that the Commission or Department of Justice may find helpful, including providing additional real-world experience or assisting in the drafting of language for a rule, policy, or guidance.

Respectfully submitted,

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[48] In that regard, there was discussion at the Workshop concerning nondisclosure agreements (also known as "confidentiality agreements"). However, the discussion focused on the use of such agreements to silence victims of alleged employer misconduct. Though sharing the same name, those nondisclosure agreements bear no relation to the purpose of nondisclosure agreements used to protect trade secrets and other confidential business information. Should the FTC consider regulating such agreements, we request the opportunity to supplement this submission to explain practical and legal requirements (under trade secret laws) for nondisclosure agreements.

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Attachments

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

Attachment 1

INDIVIDUAL BIOGRAPHIES OF NEW SIGNATORIES

Janice S. Agresti
Cozen O'Connor
New York, New York
Link to full bio here: https://www.cozen.com/people/bios/agresti-janice

Janice Sued Agresti is an associate in Cozen O'Connor's New York City office, and is licensed to practice law in New York, New Jersey, and Pennsylvania. She is a litigator who represents both plaintiffs and defendants in trade secrets and restrictive covenant matters. She is also a trusted advisor who counsels her clients on noncompetition, nonsolicitation, and confidentiality agreements. Janice also has experience as in-house counsel during her time as a secondee to Marsh & McLennan Companies. Additionally, Janice litigates and advises on other employment matters, including discrimination, harassment, and retaliation matters before state court, federal court, and administrative agencies. Janice is an active member of the New York City Bar Association's Noncompete & Trade Secrets Committee.

Jonathan Cooper
Law Offices of Jonathan M. Cooper
Cedarhurst, New York
Link to Full Bio Here: https://www.jonathancooperlaw.com/bio/jonathan-cooper.cfm

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

Jonathan L. Crook
Jackson Lewis P.C.
Raleigh, North Carolina
Link to full bio here: https://www.jacksonlewis.com/people/jonathan-l-crook

Jonathan L. Crook is the Knowledge Management Attorney at Jackson Lewis P.C. for the Restrictive Covenants, Trade Secrets and Unfair Competition practice group. Based out of Raleigh, North Carolina, Jonathan collaborates with practice group members around the country to craft agreements custom-made for each client, whether applicable to one state or all 50 states. Jonathan monitors case law and legislation at the state and federal levels to keep the practice group up-to-speed on material developments in the ever-evolving area of restrictive covenant

law. As a former litigator, Jonathan has prosecuted and defended against claims for restrictive covenant breach, trade secret misappropriation, breach of fiduciary duty, and unfair competition, often involving requests for emergency injunctive relief. With this background, Jonathan serves as a resource for clients seeking to investigate potential wrongdoing through forensic analysis, remove sensitive material from the devices or accounts of departing employees, and file for protective relief in court, if necessary. Jonathan also works closely with practice group leadership to refine best practices and explore innovative ways to protect clients' business interests. Jonathan develops internal resources that increase efficiency on multi-state projects and contributes to the firm's thought leadership in blogs and legal updates.

Puneet Dhaliwal
Beck Reed Riden LLP
Boston, Massachusetts

Puneet is an associate at Beck Reed Riden LLP, working on trade secret and restrictive covenant matters around the country. She graduated from Boston College Law School, where she served as President of the International Law Society and Vice President of the South Asian Law Student Association. Puneet was a judicial intern to Hon. Sarah Netburn at the U.S. District Court for the Southern District of New York.

Lee T. Gesmer
Gesmer Updegrove LLP
Boston, Massachusetts
Link to full bio here: https://www.gesmer.com/team/lee-gesmer/

Lee Gesmer is a founding partner of Gesmer Updegrove LLP. He has 40 years of experience in business and intellectual property litigation, which includes advising companies and employees on noncompete agreements and litigating and arbitrating noncompete disputes. He has presented educational programs on noncompete law before the Massachusetts and Boston Bar Associations. He co-authored the 2009, 2011 and 2013 (supplement) editions of Massachusetts Employment Law, Chapter 20: "Employee Noncompetition Agreements."

Scott Gibson
Denton Peterson Dunn
Mesa, Arizona
Link to full bio here: https://arizonabusinesslawyeraz.com/scott-gibson/

For more than 35 years, Scott F. Gibson has helped businesses protect themselves from unfair competition and disloyal employees. He does so through a unique position in the law, a position based on a blend of skills derived from his courtroom experience and from a deep understanding of the legal theories implicated by unfair competition. As a result, his clients are able to more effectively protect their intangible business interests.

Scott has an uncanny ability to quickly spot the most important issues in a case, which enables him to focus on ways to resolve rather than expand litigation. He is an effective advocate and a creative negotiator for his clients. His ability to spot critical issues has helped many clients bring

cases to an early conclusion through negotiation or motion practice. When a case cannot be settled through legal motions or favorable negotiations, Scott is a well-prepared and effective trial attorney.

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

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

Paul Kennedy
Littler Mendelson, P.C.
Washington, D.C.
Link to full bio here: https://www.littler.com/people/paul-j-kennedy

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

Dawn Mertineit
Seyfarth Shaw LLP
Boston, Massachusetts
Link to full bio here: https://www.seyfarth.com/people/dawn-mertineit.html

Dawn Mertineit is a litigation partner in Seyfarth's Trade Secrets, Computer Fraud and Non-Competes practice group. For more than a decade, Dawn has represented corporations and their directors and officers in a number of industries in complex commercial litigation, with special emphasis on noncompete and trade secrets litigation. She understands that many clients rely on noncompete and nonsolicitation agreements to protect their most valuable assets, while others face hurdles in recruiting and onboarding new employees bound by such restrictive covenants. Dawn brings her experience and knowledge of state and federal laws to help her clients navigate these issues, from drafting agreements and executing rollout and enforcement strategies, to analyzing competitor agreements and proposing recruitment and onboarding plans, and prosecuting or defending against claims related to breach of restrictive covenants or misappropriation of trade secrets. Dawn represents clients in trade secret and noncompete matters in a number of jurisdictions. This cross-state knowledge is particularly critical, as states continue to pass new legislation relevant to restrictive covenants and trade secrets. As the co-

editor of and a frequent contributor to Seyfarth's award-winning Trading Secrets blog, Dawn remains current with new laws and key developments in this space, and provides clients with crucial updates about the laws that affect their businesses. In light of her thought leadership, Dawn has been quoted in a number of legal and industry publications, including Bloomberg Law, The American Lawyer, Law360, Massachusetts Lawyers Weekly, and SC Magazine.

Stephen T. Paterniti
Jackson Lewis, P.C.
Boston, Massachusetts
Link to full bio here: https://www.jacksonlewis.com/people/stephen-t-paterniti

Stephen T. Paterniti is a principal in the Boston, Massachusetts, office of Jackson Lewis P.C. He concentrates his practice in the area of employment litigation and counseling on behalf of management. Steve advises and defends employers on employment issues including employment discrimination and harassment, non-competition, non-solicitation, and misappropriation of trade secrets, leave laws, wage and hour, OSHA, and reductions in force. He has extensive trial experience and appears frequently in state and federal courts, as well as administrative agencies such as the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission. He has successfully represented clients in federal and state discrimination litigation, restrictive covenant litigation, wage/hour class actions, contract claims, and other employment-related litigation. Prior to joining Jackson Lewis, he worked as a criminal prosecutor, both as an Assistant Attorney General for the Commonwealth of Massachusetts in its white collar crimes unit and also as an Assistant District Attorney in Hampden County.

Sally Piefer
Lindner & Marsack, S.C.
Milwaukee, Wisconsin
Link to full bio here: http://www.lindner-marsack.com/employment-lawyers/sally-piefer.php

Sally Piefer is a partner in the employment law section of Lindner & Marsack, S.C.. With more than 25 years of experience, Sally represents employers in a variety of employment matters, with special emphasis in employment litigation, employment counseling and compliance issues. Sally's practice involves drafting, providing advice and litigating non-compete/non-solicitation agreements and trade secret claims across the United States. Sally’s clients span numerous industries, including manufacturers, service companies, governmental entities, senior living, hospitality, retail, transportation, construction, non-profit, insurance and professional services firms. Sally earned her law degree from Marquette University.

Lauri F. Rasnick
Epstein Becker & Green P.C.
New York, New York
Link to full bio here: https://www.ebglaw.com/people/lauri-f-rasnick/

Lauri Rasnick is a partner with Epstein Becker Green and has been practicing law for twenty five years. Lauri focuses her practice on representing employers with respect to a broad range of issues. Among other things, Lauri advises companies on drafting non-competition, non-

solicitation and confidentiality agreements and assists employers in hiring employees who are subject to restrictive covenants. She also regularly litigates and arbitrates employment cases including non-compete and trade secret matters in state and federal courts and arbitral forums. Lauri frequently speaks and write on trade secrets and restrictive covenants.

Susan Gross Sholinsky
Epstein Becker & Green P.C.
New York, New York
Link to full bio here: https://www.ebglaw.com/people/susan-gross-sholinsky/

Susan Gross Sholinsky is the Vice Chair of both the Firm's Employment Labor & Workforce Management Steering Committee and its Diversity and Professional Development Committee. She gives employers the tools they need to make smart decisions about their workforce challenges. Executives, human resources, and in-house legal teams seek her out for her straight-forward advice and access to boots-on-the-ground resources, regardless of location. Susan spearheaded the firm's COVID-19 taskforce that provides employers with practical advice supported by training programs compliant in all 50 states, and dozens of pandemic-related policies and forms, as well as client advisories, blog posts, and articles. She also drafts employment agreements, offer letters, restrictive covenant agreements, policies, and other employment documentation. Whether she's conducting training on anti-harassment (similar to Epstein Becker Green's "Halting Harassment" online training tool) or leading training on diversity, internal investigations, or performance documentation best practices, Susan's effective training style helps managers spot problems early and boost productivity through safe, compliant practices.

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

Carson Sullivan is a partner in the Employment Law practice of Paul Hastings and is the chair of the Washington, D.C. Employment Law Department. Ms. Sullivan represents employers in all aspects of employment law, with an emphasis on the defense of class and collective action suits and litigation involving trade secrets and restrictive covenants. She is a member of the firm's Employee Mobility and Trade Secrets practice group as well as the Pay Equity practice group.

Peter J. Toren
Peter J. Toren, Attorney at Law
Washington, D.C.
Link to full bio here: https://petertoren.com/about/

Peter J. Toren is a litigator with over 30 years of experience, who has successfully represented clients in a variety of matters in venues all over the United States at trial and appellate levels. He has a strong focus on patent, trademark, copyright, and trade secret cases.

Peter has represented clients in patent litigation involving a variety of technologies including computer software and hardware, light emitting diodes, bio-technology, semiconductor manufacturing and fabrication, optics and medical devices as well as business methods. He has successfully obtained and defended motions for preliminary injunctions and summary judgment motions involving the Patent Act, Copyright Act, Lanham Act, Digital Millennium Copyright Act and Computer Fraud and Abuse Act. In addition to intellectual property litigation. He also has experience in computer law including cybersecurity.

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

UPDATED BIOGRAPHIES FOR SIGNATORIES TO JULY SUBMISSION

Jay M. Dade
Polsinelli
Kansas City, Missouri
Link to full bio here: https://www.polsinelli.com/professionals/jdade

Jay M. Dade is an experienced labor and employment lawyer who counsels clients on noncompete agreement implementation and enforcement; day-to-day personnel management and union management issues, including alcohol and drug testing policy implementation and enforcement; federal and state wage-hour matters; discrimination claims arising under federal and state law; Family and Medical Leave Act matters; unfair labor practice charges, union organizing campaigns, representation elections, and secondary activity and arbitrations; and unemployment compensation and eligibility proceedings. Jay represents clients regarding restrictive covenant enforcement matters in multiple states and across multiple industry and professional areas (including financial services, health care, manufacturing and media). He represents employers before the EEOC, National Labor Relations Board, U.S. Department of Labor, Missouri State Board of Mediation, numerous state and local fair employment agencies, as well as federal and state courts nationwide. He is a Chapter Editor for The Developing Labor Law and is the vice chair of the firm's employment litigation practice group.

Jackie Johnson
Constangy, Brooks, Smith & Prophete, LLP
Dallas, Texas
Link to full bio here: https://www.constangy.com/people-Jackie-Johnson

Jackie is a subject matter expert in the area of unfair competition and restrictive covenant agreements. She co-chaired Littler Mendelson's Unfair Competition and Trade Secrets practice group for almost a decade before leaving the firm in 2020 to start her own firm focusing on this subject area. Jackie is a frequent author and speaker on restrictive covenants and is the co-author of the treatises Unfair Competition and Intellectual Property Protection in Employment Law (Bloomberg BNA 2014) and Drafting and Enforcing Covenants Not to Compete (BNA 2009).

Tobias E. Schlueter
Ogletree, Deakins, Nash, Smoak and Stewart, P.C.
Chicago, Illinois
Link to full bio here: https://ogletree.com/people/tobias-e-schlueter/

Tobias Schlueter is the Managing Shareholder of the Chicago office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. He is also the Chairperson of Ogletree's international Unfair Competition and Trade Secrets practice group. Mr. Schlueter has an extensive and proven track record of litigating high stakes cases involving unfair competition claims (including restrictive covenants (noncompete, nonsolicit and confidentiality), trade secrets, duties of loyalty, tortious interference, and civil conspiracy). He also routinely advises clients, including Fortune 100 companies, about their unfair competition matters. He extensively speaks and writes about these

issues. Under Mr. Schlueter's leadership over the past five years, Ogletree has handled over 1,500 unfair competition, trade secrets, and restrictive covenant cases for more than 1,000 clients. From 2018-2020, Ogletree was the most active trade secrets law firm in the United States, representing both plaintiffs and defendants. Mr. Schlueter is rated by Chambers USA as a Top Ranked / Leading Lawyer in Labor & Employment (2017, 2018, 2019, 2020 and 2021). Mr. Schlueter is also recognized as a Best Lawyer in America (2017, 2018, 2019, 2020 and 2021) for Employment Law – Management. In 2020 and 2021, Super Lawyers recognized Mr. Schlueter as an Illinois "Super Lawyer." Super Lawyers previously named Mr. Schlueter as an Illinois Rising Star for 2011, 2012, 2013 and 2014.

Appendix 1

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July 14, 2021

Mr. Zach Butterworth
Director of Private Sector Engagement
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Washington, D.C. 20580

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

Re: Written Submission of Practicing Attorneys Concerning Potential Federal Regulation of Noncompetition Agreements

Dear Director Butterworth and Commissioners:

We write today in connection with President Biden's July 9, 2021, Executive Order on Promoting Competition in the American Economy[1] and the FTC's anticipated deliberations concerning potential restrictions on employee noncompetition agreements (sometimes referred to as "noncompetes").[2] Specifically, we write to provide background information and a real-world, practical perspective fundamental to those deliberations, as well as a suggested approach that balances the competing interests at play and avoids an over-emphasis on nascent, inconclusive academic studies.

In that vein, we pause to emphasize the severity of one of the key issues that small and large businesses seek to address through the use of noncompetition agreements: "59 percent of

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1 Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

2 Noncompetes are a type of restrictive covenant that can arise in many contexts, including (most commonly) in the employment context. Because the focus of potential regulation of noncompetes has been on their use in the employment context, we address those exclusively.

ex-employees admit to stealing confidential company information" when they leave their job.[3] The harm caused by this loss is substantial, estimated to be in the hundreds of billions of dollars a year.[4] When used appropriately, noncompetition agreements can be an extremely effective tool to prevent the harm caused by this type of information exfiltration.

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[3] *More Than Half Of Ex-Employees Admit To Stealing Company Data According To New Study*, Ponemon Institute and Symantec Corporation (Feb. 23, 2009), available at https://investor.nortonlifelock.com/About/Investors/press-releases/press-release-details/2009/More-Than-Half-Of-Ex-Employees-Admit-To-Stealing-Company-Data-According-To-New-Study/default.aspx. The results of this study are consistent with a 2013 study by Symantec Corporation concluding that "[h]alf of the survey respondents say they have taken information, and 40 percent say they will use it in their new jobs." *What's Yours Is Mine: How Employees are Putting Your Intellectual Property at Risk*," Symantec Corporation (Feb. 6, 2013), available at https://www.ciosummits.com/media/solution_spotlight/OnlineAssett_Symantec_WhatsYoursIsMine.pdf. It bears mention that the estimates in both the studies are the product of employees self-reporting their misconduct, which, of course, begs the question of how many more employees have taken company information, but simply do not admit it.

[4] In 2014, The Center for Responsible Enterprise and Trade (CREATe.org) and PricewaterhouseCoopers (PwC) estimated that the cost of trade secret misappropriation ranged from one to three percent of the U.S. Gross Domestic Product, possibly costing U.S. companies as much as $480 billion per year. *See* "*Economic Impact of Trade Secret Theft: A framework for companies to safeguard trade secrets and mitigate potential threats*," CREATe.org and PwC (Feb. 2014), available at https://www.innovation-asset.com/hubfs/blog-files/CREATe.org-PwC-Trade-Secret-Theft-FINAL-Feb-2014_01.pdf; *Update to the IP Commission Report*, *The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy*, The National Bureau of Asian Research on behalf of The Commission on the Theft of American Intellectual Property (2017) (citing the CREATe.org/PwC report), available at https://www.nbr.org/wp-content/uploads/pdfs/publications/IP_Commission_Report_Update.pdf; *but see Quantifying Trade Secret Theft: Policy Implications*, Ciuriak Consulting Inc. (April 9, 2021) (though focusing on international trade secret theft and questioning the CREATe.org/PwC study), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3706511.

Applying the CREATe.org/PwC 2014 estimates to the 2020 GDP of $20.93 trillion reveals that roughly $209 billion to $628 billion was lost last year as a result of trade secret theft. Further, given that 85 percent of trade secret thefts are committed by either an employee or someone else known to the party whose trade secrets were stolen, *see* David S. Almeling, Darin W. Snyder, Michael Sapoznikow, Whitney E. McCollum, Jill Weader, "A Statistical Analysis of Trade Secret Litigation in Federal Courts," 45:2 Gonzaga L. Rev. 291, 302-03 (2010), available at http://blogs.gonzaga.edu/gulawreview/files/2011/02/Almeling.pdf, it appears likely that the lion's share of the theft is occasioned when an employee moves to a competitor.

SUMMARY OF OUR SUBMISSION

Our submission covers five topics:

1. Our background in brief (offered solely for the purpose of enabling you to evaluate the credibility and utility of our submission).

2. The purpose and practicalities of noncompetition agreements.

3. Common misconceptions about the use, enforcement, and impact of noncompetition agreements.

4. Regulatory efforts across the country and what can be learned.

5. Recommendations for a fair approach, largely consistent with the recommendations made by the Obama Administration and the outcomes in states across the country.

In sum, we explain that, although sometimes abused, when used properly (as all of the signatories to this letter recommend) noncompetition agreements serve legitimate purposes that are important to the economy, and necessarily require a nuanced approach reflective of variations in jobs, industries, and state economies. We also explain, as one of the leading professors on the subject[5] observed, that the current research fails to "isolate random variation in the use of non-competes" that would be necessary to establish noncompetition agreements as the cause of negative outcomes.[6] Accordingly, we explain that any regulatory efforts should proceed with

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5 Professor Evan Starr of the Robert H. Smith School of Business, University of Maryland.

6 Professor Starr explained, "[W]hen you compare workers who have signed a non-compete to those who haven't, you have to worry that there are other differences between those workers, not just whether they have signed the non-compete, which could be driving any outcomes you observe . . . . And it makes it really tricky, and I don't think we really have any great studies so far that really isolate random variation in the use of non-competes . . . ." Final Transcript of January 9, 2020 FTC Workshop – "Non-competes in the Workplace: Examining Antitrust and Consumer Protection Issues" ("FTC Workshop Tr."), p. 158-59, available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf.

In a 2017 research paper, Cornell University Professor Matt Marx (another leading academic) summarized the scope, deficiencies, and limitations of the available research on noncompetition

caution, understand the limitations of the existing research, and avoid adverse unintended consequences.

Nevertheless, some changes in the law would unquestionably benefit workers, without harming companies or the economy. Chief among them would be to require that an employee be provided advance notice if a noncompete will be required as part of a job. That single change would, according to a 2019 study discussed below, offset the alleged adverse wage impacts of noncompetes.

Other changes we recommend (to the extent the FTC determines that it has the authority to regulate in this area) are directed to leveling the playing field and increasing transparency and fairness in the use of noncompetes.

DISCUSSION

1. OUR BACKGROUND

The 59 signatories to this submission include lawyers and paralegals from around the country, all with extensive relevant experience representing clients (from Fortune 50 companies to "mom and pop" shops to individual employees) in countless trade secret and noncompete matters on all sides of these disputes. Among the signatories are some of the country's leading authorities in the inextricably-related laws of noncompetes and trade secrets. Through our work helping thousands of clients, we have each seen first-hand the varied approaches that companies take to protecting their information, customer relationships, and other recognized "legitimate" business interests; the benefits and detriments of noncompetition agreements (and other restrictive covenants); and the practical, real-world impact they have on employees and employers alike.

Further, this letter includes input from, and is signed by, some of the same people who provided information relied upon by the U.S. Department of the Treasury and the White House in connection with President Obama's 2016 investigation into noncompetes,[7] including

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agreements in a paper available at https://sih.berkeley.edu/wp-content/uploads/2018/06/Employee-Non-compete-Agreements.pdf.

[7] The resulting reports were: *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Department of the Treasury, Office of Economic Policy (March 2016), available at https://www.treasury.gov/resource-center/economic-policy/Documents/UST Non-competes Report.pdf; *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*,

participants in the small working group convened by President Obama's Administration to develop the resulting Call to Action.[8]

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

We thank you for your consideration of the matters addressed in this letter.

2. THE PURPOSE AND PRACTICALITIES OF NONCOMPETITION AGREEMENTS

What Are Noncompetes And How Are They Used?

Regulated for more than 200 years by state law, noncompetition agreements place restrictions on the permissible post-employment competitive conduct of an employee.[9] But the restrictions are cabined; no state permits unfettered use of noncompetes. Rather, each of the 47 states that permit noncompetes[10] allows them to be used only as necessary to protect companies

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White House (May 2016), available at https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf.

[8] *State Call to Action on Non-Compete Agreements*, Obama Administration (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf.

[9] *See* Catherine L. Fisk, Catherine L. Fisk, WORKING KNOWLEDGE: TRADE SECRETS, RESTRICTIVE COVENANTS IN EMPLOYMENT, AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1920, 52 Hastings L.J. 441, 453–54 (2001), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262010; Russell Beck, NEGOTIATING, DRAFTING, AND ENFORCING NONCOMPETITION AGREEMENTS AND RELATED RESTRICTIVE COVENANTS, at § 2.1, at 2-2 – 2-6 (MCLE, Inc. 6th ed. 2021); *Hess v. Gebhard & Co.*, 808 A.2d 912, 918 n.2 (Pa. 2002) ("The earliest known American case involving a restrictive covenant is *Pierce v. Fuller*, 8 Mass. 223 (1811).").

[10] Only three states prohibit noncompetes generally: California (since 1872; *see Edwards v. Arthur Andersen LLP*, 44 Cal.4th 937, 945 (2008)); North Dakota (since 1865 – before North Dakota was even a state; *see Werlinger v. Mutual Service Cas. Ins. Co.*, 496 N.W.2d 26 (N.D. 1993)); and Oklahoma (since 1890 – before Oklahoma was a state; *see Noncompetes in Oklahoma Mergers and Acquisitions*, 88 Oklahoma Bar Journal 128, at n.2 (Jan. 21, 2017)).

Contrary to frequent confusion, although Montana at one point interpreted its statute as a ban, the Montana Supreme Court established (at least as of 1985) that Montana law does *not* ban employee noncompete agreements. *See Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 362 Mont.

from certain types of unfair competition. And, over the course of time, state laws have evolved in ways that make sense for the citizens, industries, and economies of each state.[11]

Despite the state variations,[12] noncompetes are generally disfavored in the law and as a result, unlike most contracts, will not be enforced unless a court determines that it is reasonable and appropriate to do so. In most states, that means that courts will review the reasonableness of the restraint, balancing the interests of the employee against the interests of the employer in the particular case. Specifically, noncompetes are typically considered enforceable if, and only to the extent that, in addition to satisfying other requirements (such as meeting all state-based contractual formalities), they are:

496, 503-07 (Mt. Sup. Ct. 2011); *Dobbins, DeGuire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 396-97 (Mt. Sup. Ct. 1985).

Although not a state, in 2021, Washington, D.C. passed a law prohibiting all noncompetes, except (contrary to what many states are doing) permitting noncompetes to be used for volunteers, casual babysitters, government employees, lay members holding office in a religious organization engaged in religious functions, and "medical specialists" (essentially physicians earning at least $250,000). *See* B23-0494 - Ban on Non-Compete Agreements Amendment Act of 2019 (available at https://lims.dccouncil.us/Legislation/B23-0494). The D.C. law, which will not become effective until funded, is the subject of pending amendments. *See* Council Bill 240256, available at https://legiscan.com/DC/bill/B24-0256/2021.

[11] The need for this very type of state-specific analysis was observed over 20 years ago by Ronald Gilson in his seminal comparison of Silicon Valley's tech sector to Massachusetts' Route 128 Miracle Mile. *See* Ronald J. Gilson, THE LEGAL INFRASTRUCTURE OF HIGH TECHNOLOGY INDUSTRIAL DISTRICTS: SILICON VALLEY, ROUTE 128, AND COVENANTS NOT TO COMPETE, 74 N.Y.U. L. REV. 575, 627-29 (1999) ("[B]ecause industries are not randomly distributed across jurisdictions, each state's particular industrial population may dictate a different balance. . . . Given the opportunity to act by design rather than by historical accident, the better approach may be to craft a legal infrastructure that has the flexibility to accommodate the different balance between external economies and intellectual property rights protection that may be optimal in different industries.").

[12] Of the 47 states that allow the use of employee noncompetes, 24 of them have statutes supplemented by common law, while the rest rely on common law that generally follows the Restatement (Second) of Contracts, § 188. *See* Beck, *Employee Noncompetes, A State-by-State Survey* ("*50 State Noncompete Survey*"), available at https://www.beckreedriden.com/50-state-noncompete-chart-2/. Originally drafted in 2010, this chart is updated periodically; the most current version (June 27, 2021, as indicated on the chart) is attached for your convenience as *Attachment B*.

- reasonable in duration (commonly one to two years[13]);
- reasonable in geographic reach (generally limited to the territory in which the employee worked or had a material impact, including where the confidential information to which the employee had access could be used to unfairly compete against the employer);
- reasonable in scope of restricted activities (typically related to the type of work the employee performed for the employer or work in which the employee would be likely to use the employer's confidential information);
- necessary to protect the enforcing party's legitimate business interests[14] (see *Legitimate Business Interests Protected by Noncompetes*, below); and
- consonant with public policy.

Legitimate Business Interests Protected by Noncompetes

The interests that may be protected by a noncompete are circumscribed by state law. While state laws vary to some degree, the protection of trade secrets is a fundamental private right, universally recognized as a legitimate business interest.[15]

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13 Some states have recently begun to statutorily limit the duration of the restricted period. For example, as of 2016, Oregon limits noncompetes to 18 months, ORS 653.295(2), and, effective 2022, will be limiting them to one year. In 2018, Massachusetts limited noncompetes to one year (unless the employee breached their fiduciary duties to the employer or unlawfully took property of the employer). G.L. c. 149, § 24L(b)(iv). Taking a different approach, rather than prohibiting noncompetes based on a bright-line rule, the state of Washington has made noncompetes longer than 18 months *presumptively* unreasonable and unenforceable. RCW 49.62.020.

14 The business justifications for noncompete agreements are generally referred to as "legitimate business interests," "protectable interests," or something similar.

15 *See 50 State Noncompete Survey*. Indeed, even the three states that prohibit (most or all) noncompetes (California, North Dakota, and Oklahoma) and Washington, D.C. (discussed above, *see supra* at p. 6, n.10) have adopted a version of the Unform Trade Secrets Act and recognize the importance of protecting trade secrets. *See* Beck, *Trade Secrets Acts Compared to the UTSA* ("*50 State Trade Secrets Comparison Chart*"), available at https://www.beckreedriden.com/trade-secrets-

The next most widely recognized protectable interest is goodwill developed by the company (through the work it pays its employees to perform) necessary to maintain the employer's continued relationships with its customers.[16] Goodwill is frequently the primary concern in certain sectors (notably, the staffing industry) and for companies managing departing salespersons.

Other legitimate business interests exist, though they vary by state. For example, some states permit the use of noncompetes to ensure that employer investments in employee training are both promoted and protected, while others recognize the need to encourage and protect an employer's extraordinary investments in developing an individual employee's unique skills to meet specific competitive opportunities.[17]

The Relationship Among Trade Secrets, Nondisclosure Agreements, and Noncompetes

To fully understand the need for noncompetes to protect trade secrets, some additional background is useful. Specifically, it is important to understand the relationship among trade secrets (the universally protected interest) and the three primary tools to protect them: trade secret law, nondisclosure agreements, and noncompetes.

As each is considered below, it is helpful to recognize that employees are at the center of most aspects of trade secrets: Trade secrets could not exist without the work of employees, cannot be protected without the efforts of employees, and would seldom be compromised or lost without the conduct of employees.

While employers and employees are generally aligned in protecting trade secrets for their mutual benefit at the beginning of and during the employment relationship, an employer's interest in protecting its trade secrets and an employee's interest in engaging in future employment may clash when the employment relationship comes to an end. This potential conflict is complicated by the fact that, although the departing employee is at the end of one employment life cycle, they are typically simultaneously at the beginning of the next, where the former's employer's risk of compromise or loss of its trade secrets corresponds directly to the

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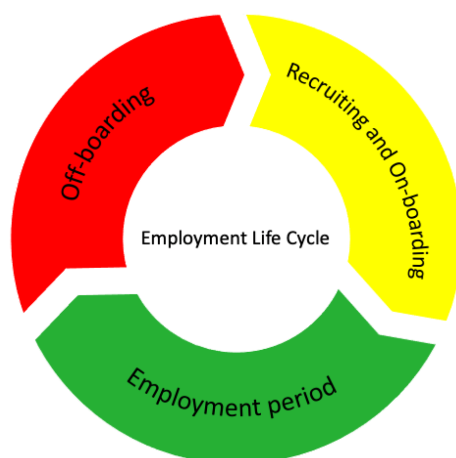
laws-and-the-utsa-a-50-state-and-federal-law-survey-chart/. (Originally prepared on August 14, 2016, this chart has been updated as laws have changed and is current as of the date indicated.)

16 *50 State Noncompete Survey.*

17 *Id*. (see, *e.g*., Alabama, Arkansas, Colorado, Florida, Iowa, Kansas, Kentucky, Louisiana, Maryland, New York, Pennsylvania, Tennessee, Texas, and Utah).

new employer's risk of infiltration of those same trade secrets in a way that contaminates its work. Accordingly, these issues can be conceptualized from a chronological perspective of the employment relationship, from recruiting and on-boarding, to the period of employment, to the off-boarding of an employee, and back to the on-boarding, reflected visually as follows:



Trade Secrets and Trade Secret Law: Trade secrets are information having economic value (actual or potential) derived from the fact that they are secret – and they must have been the subject of reasonable efforts to maintain secrecy. Trade secrets are protected by state trade secret laws and, as of May 11, 2016, by federal law as well.[18]

Information failing to qualify as a trade secret is not protectable under trade secret laws – state or federal. But just because the information may not qualify as a trade secret does not mean that it is unimportant to the business. For example, a significant source of disagreement in trade secret lawsuits can be customer information (often, complete or partial customer lists). Some states include customer information or customer lists in the definition of trade secrets.[19] Others

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[18] On May 11, 2016, the Economic Espionage Act, 18 U.S.C. §§ 1831-1839, was amended by the Defend Trade Secrets Act of 2016 (DTSA) to create a private right of action for the protection of trade secrets under federal law.

[19] *See 50 State Trade Secrets Comparison Chart*; Sid Leach, *Anything but Uniform: A State-By-State Comparison of the Key Differences of the Uniform Trade Secrets Act*, available at https://www.swlaw.com/assets/pdf/news/2015/11/06/How Uniform Is the Uniform Trade Secrets Act - by Sid Leach.pdf.

do not.[20] In the states that do not, the threshold battle typically involves whether the customer information can even be a trade secret. And, even when it *can* be a trade secret, parties still spar over (among other things) whether the particular customer information in fact qualifies as a trade secret. The ease or difficulty of compiling the information and the reasonableness of the efforts taken to maintain its secrecy are also frequent battlegrounds in these cases.

One of the most nuanced issues in trade secret law is how to handle the fact that trade secrets can often be retained in a person's memory. As a general matter, the mere fact that information is lodged in someone's head does not strip it of its trade secret qualities or the available protections. The secret formula to Coca-Cola is an example.[21] There are reportedly only two people in the world who know it – each purportedly knows all of it, not just a portion.[22] And, neither can lawfully disclose it to PepsiCo (or anyone else).

An example of how this issue can present a significant threat to a company (in a context in which the company is unable to use a noncompete) is a Chief Marketing Officer (CMO) who worked on the company's strategic plan and then leaves for a competitor to be its CMO, developing its strategic plan. The information the CMO knows about the former employer's plans may inform decisions about the new employer's strategic plan. How can the CMO avoid taking advantage of the weaknesses in the prior employer's strategy, or avoid getting tripped up by the strengths of that plan, as he or she maps out the course for the new company?

Another type of information presenting the same problem is the so-called "blind alley" (or "negative information"), *i.e.*, information that was considered and rejected on the path to finding the right solution. The product WD-40 provides a good example. WD-40 is the lubricant that unsticks things that are stuck, but should not be, and fixes squeaks.[23] Anyone

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[20] *Id*.

[21] The references in this letter to Coca-Cola, Pepsi, and WD-40 are to well-known products for illustrative purposes only. No signatory to this letter is endorsing any statement as to any such company or product outside the context of this letter, nor doing so as counsel for, or as an agent of, any such company or any company competitive thereto. Accordingly, nothing in this letter is an admission by or on behalf of any such company or any party with interests adverse thereto.

[22] *Coca-Cola's Secret Formula Coca-Cola's formula is not really so much of a secret that only two men each know half of it*, available at https://www.snopes.com/fact-check/coca-cola-fomula/?collection-id=209643.

[23] As they say on their website, "You need only two things in life: duct tape and WD-40; if it moves and shouldn't, use duct tape, if it doesn't move and should, use WD-40."

setting out to create a similar product would benefit from knowing the rejected formulas.[24] And someone who knows those failed efforts (such as a chemist who worked on their development) would be unlikely to blindly recreate them (knowing they will fail) if they were attempting to make their own similar product. Instead, they would be tempted to reject those failed formulas at the outset, thereby saving substantial research and development efforts and cost.

Despite all of this, some states' laws do not fully address the risks surrounding the hypothetical Coca-Cola executive working on Pepsi's secret formula, the CMO working on the new employer's strategic plan, and the WD-40 chemist working on the new competitive product. And even where the law provides protection in the abstract, in most cases the details of a departing employee's potential misconduct remain unknowable to the former employer. In this sense, litigation over potential misappropriation of a trade secret – which can be expensive and disruptive for all parties involved – is inherently imperfect as a means of protecting that secret.

Nondisclosure Agreements: Nondisclosure agreements (NDAs) (sometimes called "confidentiality agreements") are agreements by which someone (frequently an employee or business partner) promises not to use or disclose the other party's information. These agreements are typically a prerequisite to a company's ability to protect its trade secrets and other confidential information.[25]

NDAs serve multiple important purposes, including putting employees on notice that the company has information that may be confidential in general, and identifying for the employee particular types of information that the company considers confidential. Also, nondisclosure agreements are an important building block in a company's efforts to take (and ability to demonstrate that it has taken) reasonable measures to protect its information. They may also provide a breach of contract remedy for the taking of company information (to the extent not preempted by applicable state trade secret laws).

Like trade secret laws, NDAs do not prevent an employee from working for a competitor, even in the situations described above (involving the CEO, CMO, and chemist). While courts enforcing NDAs will typically order the return of information, they will rarely prevent employees from working for the competitor, thereby leaving the former employer to police the

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[24] WD-40 stands for "Water Displacement perfected on the 40th try." Accordingly, there were 39 formulas that were rejected before the formula was finally perfected. Knowing those earlier failed attempts, and therefore knowing to avoid, them would necessarily save substantial time and resources in the development of a competing product.

[25] Confidential information is a broad category of information of which trade secrets are a part.

former employee's conduct (*i.e.,* use of its trade secrets) without all the tools that may be necessary to prevent irreparable harm.[26] Further, some courts have recently begun heavily scrutinizing nondisclosure agreements, rendering them entirely unenforceable if they purport to cover information too broadly.[27]

Noncompetes: Noncompetes can be an important tool in the protection of trade secrets, especially in scenarios like those described above. Specifically, they can serve as a prophylactic to prevent the very circumstances in which trade secrets are most likely to be put at risk, thereby preventing the use or disclosure before it happens. Thus, they can provide effective protection against the greatest potential threat to trade secrets: when employees move to a competitor.

As noted above, "59 percent of ex-employees admit to stealing confidential company information" when they change jobs, the economic consequences of which are estimated to be in the hundreds of billions of dollars a year.[28] Accordingly, noncompetition agreements – when used appropriately – can be a critical tool to prevent the harm caused by this type of information exfiltration, as well as the correlative inbound contamination of a new employer's existing information and work product.

The threat to the economy and to the innovation reflected in trade secrets is so great that it led to the passage of the Defend Trade Secrets Act of 2016[29] (DTSA), establishing a federal private right of action for trade secret misappropriation.

But neither trade secret law (including even the DTSA) nor nondisclosure agreements can provide the level of protection, deterrence, and clarity offered by noncompetes.[30] As such,

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[26] Because "a secret once lost is . . . lost forever," *FMC Corp. v. Taiwan Tainan Giant Indus. Co., Ltd.*, 730 F.2d 61, 63 (2nd Cir. 1984), and policing a former employee's (and their new employer's) conduct is generally quite difficult, noncompetes can provide much more reliable protection for the integrity of a company's trade secrets than litigation claiming misappropriation.

[27] *See*, *e.g.*, *TLS Management and Marketing Services, LLC v. Rodríguez-Toledo*, 966 F.3d 46, 56-61 (1st Cir. 2020); *Brown v. TGS Management Company, LLC*, 57 Cal.App.5th 303, 315-18 (Cal. App. 4th Dist. 2020).

[28] *See supra* at pp. 1-2 & n.3 & 4.

[29] *See supra* at p. 9, n.18.

[30] There are other agreements that are also designed to protect recognized legitimate business interests as well. They include:

noncompetition agreements can be a critical tool to prevent the harm caused by this type of information exfiltration, and to help employees avoid new employment relationships that will tempt, or create the very real prospect of, their breach of confidentiality obligations. Rather than putting the parties and the court to the expense and uncertainty of litigation, noncompetes operate to temporarily prevent an employee from taking a role with a competitor that would put the former employer's trade secrets and other confidential business information at risk of being used, including by being relied upon, or disclosed.[31]

3. Common Misconceptions About The Use, Enforcement, And Impact Of Noncompetes

There are many misconceptions about noncompetes. We address some of the more common ones below.[32]

- nonsolicitation agreements, which for a limited time prohibit a former employee from soliciting customers with whom they worked while at their former employer or about whom they acquired confidential information through their prior employer;
- no-service agreements, which for a limited time prohibit a former employee from working with customers with whom they worked while at their former employer or about whom they acquired confidential information through their prior employer; and
- no-recruit or no-raid agreements, which for a limited time prohibit a former employee from recruiting former colleagues from their prior employer.

These less-restrictive agreements are often reasonably effective at achieving their purpose without the need for the additional restrictions associated with noncompete agreements. Indeed, many judges will not enforce a noncompete against a salesperson absent some other wrongdoing by that person. However, in some circumstances, these other "lesser" restrictions prove to be insufficient. This is precisely why the new Massachusetts noncompete law expressly authorizes courts to impose a "springing noncompete" (or a "time out noncompete," as John Marsh, a signatory to this letter, has called them) when an employee violates these other contractual obligations, or certain other obligations. *See infra* at p. 33.

[31] As also noted above, states vary on the other interests that can be protected through noncompete agreements. *See Attachment B* (*50 State Noncompete Survey*). In that vein, for companies for which customer contacts are the key to the business, noncompetes can prevent even the subtle customer solicitation that might otherwise occur.

[32] A more detailed discussion of popular assumptions about the impact of noncompetes and a discussion

Misconception: Noncompetes Prevent Employees From Working

Some commentators claim broadly that noncompetes prevent employees from working. This is not true. Noncompete agreements cannot (lawfully) be used simply to prevent an employee from quitting their job, working in their field, or using their general skills and knowledge.[33] Rather, as applied by the courts, noncompetes restrict only competition that puts at risk the protectable information or other interest of a former employer.[34]

Even under the restriction of a noncompete, employees remain free to resign and work for a company where they will use their general skill and knowledge. For example, Coca-Cola's CEO can be the CEO at any company that does not compete with The Coca-Cola Company. The CMO described above can be a CMO at any company that does not compete with his former employer. And the chemist described above can be a chemist working on anything other than a product competitive with WD-40. What they cannot do is use or put at risk their former employer's trade secrets on behalf of a new employer. Accordingly, when used properly, noncompetes prevent only *unfair* competition. (Abusive application of noncompetes is addressed below.)

Misconception: Noncompetes Are Used With Increasing Frequency

A very common assumption about noncompetes is that they are being used with increasing frequency. There is no empirical evidence to support this. In contrast, using the

of the limited research available to date is set forth in "*Misconceptions In The Debate About Noncompetes*," Law360, July 8, 2019 (reprinted on *Fair Competition Law* as "*Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston's Route 128*," available without subscription at https://www.faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128/). *See also* Matt Marx, SCIENCE POLICY RESEARCH REPORT: EMPLOYEE NON-COMPETE AGREEMENTS (June 2018) (discussing existing noncompete research), available at https://sih.berkeley.edu/wp-content/uploads/2018/06/Employee-Non-compete-Agreements.pdf.

[33] A noncompete prevents someone from working for a competitor in a role in which they would likely use trade secrets or otherwise engage in unfair competition. Such a restriction can, of course, have collateral effects, preventing what would otherwise be lawful competitive activities (depending on the nature of the planned role and extent of the noncompete restriction as applied).

[34] *Cleaning up overly broad noncompetes: the "Janitor Rule,"* available at https://faircompetitionlaw.com/2018/07/04/cleaning-up-overly-broad-noncompetes-the-janitor-rule/.

number of reported judicial opinions about noncompetes as a proxy, we can conclude that the use and enforcement of noncompetes has remained roughly static during the last decade. But because reported anecdotes create a different impression,[35] some pundits claim that noncompetes are increasingly used for lower-level employees, and have correlated that with slow wage growth since the Great Recession, blaming the latter on the former. However, this too is not supported by empirical analysis.

Indeed, we are unaware of any longitudinal studies finding that the use of noncompetes has risen over the years. We know only that, as Professor Starr explained, "roughly 18 percent of the U.S. workforce [was] bound by a non-compete [in 2014]. Among low-skill workers . . . without a college degree, it's about 15 percent."[36] But, we also know that the use of noncompetes dates back at least to medieval times, when master craftsmen tried to restrain their apprentices from using the skills the masters taught them.[37] And a century ago, noncompetes were already being used for low-wage and blue collar workers.[38]

Misconception:
Noncompetes Depress Wages

As to the effects on wages, we do not know whether there is something about the way noncompetes have been used recently that has stifled wage growth. Slow wage growth has apparently been a persistent problem for at least the last 50 years – not just since the Great

[35] *Non-compete Contracts: Economic Effects and Policy Implications*, U.S. Department of the Treasury, Office of Economic Policy (March 2016), available at https://www.treasury.gov/resource-center/economic-policy/Documents/UST Non-competes Report.pdf.

[36] *Study Finds Many Companies Require Non-Compete Clauses For Low-Wage Workers* (Nov. 7, 2016), available at https://www.npr.org/2016/11/07/501053238/study-finds-many-companies-require-non-compete-clauses-for-low-wage-workers.

[37] *See* Catherine L. Fisk, WORKING KNOWLEDGE: TRADE SECRETS, RESTRICTIVE COVENANTS IN EMPLOYMENT, AND THE RISE OF CORPORATE INTELLECTUAL PROPERTY, 1800–1920, 52 Hastings L.J. 441, 453–54 (2001), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=262010.

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

Recession or the concomitant supposed increase in the use and abuse of noncompetes.[39] Moreover, recent pre-pandemic reports indicate that wages had in fact picked up of late.[40] In sum, without the benefit of studies on how noncompete use has changed over years, no one can pronounce noncompetes to be the cause of slow wage growth (whether for low-wage workers or anyone else).[41]

However, we do know (as set forth below) that noncompetes can *increase* wages for certain employees (executives and physicians, for example) and, more importantly, that when advance notice is provided, people subject to noncompetes tend to have *higher* wages than people not similarly bound.[42]

Misconception: Every Restrictive Covenant Is A Noncompete

A major source of confusion in this debate consists of those who conflate or confuse noncompete agreements with nondisclosure or nonsolicitation covenants. As noted above, they

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[39] *America's slow-motion wage crisis*, by John Schmitt, Elise Gould, and Josh Bivens (Sept. 13, 2018), available at https://www.epi.org/publication/americas-slow-motion-wage-crisis-four-decades-of-slow-and-unequal-growth-2/.

[40] *See Why Wages Are Finally Rising, 10 Years After the Recession*, by Ben Casselman, *The New York Times* (May 2, 2019) https://www.nytimes.com/2019/05/02/business/economy/wage-growth-economy.html; *U.S. labor costs rise in third quarter*, Reuters (October 31, 2019) https://www.reuters.com/article/us-usa-economy-costs-idINKBN1XA1PC.

[41] For more, *see President Biden's Proposed Ban of (Most) Noncompetes: Protection Strategies and Steps to Take Now* (observing that "if noncompetes were in fact the root cause of comparatively depressed wages, one would think that California . . . would have the highest median income (all things being equal). But it doesn't. It has the 10th" and "every other state . . . above California (*i.e.*, with a higher median income) enforces noncompetes."), available at https://faircompetitionlaw.com/2020/12/02/president-bidens-proposed-ban-of-most-noncompetes-protection-strategy-and-steps-to-take-now/.

[42] It bears noting that the positive impact of advance notice on wages appears to diminish in states with greater relative enforceability of noncompetes. *See* Evan Starr, J.J. Prescott, and Norman Bishara, *Noncompetes in the U.S. Labor Force*, at 15-16 (Oct. 12, 2020) ("[W]hile greater enforceability is associated with more training for individuals with early-notice noncompetes, the wage premium for agreeing to a noncompete also diminishes with enforceability, regardless of noncompete timing."), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. Accordingly, the additional recommendations below should assist in preserving the positive wage effects of advance notice.

are often related, but are legally and practically distinct. This confusion is a potential foundational problem in some of the data used in studies to assess the effects of noncompetes.

Misconception: Union Members Are Subject To Noncompetes

A related misconception that arises occasionally is that union workers are required to sign noncompetes. Outside of the context of professional athletes and certain media professionals, noncompetes are rarely a part of a union contract. Rather, union members are sometimes bound by perfectly reasonable restrictions on their competitive activities *during* their employment – again potentially demonstrating some of the confusion concerning what restriction has been agreed to.[43]

Misconception: Noncompetes Are Routinely And Vigorously Enforced

Another misconception is that noncompetes are regularly enforced and are enforced with extreme vigor. Once again, we are unaware of any studies revealing the frequency of such enforcement by courts (or arbitrators) or that examine in a reliable way how enforcement may have changed over time.[44] However, over the past decade and a half, the number of reported court decisions (*i.e.*, published rulings by judges and collected in Westlaw's database) involving

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[43] In that vein, during the FTC's January 9, 2020, workshop on noncompetes ("Non-competes in the Workplace: Examining Antitrust and Consumer Protection Issues"), Damon Silvers, Policy Director and Special Counsel to the AFL-CIO, explained, "I can tell you that unions never agree to non-compete agreements. I have never seen a collective bargaining agreement that had one in it." Final Transcript of the FTC January 9, 2020, workshop ("FTC Workshop Tr."), p. 54-55, available at https://www.ftc.gov/system/files/documents/public_events/1556256/non-compete-workshop-transcript-full.pdf.

[44] In any useful study, consistent nomenclature will be important. "Enforcement" can take many forms, ranging from merely reminding the employee about the existence of the noncompete to bringing a lawsuit and seeking injunctive relief from a court.

noncompetes has largely remained the same[45] despite the (pre-pandemic) growing workforce[46] and somewhat increased number of job changes per capita.[47] This leveling off of the number of court decisions may suggest that fewer noncompetes are being used, fewer noncompetes are being enforced, or both.

In contrast, trade secret litigation appears to have increased substantially during that same period.[48] Further, more trade secret litigation occurs in California than any other state, perhaps suggesting that litigation is being used as a substitute for the unavailable tool of a noncompete.[49] To the extent that such a conclusion can be properly drawn, it stands to reason that a national ban on the use of noncompetes would have similar results nationally.[50]

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[45] *See Trade Secret and Noncompete Case Growth Graph* ("*Case Growth Graph*") (Updated January 2, 2021), available at https://faircompetitionlaw.com/2021/01/02/new-trade-secret-and-noncompete-case-growth-graph-updated-january-2-2021/. (The chart is a "back-of-the-envelope" count intended to demonstrate relative numbers per year, not provide absolute numbers. Further, the counts in the most recent years tend to be significantly underreported as a consequence of the timing and manner in which Westlaw updates its database; accordingly, it is difficult to draw any meaningful conclusions from the counts in the last few years.)

[46] *See* Civilian Labor Force Level, January 1, 1948, through February 2020, available at https://fred.stlouisfed.org/series/CLF16OV.

[47] *How Many Times Will People Change Jobs? The Myth of the Endlessly-Job-Hopping Millennial*, by Jeffrey R. Young (July 20, 2017), available at https://www.edsurge.com/news/2017-07-20-how-many-times-will-people-change-jobs-the-myth-of-the-endlessly-job-hopping-millennial.

[48] *See Case Growth Graph*.

[49] *See California Trade Secrets Litigation Supplants Noncompete Litigation*, available at https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/.

[50] It bears noting that trade secret litigation is far more involved, more costly, longer lived, and less predictable than noncompete litigation. *See generally* Christina L. Wu, NONCOMPETE AGREEMENTS IN CALIFORNIA: SHOULD CALIFORNIA COURTS UPHOLD CHOICE OF LAW PROVISIONS SPECIFYING ANOTHER STATE'S LAW?, 51 UCLA L. Rev. 593, 610-11 (2003) ("Noncompete agreements can also reduce the cost of trade secret litigation. . . . Instead of claiming misappropriation of trade secrets, an employer can simply bring a contract action for breach of the covenant not to compete, which would be less costly and easier to prove. Trade secret misappropriation cases can involve extensive discovery. They also consume the time of other employees, who would otherwise be performing more productive tasks. In contrast, proving a violation of a noncompete agreement would not involve extensive discovery or exhaust other employees' time." (footnotes omitted)).

Misconception: Noncompetes Cannot Be Challenged in Court

Some people believe that noncompetition agreements typically use arbitration provisions to bar employees from challenging their contracts in court. This is not true. Although they are common in some industries (financial services and healthcare industries, for example), we are unaware of any studies or even anecdotal evidence suggesting that arbitration provisions are regularly used to move noncompete disputes into arbitration. Based on our collective experience, noncompetes do not typically include arbitration provisions outside of certain limited industries. Further, even when arbitration provisions are used, they usually allow for early judicial intervention to allow a judge to determine whether or not the employee may in the near term be prevented from beginning work at a new employer.

Misconception: Massachusetts Bans Noncompetes Or Requires Garden Leave

In the wake of extensive media coverage of the Massachusetts noncompete legislative process, which led other states to reevaluate their own noncompete laws, there has been substantial confusion about what the new Massachusetts law requires. Many seem to think that Massachusetts banned noncompetes. It did not. It considered and rejected a ban; the law permits noncompetes when they comply with the statutory requirements.[51]

Another popular misconception is that Massachusetts now requires employees to be paid "garden leave," *i.e.*, payment of a portion of their salary during the term of the restriction. It does not. Though the statute *permits* the use of a "garden leave clause," such payments are not required. Parties are permitted to support the noncompete with "other mutually-agreed upon consideration."[52]

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[51] *See* M.G.L. c. 149, § 24L.

[52] *See* M.G.L. c. 149, § 24L(b)(vii); *see also* Beck & Hahn, *Consideration Happens, But Not During Garden Leave*, Massachusetts Lawyers Weekly (Jan. 2, 2020), available at https://masslawyersweekly.com/2020/01/02/consideration-happens-but-not-during-garden-leave/. (A free version is available at https://faircompetitionlaw.com/2020/01/06/massachusetts-noncompete-consideration-happens-but-not-during-garden-leave/.)

Misconception: Noncompetes Protect Only Companies, Not Employees

Finally, some commentators have claimed that noncompetes are an inherently employer-versus-employee issue. While there is some truth in that observation, it is an over-simplification. To the extent that noncompetes protect a company, they also protect the company's remaining employees. In fact, it is often the employees that remain with the company who feel most strongly that they are adversely impacted by a departing employee's breach of their noncompete, and it is they who push to enforce the noncompete – to protect not just the company, but their income and potentially their job.[53]

4. Regulatory Efforts Across The Country And What Can Be Learned

Over just the past several years, no fewer than 37 states across the country have been engaged in the process of reevaluating their noncompete laws.[54] This year alone, there have been 66 bills filed in 25 states.[55]

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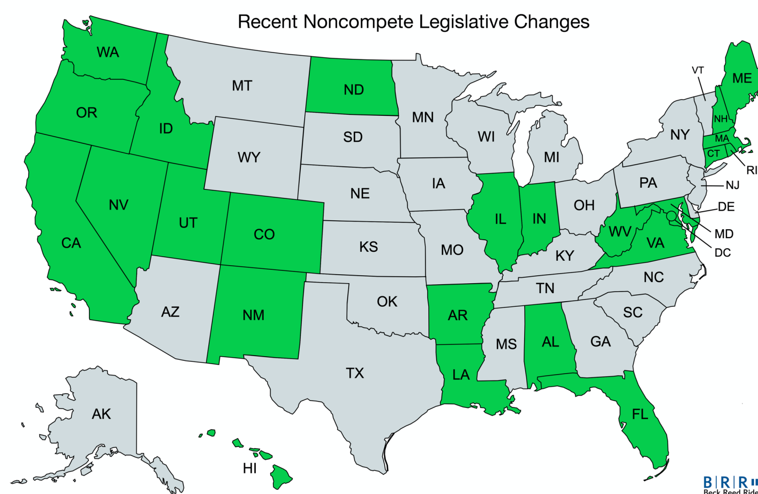
[53] Proposed bans on noncompete agreements overlook the second- and third-order consequences on employees.

[54] The surge in reexamination is likely the result of a confluence of many factors, including the following: Oregon changed its noncompete law in 2008, as the Great Recession was just beginning. Then, in 2009, Massachusetts began a nearly ten-year journey to update its noncompete laws, starting with the filing of two separate, unrelated bills by Representative Lori Ehrlich and now Senator (then Representative) Will Brownsberger in response to matters brought to their attention. One of those bills was a proposed ban of noncompetes, while the other would have modified the law. The proposed ban in particular caught the attention of the media (though it was not the bill that ultimately passed ten years later). Shortly after Massachusetts was in the news for its proposed ban, Georgia held a state-wide referendum to modify its noncompete laws – making noncompetes *more* enforceable, which also caught the attention of the media. But, perhaps most influential, starting around 2014, noncompetes began getting substantial media attention following the firestorm created when a sandwich chain was revealed to have been requiring its sandwich makers to sign noncompetes. Coupled with the media attention, academic commentary on the potential impacts of noncompetes was accelerating around the same time.

[55] The 25 states are Arkansas, Connecticut, Georgia, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, and West Virginia. *See map of 2021 legislation*, available at https://faircompetitionlaw.com/2021/06/08/new-map-of-recent-changes-to-state-noncompete-laws/.

In total, as reflected on the map (below right), over the past several years, 24 states (plus Washington, D.C.) have enacted legislation modifying their noncompete laws,[56] four (including D.C.) in just this year alone. While many of the states have considered noncompete bans like those in California, North Dakota, and Oklahoma, none has yet been adopted.[57] Rather, each state has evaluated the diverse needs of its economy, workforce, and industries, and reached a balance of interests that it determined appropriate for its population – some strengthening the enforceability of noncompetes, others making it harder to enforce them. Hawaii, for example, in 2015, banned the use of noncompetes for workers in the technology field. No other state has similarly sought to limit the use of noncompetes based on industry sector.



[56] The states are Alabama, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, Utah, Virginia, Washington, and West Virginia. *See The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, available at https://www.faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/. Interestingly, California added a requirement to its general labor code that has the effect of mandating that most noncompete disputes with California employee must be litigated in California. *See* Cal. Lab. Code § 925. In addition, North Dakota, which bans employee noncompetes, made it easier to enforce them in the context of a sale of a business.

[57] The last time a permanent ban on employee noncompetes was adopted was in 1890 (in Oklahoma). Interestingly, Michigan banned noncompetes in 1905, but then repealed the ban in 1985. *See* Matt Marx, Deborah Strumsky & Lee Fleming, MOBILITY, SKILLS, AND THE MICHIGAN NONCOMPETE EXPERIMENT, 55(6) Management Science 875-889, at 6 (April 15, 2009) (discussing Michigan's 1905 statute 445.761 banning noncompetes and the Michigan Antitrust Reform Act of 1985, which "repealed MCL 445 and with it the prohibition on enforcing noncompete agreements"), available at https://www.researchgate.net/publication/220534518_Mobility_Skills_and_the_Michigan_Non-Compete_Experiment. Further, as noted above, although Washington, D.C. has come close, even its ban has exemptions. *See supra* at p. 6 n.10.

Of the 24 states that have modified their noncompete laws, ten have banned their use for low-wage and blue-collar workers (with varying methods of determining who qualifies for the exemption).[58] The standards in each state are summarized in the following chart[59]:

State	Wage Threshold
Illinois	$75,000
Maine	400% of the federal poverty level
Maryland	$15 per hour or $31,200 annually
Massachusetts	Nonexempt under the Fair Labor Standards Act
Nevada	Paid solely on an hourly wage basis, exclusive of tips or gratuities
New Hampshire	$14.50 per hour (for non-tip-based employees)
Oregon	$100,533
Rhode Island	250% of the federal poverty level for individuals or nonexempt under the Fair Labor Standards Act
Virginia	Average weekly wage in Virginia
Washington	$100,000 for employees and $250,000 for independent contractors

Similarly, through recent legislative changes, states have been addressing the concern that employees report to a new job and learn, for the first time, that they will be subject to a noncompete. Specifically, states are imposing notice requirements, with wildly varied approaches, summarized on the following chart:

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[58] Those states are Illinois (in 2016 and again – pending the governor's signature – in 2021 following a unanimous vote in the house and senate), Maine (in 2019), Maryland (in 2019), Massachusetts (in 2018), Nevada (in 2021), New Hampshire (in 2019), Oregon (which, in 2021, increased the wage threshold thereby exempting more employees), Rhode Island (in 2020), Virginia (in 2020), and Washington (in 2020). *See* "*'Low-wage' employees are now exempt from 10 noncompete laws. Who are these employees and where are they exempt?*," available at https://faircompetitionlaw.com/2021/06/19/low-wage-employees-are-now-exempt-from-10-noncompete-laws-who-are-these-employees-and-where-are-they-exempt/. Instructively, Oregon has had such a ban since 2008, though it updated its criteria in 2021, effective January 1, 2022.

[59] Note that the specific dollar values may be subject to increase for inflation or other reasons.

State / District	Substance of Notice	Timing of Notice
D.C.	Employees must be provided with the following notice: No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020.	The language must be provided in three timeframes: • within 90 days of the "applicability date" of the Act (date TBD); • within 7 days of an individual becoming an employee; and • within 14 days of a written request from an employee for the language.
Illinois	Employer must advise the employee in writing to consult with an attorney.	Before entering into the agreement.
	Employer must provide a copy of the noncompete.	For new employees, at least 14 calendar days before commencement of employment. For existing employees, at least 14 calendar days to review.
	Timing of notice is expressly waivable.	
Maine	Employer must provide notice of the noncompete.	By the time of the offer.
	Employer must provide the agreement.	Three business days before the deadline to sign.
Massachusetts	Employer must provide the noncompete, including that the employee has the right to consult with counsel, to the employee.	For new employees, the earlier of 10 business days before commencement of work or prior to a formal offer. For existing employees, at least 10 business days before the agreement becomes effective.
New Hampshire	Employer must provide the noncompete.	Prior to acceptance of the offer of employment.
Oregon	The employer must provide a copy of the noncompete with an offer letter that states that employment will be conditioned on the employee's signing the noncompete.	At least two weeks before the associate's first day of employment.
	Signed copy of the noncompete.	Within 30 days after termination.
Virginia	Employer must post a copy of Virginia code § 40.1-28.7:7 (Covenants not to compete prohibited as to low-wage employees; civil penalty) or a summary approved by the Department in the location it posts other required notices.	At all times.
Washington	Employer must disclose the terms of the covenant in writing to the prospective employee. If the agreement will become enforceable only at a later date as a consequence of changes in the employee's compensation, the employer must disclose that the agreement may be enforceable against the employee in the future.	Before acceptance of the offer or before the agreement becomes effective (whichever applies).

Based on a well-regarded 2019 study by Evan Starr, J.J. Prescott, and Norman Bishara (discussed below) finding that employees who "learn of their noncompete before they accept their job offer . . . have 9.7% *higher* earnings . . . relative to those employees without a non-compete," these changes may offset many of the purported negative wage effects.[60]

60 *See Noncompete Agreements in the U.S. Labor Force* (Oct. 12, 2020) (emphasis added), available at

5. RECOMMENDATIONS FOR A FAIR APPROACH

Taking a Step Back:
Is Federal Regulation Needed?

In announcing his "Executive Order on Promoting Competition in the American Economy,"[61] President Biden expressed a concern that noncompetes are used "for ordinary people . . . for one reason: to keep wages low. Period."[62] Whether or not this is demonstrably true, as part of the extensive state legislative activity noted above, a number of states have begun requiring advance notice of a noncompete, which, according to the results of the study mentioned just above,[63] will (among other things) directly address President Biden's concern about the potential adverse impact of noncompetes on wages – as well as address the general unfairness issues associated with showing up to work on the first day to only then learn that a noncompete will be required.

Further, as noted above, ten states have already banned noncompetes for low-wage and blue-collar workers, and more are in the works.[64] Accordingly, that part of President Biden's

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714; *see also The Chilling Effect of Non-Compete Agreements*, by Matt Marx and Ryan Nunn (May 20, 2018) ("If it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so, these agreements could be valuable for both workers and firms.") (emphasis added), available at https://econofact.org/the-chilling-effect-of-non-compete-agreements. To the extent that the positive impact of advance notice on wages tends to diminish in states with greater relative enforceability of noncompetes, the additional recommendations below should assist in preserving the wage premium associated with advance notice.

[61] Available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[62] While that (and other improper objectives) may sometimes be the goal, addressing that abuse can be accomplished with regulation targeted specifically to that issue, as opposed to a more blunt ban of noncompetes, which are typically used for proper, legitimate purposes, including (as President Biden has identified) protecting trade secrets.

[63] *Noncompetes in the U.S. Labor Force*, by Evan Starr, J.J. Prescott, and Norman Bishara (Oct. 12, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

[64] *See The Changing Landscape of Trade Secrets Laws and Noncompete Laws Around the Country*, available at https://www.faircompetitionlaw.com/changing-landscape-of-trade-secrets-laws-and-noncompete-laws/.

concern is being addressed at the state level with a more particularized and focused approach.[65]

President Biden has also, more generally, raised a concern about the impact that noncompetes have on employee mobility. That issue also has been front and center in the legislative activity occurring at local levels. And the states – the laboratories of democracy – have tailored their noncompete laws to serve the distinct needs of their citizens, industries, and economies, a tailoring that remains the subject of ongoing reevaluation and refinement. Indeed, the wide variety of new state laws means that we will be able to measure impacts reliably and produce learning on the issue that is informed by empirical facts, not assumptions, speculation, or rhetoric. We should consider very skeptically any proposal to cut short this experimentation by imposing a singular, preemptive federal standard.

Abuses Should Not Be Allowed to Mis-define The Problem

As the need for legislation is evaluated, we should recognize that it is not the existence of noncompete agreements that creates the problem – it is the abuses of them.[66] As explained above, contrary to much of the colloquial commentary, noncompete agreements cannot (lawfully) be used to prevent an employee from broadly using his or her general skills and knowledge (or otherwise working). Yet, we often see the abuses captured in the headlines, and it can drive an overreaction that could potentially eliminate an important tool for some businesses to maintain control of critical information assets.

Abuses consist mainly of the use of noncompetes for low-wage workers, the lack of advance notice given to employees that they will be required to sign a noncompete, and the use (and aggressive enforcement) of overly-restrictive agreements. Each can – and should – be reined in (as described below) and, as noted above, these issues are under active consideration among state legislatures. Further, these reforms are consistent with the general advice the legal professionals who have signed this letter have provided.

Focusing on the abuses is supported by the academic research, which raises significant concerns about the impacts that broad-based legislative activity may have if not carefully

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[65] It bears noting that, though less satisfactory, courts will frequently refuse to enforce noncompetes against low-wage workers, even without a statutory ban. Of course, as a practical matter, the fact that a determination would require the expense of litigation offers little solace to the low-wage workers subject to the restrictions.

[66] The nature of the "problem" addressed here is the impact on workers, companies, industries, and the economy, not a philosophical antipathy toward noncompetes.

considered and tailored. In that regard, while some studies suggest that noncompetes may have adverse effects in certain contexts, other studies come to a different conclusion, highlighting the positive effects of noncompetes[67]:

- Employees "who learn of their noncompete before they accept their job offer . . . have 9.7% . . . *higher* earnings, are 4.3 percentage points more likely to have information shared with them (a 7.8% increase relative to the sample average), are 5.5 percentage points more likely to have received training in the last year (an 11% increase), and are 4.5 percentage points more likely to be satisfied in their job (a 6.6% increase) relative to those employees without a non-compete."[68]

- Employees subject to noncompetes "tended to be more productive, take fewer risks and align their behaviors with the goals of their employers" (at least in the mutual fund industry).[69]

- "[R]elaxing the enforceability of non-competes [meaning making noncompetes less enforceable] actually makes firms less willing to fire

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[67] We recognized that these studies, like other studies, may be impacted by confounding variables, but we reference them to illustrate that not all examination of noncompete usage reveals negative outcomes for employees.

[68] *Noncompete Agreements in the U.S. Labor Force*, by Evan Starr, J.J. Prescott, and Norman Bishara (Oct. 12, 2020) (emphasis added), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714; *see also The Chilling Effect of Non-Compete Agreements*, by Matt Marx and Ryan Nunn (May 20, 2018) ("If it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so, these agreements could be valuable for both workers and firms.") (emphasis added), available at https://econofact.org/the-chilling-effect-of-non-compete-agreements.

[69] *Study Finds Noncompete Clauses Affect How Employees Behave, To Benefit Of Employers*, available at https://news.ku.edu/2019/03/25/study-finds-non-compete-clauses-affect-how-employees-behave-benefit-employers; *see also* Gjergji Cici, Mario Hendriock, & Alexander Kempf, THE IMPACT OF LABOR MOBILITY RESTRICTIONS ON MANAGERIAL ACTIONS: EVIDENCE FROM THE MUTUAL FUND INDUSTRY (University of Cologne) at 2, 5 (March 28, 2018) ("Our first set of results shows unambiguously that increased enforceability of NCCs [*i.e.*, noncompetes] leads to better fund performance. . . . Our empirical results show that fund managers increase effort even more in large fund families after NCC enforceability becomes stricter."), available at https://www.econstor.eu/bitstream/10419/177385/1/1017934355.pdf.

their workers and leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees."[70]

- Noncompetes appear to systematically increase earnings for CEOs and executives and make them more accountable.[71]

- Noncompetes appear to increase earnings for physicians.[72]

- Firm-sponsored training is more common in states with stronger noncompete enforcement.[73]

- States that permit stronger enforcement of noncompete agreements tend to have fewer – but better (higher-quality ideas and more likely to survive) – startups.[74]

Accordingly, given the state of the research, the most significant conclusion that can be drawn is that the law surrounding noncompete agreements is not inherently in need of change beyond what is happening at the state level, and certainly not wholesale preemption by federal standards.

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[70] *See* FTC Workshop Tr. p 148 (comments of Professor Kurt Lavetti, The Ohio State University).

[71] *See* FTC Workshop Tr. p 175-79 (comments of Professor Ryan Williams, University of Arizona).

[72] *See* FTC Workshop Tr. p 147-51 (comments of Professor Kurt Lavetti).

[73] *Training the Enemy? Firm-Sponsored Training and the Enforcement of Covenants Not to Compete*, by Evan Starr (January 25, 2015), available at https://www.faircompetitionlaw.com/wp-content/uploads/2015/02/training-the-enemy-firm-sponsored-training-and-the-enforcement-of-covenants-not-to-compete-starr.pdf.

[74] *Enforcing Covenants Not to Compete: The Life-Cycle Impact on New Firms*, by Evan Starr, Natarajan Balasubramanian, and Mariko Sakakibara (June 15, 2014), available at https://www.faircompetitionlaw.com/wp-content/uploads/2015/02/more-noncompete-enforcement-equals-fewer-but-better-startups-starr_nv.pdf. Accordingly, the argument made by some that noncompetes make it harder to start, grow, and recruit for start-ups and lower entrepreneurship rates, while potentially true, misses the point of this research.

Unintended Consequences

Before considering the possible areas for regulation, it is important to understand the other, less-obvious, potential unintended consequences of barring the use of noncompetes, including, significantly increasing the likelihood that trade secrets will be unlawfully taken to a competitor and increasing the volume of more-costly trade secret litigation.[75]

Small companies would likely suffer the most from a ban, as they often have few or only one trade secret that forms the basis of their value but cannot afford costly litigation when their trusted employees leave for competitors or are lured away by larger companies that can easily misuse the trade secret(s) in ways that may not be detectable. During the Massachusetts noncompete/trade secret law legislative process, many small companies emphasized this and similar concerns. In particular, it was noted that some small business owners have invested their entire life savings in the company, and if they cannot prevent a former employee from working (for a limited period) in a competitive role that threatens the existence of the company, their savings, their livelihood, and the remaining employees' jobs will all be lost.

There are also the unintended consequences of reducing employee opportunities and training. Small businesses, which are frequently formed with the personal life savings of the owner, are unlikely to provide new opportunities and detailed training if their business will be left at risk. That could curtail investment and expansion of what has been the dominant engine of U.S. job growth over the last decade,[76] or it could constrain recruitment and retention efforts to family members or others within the social network connections of such employees.[77]

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[75] *See California Trade Secrets Litigation Supplants Noncompete Litigation*, https://www.faircompetitionlaw.com/2017/06/25/california-trade-secrets-litigation-supplants-noncompete-litigation/.

[76] According to the Small Business Administration, small companies create millions of jobs annually and accounted for about 63 percent of new private sector jobs in the United States from 2010 to 2019. *See* Congressional Research Service, SMALL BUSINESS ADMINISTRATION AND JOB CREATION, at 5 (UPDATED JUNE 23, 2021), available at https://fas.org/sgp/crs/misc/R41523.pdf (citing https://cdn.advocacy.sba.gov/wp-content/uploads/2020/12/08111415/December-Economic-Bulletin.pdf).

[77] This not only limits employee opportunities generally, but could in fact have a greater deleterious effect on minority applicants unable to provide contractual assurances to new employers with whom they have no previous connections.

Additional Research Is Needed

While a number of helpful studies have been conducted,[78] this area of research is still in many respects nascent. Indeed, most of the academics at the FTC's 2020 workshop on noncompetes were the first to point out that the existing research suffers from certain inherent difficulties (including that it can be hard to isolate direct causal connections to noncompetes), reflects areas of (seeming) inconsistencies, and leaves open many areas in need of additional study. Further, the research has, in large measure, focused primarily on the perceived problems with noncompetes, rather than accounting for their benefits. The following are just some examples:

- Although some research suggests that noncompetes appear to reduce wages for low-wage workers, as Professor Lavetti observed at the workshop, this may be an over-simplification.[79] (This includes, in addition to the issues identified by Professor Lavetti at the workshop, unanswered questions about a causal connection between noncompetes and the purported effects suggested by some of the research.)

- Although some have routinely asserted that noncompetes (as well as no-poach agreements) are being used with more frequency than in the past, there is no empirical proof of these claims, as there are no longitudinal studies looking at changes over time.[80] But because noncompetes appear (anecdotally and as emphasized in the media) to be more widely used than in the past,[81] many have seized on the perception that employers are

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[78] Because our discussion of the research is intended to simply point out that many unknowns remain before we can fully understand the circumstances in which noncompetes have positive versus adverse effects, we do not discuss all of the research, including recent studies regarding spillover effects and the bundling of restrictive covenants suggesting that, in some contexts, more vigorous enforcement of noncompetes will tend to reduce wages, mobility, and entrepreneurship.

[79] FTC Workshop Tr., p. 152.

[80] As noted above (pages 14-15, 17-18 & n.45) the opposite is quite possibly true for noncompetes, assuming one can draw such an inference from the fact that the number of Westlaw-reported judicial decisions concerning noncompetes (which can serve as a proxy for the use and enforcement of noncompetes) has remained roughly static during the last decade.

[81] *See* Office of Economic Policy, U.S. Department of the Treasury, "Non-compete Contracts: Economic Effects and Policy Implications" (March 2016), available at

increasingly using noncompetes for lower level employees, and have correlated that with slow wage growth since the Great Recession, blaming the latter on the former. However, as explained above, no one knows if either of those assertions is true.[82] In sum, we do not know how noncompete use has changed over the years, and we certainly cannot pronounce noncompetes to be the cause of slow wage growth.

- The research has yet to explain why there are roughly as many noncompetes used (by percentage) in states that do not enforce noncompetes (for these purposes, California) as in states that do, or what effect that has for the research or as a practical matter.[83]

- Most of the studies that ask employees whether they are bound by a noncompete have no meaningful way to know whether the employee actually understands the difference between a noncompete, a nonsolicitation agreement, or even a nondisclosure agreement.[84] Many employees do not know the difference.[85]

In light of the above, any legislation or rule-making based on the current research needs to be carefully considered to avoid potentially creating extraordinarily-adverse consequences.[86]

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https://www.treasury.gov/resource-center/economic-policy/Documents/UST Non-competes Report.pdf.

82 *See supra* at pp. 14-15.

83 FTC Workshop Tr., pp. 129-30, 169-70.

84 Professor Starr has indicated that, in recent studies, he has focused on that very issue and has been making an effort to ensure that his research asks the right questions to make sure that the people surveyed understand the difference.

85 This was abundantly clear during the lengthy legislative process in Massachusetts, where employers would explain their use of noncompetes, only to learn that they were talking about nonsolicitation agreements.

86 As noted above, one study found that "relaxing the enforceability of non-competes [meaning making noncompetes less enforceable] actually . . . leads to higher rates of misconduct among financial advisors. So this could actually be potentially harmful for consumers. Consumers are also charged higher fees." FTC Workshop Tr., p. 148.

Suggested Regulations

To the extent that the FTC has authority to promulgate a rule[87] and chooses to exercise it, we urge the Commission to be judicious and tailor any regulations to the specific abuses and recognize that reliance on early-stage empirical research, conflicting evidence, and faulty assumptions[88] to change noncompete laws is, in the end, not only unnecessary, but potentially counterproductive and contrary to the U.S. government's policy of protecting trade secrets, as expressed through the Defend Trade Secrets Act. We recognize that a ban might be seen as politically expedient, but this is a complicated issue, and complicated issues call for carefully considered solutions.

Given all of the above, if the Commission determines that noncompete contracts are an appropriate subject of federal regulation, we recommend the following two broad categories of changes:

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[87] The signatories to this letter offer no opinion about whether the Commission has or does not have such power.

[88] In particular, the assumption that the rise of Silicon Valley and the (somewhat exaggerated) fall of Massachusetts' Route 128 is a reflection of the different noncompete enforcement regimes has taken on an almost mythical quality that is not supported by the record. It is not what AnnaLee Saxenian (who first compared the two regions) said, nor is it what Ronald Gilson (who built on that work and specifically looked at the different treatment in noncompetes) said either. What they discussed was much more nuanced. In any event, Professor Gilson added an important caveat: "I think caution is in order in assessing the policy implications of Silicon Valley's history. . . . [E]ach state's particular industrial population may dictate a different balance." Ronald J. Gilson, THE LEGAL INFRASTRUCTURE OF HIGH TECHNOLOGY INDUSTRIAL DISTRICTS: SILICON VALLEY, ROUTE 128, AND COVENANTS NOT TO COMPETE, 74 N.Y.U. L. Rev 575, 627-28 (June 1999), available at https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1950&context=faculty_scholarship. Thus, while indiscriminate acceptance of the Silicon Valley/Massachusetts myth is certainly harmless in general, using it to justify noncompete regulation is extremely misguided. For more discussion, see *Misconceptions In The Debate About Noncompetes*, Law360, July 8, 2019 (reprinted on *Fair Competition Law* as "*Correlation Does Not Imply Causation: The False Comparison of Silicon Valley and Boston's Route 128*," available without subscription at https://www.faircompetitionlaw.com/2019/07/09/correlation-does-not-imply-causation-the-false-comparison-of-silicon-valley-and-bostons-route-128/); Jonathan Barnett & Ted M. Sichelman, THE CASE FOR NONCOMPETES, 86 U. Chicago L. Rev. 953, 978-1009 (July 22, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3516397.

A. Fairness and Transparency

There are several changes that would help to balance the playing field and ensure fairness.

- A **ban** on noncompetes for **low-wage workers** (defined as employees who are not exempt under the Fair Labor Standards Act). There is rarely a need for such workers to be bound by noncompetes, and even when the need might exist in the abstract, the potential detriment to the worker will typically outweigh it.

- A **requirement** that employers provide **advance notice** that a noncompete will be required. As Professor Marx has observed, "[i]f it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so, *these agreements could be valuable for both workers and firms*."[89] For example, it would be best practice to include a noncompete with any formal offer of employment.

- A **ban** on noncompetes where the overriding interests of third parties should be given priority.

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[89] *The Chilling Effect of Non-Compete Agreements*, by Matt Marx and Ryan Nunn (May 20, 2018) (emphasis added), available at https://econofact.org/the-chilling-effect-of-non-compete-agreements. Professor Marx continued with his observation, "However, the actual conditions under which non-competes are used provides reason to doubt that non-competes are indeed mutually beneficial in all or most cases." *Id.* This observation is consistent with the findings in *Noncompete Agreements in the U.S. Labor Force*, by Evan Starr, J.J. Prescott, and Norman Bishara (Oct. 12, 2020) (identifying various positive effects of noncompetes when advance notice is provided, including higher earnings, more access to information, more training, and more job satisfaction), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. Instructively, according to that study, more than half (52 percent) of people presented with a noncompete chose to "forgo[] the opportunity to negotiate [because] the terms were reasonable," while 41 percent assumed they were not negotiable, *id.* at p. 9, the latter of which could be addressed with advance notice. Indeed, 55 percent of people presented with a noncompete before they accepted the offer thought it was reasonable and 48 percent thought they could negotiate it. *Id.* Accordingly, the recommendations in this letter are intended to address these issues holistically.

B. Limitations on Use to Only What Is Necessary

Recognizing that noncompetes are an important tool in the protection of trade secrets (and other business interests recognized by many states), the following changes would allow the agreements to be used only where needed and only in a non-overreaching way.

- Mandate the so-called "**purple pencil**" rule to address overly broad noncompetes. States take one of three general approaches to overly broad noncompetes: *reformation* (sometimes called "*judicial modification*," in which the court essentially rewrites the language to conform the agreement to a permissible scope); *blue pencil* (in which the court simply crosses out the offending language, leaving the remaining language enforceable or not); and *red pencil* (also referred to as the "all or nothing" approach, which, as its name implies, requires a court to void any restriction that is overly broad, leaving nothing to enforce). Although in its new law, Massachusetts retained the reformation approach (which it and the majority of states have historically used), an equitable, middle-ground approach (which one Massachusetts state senator dubbed the "purple pencil") is a hybrid of the reformation and red pencil approaches, requiring courts to strike the noncompete in its entirety unless the language reflects a clear good-faith intent to draft a reasonable restriction, in which case the court may reform it.

- Provide for "**springing**" (or "**time-out**") noncompetes. To encourage employers to limit their reliance on noncompetes, they must have a clear and viable remedy when an employee violates other (less-restrictive) obligations (such as a nondisclosure and nonsolicitation obligations), misappropriates the employer's trade secrets, or breaches their fiduciary duties to the employer. In Massachusetts and Rhode Island (copying Massachusetts), the new noncompete laws expressly allow courts to prohibit the employee from engaging in certain work when, based on the employee's breach of certain enforceable obligations, the court is convinced that the individual cannot be trusted to perform the work without continuing to violate their other obligations. We colloquially refer to these as "springing noncompetes" (or sometimes "time out" noncompetes) because they are not required of the employee in the first instance, but are only activated if the employee engages in certain unlawful behavior.

Again, the signatories below thank you for your consideration of this submission and for taking on such an important and fraught issue. We are prepared to appear and testify live before the Commission or the Executive Office of the President, should either so desire. We also offer any other assistance that the Commission or Executive Office of the President may find helpful, including drafting language for a rule, policy, or guidance.

Respectfully submitted,

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Attachments

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

Attachment A

INDIVIDUAL BIOGRAPHIES

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

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Erika Hahn is a paralegal at Beck Reed Riden LLP. She provides extensive support on trade secret and noncompete matters nationally, and has been a substantial contributor and editor on multiple books and articles on noncompete law and trade secret law, as well as many other publications. Erika also tracks state and federal legislative noncompete and trade secret law developments around the country.

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Paula Astl has more than 20 years of experience working as a litigation paralegal in a number of areas of law including trade secrets, restrictive covenants, employment law, patent litigation, complex business securities litigation, and government enforcement. Her particular areas of expertise include working with clients on data collection and e-discovery, discovery and deposition preparation, assisting with motion practice, and preparing for, as well as assisting through, the trial and post-trial phases of cases.

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Clifford Atlas is a principal in the New York City, New York, office of Jackson Lewis P.C. He is the co-leader of the Restrictive Covenants, Trade Secrets and Unfair Competition practice group. Cliff works extensively with clients in developing and drafting employment contracts and restrictive covenant agreements, and developing programs to best protect clients' confidential business information. He has significant experience in prosecuting as well as defending actions involving breach of noncompetition and nonsolicitation agreements, employee raiding, misappropriation of confidential information, tortious interference with contract, unfair competition, and related business claims. Cliff also has assisted clients in employment issues arising from corporate transactions. Additionally, Cliff handles all types of employment discrimination, harassment, disability, wrongful discharge, and related employment tort, contract, wage-hour and employee benefits claims. He has tried cases in state and federal courts, and before administrative agencies. Cliff has argued numerous appeals to the United States Court of Appeals for the Second Circuit. Cliff joined Jackson Lewis in 1985.

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Raymond P. Ausrotas is a Founding Partner of Arrowood LLP in Boston, Massachusetts. Ray is a graduate of Brown University and the George Washington University Law School. His practice is primarily focused on commercial litigation and business disputes, including in the areas of misappropriation of confidential information & trade secrets, and breach of fiduciary duty involving corporate officers and directors. Ray has twice been trial counsel on "Top Ten" verdicts awarded for the year in Massachusetts, including as first-chair on a favorable $16 Million verdict in 2019, which was the only business dispute among the Top 10 that year. He is the lead author of both Massachusetts Civil Trial Practice and Massachusetts Civil Pretrial Practice, which are published and regularly updated by LexisNexis. He has presented on statewide CLE panels, and written several articles on discovery and other topics (including

noncompete law). Since 2014, Ray has been recognized annually as a "Top 100" SuperLawyer for both New England and Massachusetts in the area of Business Litigation; since 2016 he has been recognized nationally by Best Lawyers in the categories of Commercial Litigation and Litigation / Regulatory Enforcement (and "Lawyer of the Year" for Boston in the latter category in 2021). In 2015, he was inducted as a Fellow of the Litigation Counsel of America, a trial lawyer honorary society composed of less than one-half of one percent of American lawyers. Ray has also earned an AV®Preeminent™ Peer Review Rating from Martindale-Hubbell® in the categories of Litigation and Business Law."

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Jennifer Baldocchi is Chair of the firm's Employee Mobility and Trade Secrets practice and Vice Chair of the Employment Law department. Her practice focuses on employee mobility and intellectual property, including trade secrets, covenants not to compete, unfair competition, and fiduciary duties.

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David J. Carr is a partner in the Labor/Employment section of Ice Miller LLP, focusing his practice in the areas of employment law advice, employment discrimination and harassment, and employment contracts involving trade secrets, and covenants against competition. Mr. Carr is a veteran labor negotiator and has successfully negotiated labor agreements on behalf of employers. He has handled labor arbitrations, union avoidance and other collective bargaining matters, wrongful discharge lawsuits, as well as other nationwide employment-related litigation and collective/class actions. Mr. Carr is a contributing author for four employment law related ABA treatises, including Employment Covenants Not Compete: A State by State Survey (13th Edition, Bloomberg Law, 2021), and is a member of College of Labor & Employment Lawyers, one of less than 20 in Indiana, as well as a recipient of the Best Lawyers in America, and Super Lawyer designations. He holds a J.D. from Georgetown University Law Center, and B.A. from DePauw University.

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Jillian Carson is an attorney in Beck Reed Riden LLP's business litigation practice. Jillian focuses on trade secret and restrictive covenant law. She has represented corporate and individual clients on matters concerning, among other things, the enforceability of noncompetition, nondisclosure, and nonsolicitation agreements, trade secret misappropriation,

unfair competition, breach of fiduciary duties, and interference with contract. She has represented clients in both state and federal court as well as mediations. In addition to her litigation practice, Jillian supports Beck Reed Riden LLP's employment law practice in matters involving employee mobility, risk management, and contract drafting. Jillian is also an active member of the Boston Bar Association. Jillian has been selected as a "2020 Massachusetts Rising Star" by Super Lawyers Magazine and graduated cum laude from New England Law Boston with numerous individual honors. She earned her MA from Columbia University and worked at the Institute for the Study of Human Rights at Columbia University before attending law school.

Michael Chinitz
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Michael has been a practicing lawyer since 1988. Throughout his career, he has litigated and arbitrated cases involving noncompetition cases across many industries. He also regularly advises employees ranging from C-Suite executives to middle management on a broad range of issues concerning their "mobility," including issues concerning arising from noncompetition agreements.

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Bret A. Cohen is a partner in Nelson Mullins' Boston and New York office and serves as the chair of the firmwide Labor and Employment practice and co-chair of the firmwide Employee Mobility and Trade Secrets Practice. Bret counsels leading companies and executives across on negotiating and drafting non-compete, confidentiality, and other employment-related agreements. He has 28 years of experience litigating non-compete and trade secret matters in state and federal courts throughout the United States. Bret is recognized as a national leader in trade secrets and noncompete matters and has published extensively on these and related issues.

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Jerry Cohen's law practice, teaching, writing/speaking and legislative testimony in several areas of intellectual property (IP) have a common theme of balancing interests based on transparency and truth. The balancing can occur as to scope and perfection of IP rights within just limits, enforcement with proportionality based on hard facts and permissible exploitation consistent with public interest. As applied to noncompetition covenants it is necessary to overcome ambiguity in defining valid employer and employee interests to be protected including proper definitions of fair and unfair competition and material injury to employers and employees

tailored to circumstances of the parties. These have been and continue as the subjects of worthwhile professional and political engagement.

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

Jay M. Dade
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Jay M. Dade is an experienced labor and employment lawyer who counsels clients on noncompete agreement implementation and enforcement; day-to-day personnel management and union management issues, including alcohol and drug testing policy implementation and enforcement; federal and state wage-hour matters; discrimination claims arising under federal and state law; Family and Medical Leave Act matters; unfair labor practice charges, union organizing campaigns, representation elections, and secondary activity and arbitrations; and unemployment compensation and eligibility proceedings. Jay represents clients regarding restrictive covenant enforcement matters in multiple states and across multiple industry and professional areas (including financial services, health care, manufacturing and media). He represents employers before the EEOC, National Labor Relations Board, U.S. Department of Labor, Missouri State Board of Mediation, numerous state and local fair employment agencies, as well as federal and state courts nationwide. He is a Chapter Editor for The Developing Labor Law and is the national practice group leader for Polsinelli's Management-Labor Relations practice group.

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Nicole Corvini Daly is a partner at Beck Reed Riden LLP, a litigation and employment boutique in Boston. Her practice is in all aspects of restrictive covenant, trade secret misappropriation, and employment counseling and litigation. Nicole is a graduate of Boston College and Northeastern University School of Law.

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As Department Chair of the Labor and Employment department, Denise Drake is known for her creative and practical approach to employment law issues, as well as her sincere interest in helping employers improve their workplaces, proactively avoid litigation, and strategically defend lawsuits. Denise has significant experience defending companies in discrimination, harassment, retaliation, wage & hour, and ERISA matters, including class actions, collective actions, multi-plaintiff, and multi-defendant lawsuits. Denise has a strong track record of defeating nationwide class and collective action certification, including nationwide cases valued at more than $500 million. Denise has obtained defense verdicts in single plaintiff trials and arbitrations involving: sexual and racial harassment, sex, race, disability, age discrimination, and retaliation and whistleblower claims. Denise has also successfully obtained strategic dismissals or summary judgments in cases filed across the nation. While Denise counsels clients in many industries, she has extensive experience and knowledge that allows her to advise clients on unique issues pertaining to certain industries.

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Michael Elkon is a partner with Fisher Phillips. Michael practices in Atlanta and advised the Georgia Legislature on the bill that ultimately became Georgia's new Restrictive Covenant Act in 2010-11. Michael advises clients on restrictive covenant, trade secret, fiduciary duty, and computer theft issues throughout the country. Michael has also litigated dozens of such cases, representing both plaintiffs and defendants. Finally, Michael is a frequent writer and speaker on restrictive covenant issues, including with the Sedona Conference (where he served as a Contributing Editor on the Sedona Conference Commentary on Equitable Remedies in Trade Secret Litigation) and the American Intellectual Property Law Association.

James P. Flynn
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Jim Flynn is the Managing Director of Epstein Becker Green, and a lawyer with over 30 years' experience in noncompetition and trade secret matters during which he has represented various stakeholders, from departing employees to new employers to former employers. As an invited attorney advisor, he worked closely with the New Jersey Law Revision Commission before the state's 2012 adoption of its version of the Uniform Trade Secrets Act, and was co-lead counsel on the appeal and later successful trial in New Jersey's leading physician restrictive covenant case (*Community Hospital v. More*, 183 N.J. 36 (2005)). His practice regularly includes high-stakes trade secret and data theft cases, and other matters involving employee mobility and the

migration of confidential and proprietary information. He is long-time co-author of the Thomson Reuters Practical Law summary of Noncompete Laws: New Jersey, and has spoken and written on such topics many other times over the course of his career, and continues to do so (including at the upcoming (in September) Practicing Law Institute's Noncompetes 2021, where he will speak on Managing a Key Employee Departure to Avoid the Loss of Trade Secrets, Customers, and Colleagues).

Richard Friedman
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Richard B. Friedman is a former AMLAW100 partner and the managing attorney of New York-based Richard Friedman PLLC, a six lawyer firm which specializes in the following kinds of matters: (i) counseling, drafting, and negotiating on behalf of executives and professionals in connection with separation, employment, and other executive compensation agreements; (ii) "switching side" a/k/a "lift out" employment litigation matters involving, among other things, noncompete, trade secret, and fiduciary duty issues where the firm represents one or more employees generally referred by the clients' new employer's law firm; (iii) commercial litigation cases, particularly in the New York County Commercial Division where he serves as one of fifteen or so judicially appointed trial lawyers on the Advisory Committee along with the eight judges of that court; (iv) negotiating and, where necessary, litigating business divorces among shareholders of closely held corporations, members of limited liability companies, and partners; (iv) internal investigations referred to us by a corporation's law firm so that it can reduce the likelihood of a motion to disqualify that firm as litigation counsel and improve its prospects of defeating any such motion; and (v) FINRA arbitrations involving restricted stock units and other compensation-related issues on behalf of senior finance personnel against their former employers. Mr. Friedman has been a legal commentator on CNN, FOX News, Fox Business, HLN, and several other major networks on employment-related issues. Mr. Friedman is the founding co-chair of the In-house/Outside Counsel Litigation Group of the NYC Bar Association (the "Association"). He is also a member of the Board of Directors of the New York County Lawyers Association ("NYCLA"), a member of the Executive Committee of the Commercial & Federal Litigation Section of the New York State Bar Association ("NYSBA"), and a NYCLA delegate to the NYSBA House of Delegates, having served in that capacity as an Association Delegate for the maximum four one-year terms.

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Bernard (Bernie) J. Fuhs is a nationally recognized emergency litigator with expertise in noncompete, trade secret, shareholder dispute, and franchise litigation He has litigated and/or counseled clients on noncompete/trade secret matters in all 50 states and presented to many national and local business and/or legal organizations regarding the same. Mr. Fuhs was recently

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Nicole Gage is a Partner at Beck Reed Riden LLP with over 20 years of litigation and counseling experience in all aspects of intellectual property law and in relation to numerous industries. With an in-depth knowledge of IP law and its application, Nicole frequently teaches and advises companies and individuals on how to protect and enforce their respective intellectual property rights.

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Jim Gale is Co-Chair of Cozen O'Connor's IP Litigation department. He has been practicing Intellectual Property law and litigation for over 38 years, both as an outside lawyer in national and international law firms, and as General Counsel for an international medical device company. Jim was the inaugural chair of Florida's IP Board Certification Program. He has handled well over 400 injunctions in state and federal courts in over 35 different states in Trade Secret, Restrictive Covenant and employee "raiding" cases. In addition to multimillion dollar jury verdicts, and defense verdicts in "bet the company" litigation, Jim obtained a $2,300,000,000.00 judgment against a Chinese company that misappropriated his client's trade secret technology.

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Nicole D. Galli is the founder and Managing Member of the ND Galli Law LLC, an intellectual property (IP) focused boutique law firm located in Philadelphia and New York that provides business law, IP and litigation services to emerging growth and large company clients. Nicole's practice focuses on commercial and IP litigation, IP and business counseling and trade secrets. In addition to her client work, Nicole is involved in several national initiatives around effective trade secrets management, including serving as a Vice Chair of IP Protection in the Supply Chain Committee for the LES Standards Setting Project, focused on developing ANSI "best practices" standards for managing IP (especially trade secrets) in a supply chain and serves on the Sedona Conference Working Group on Trade Secrets (WG12) Steering Committee and co-chairs the Sedona WG12 sub-team on the governance and management of trade secrets (Team 5).

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

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J. Scott Humphrey is National Chair of Benesch's Trade Secrets, Restrictive Covenant and Unfair Competition Group. Scott has litigation, arbitration, and counseling experience involving a wide range of complex commercial contract disputes and business torts, including matters arising from trade secret appropriation and breach of restrictive covenants. He currently serves as lead trade secret and restrictive covenant counsel for a broad range of clients, including financial services companies; commercial and consumer product manufacturers; consulting firms; pharmaceutical, surgical, and medical companies; processing companies; commercial product distributors; health care organizations; media firms; commercial transport companies; food and beverage companies; and insurance companies. His clients range from small business owners and startups, to Fortune 100 companies, and Scott has been recommended by Legal 500 as a go to lawyer for trade secrets and restrictive covenants.

Jackie Johnson
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Jackie is a subject matter expert in the area of unfair competition and restrictive covenant agreements. She co-chaired Littler Mendelson's Unfair Competition and Trade Secrets practice group for almost a decade before leaving the firm in 2020 to start her own firm focusing on this subject area. Jackie is a frequent author and speaker on restrictive covenants and is the co-author of the treatises Unfair Competition and Intellectual Property Protection in Employment Law (Bloomberg BNA 2014) and Drafting and Enforcing Covenants Not to Compete (BNA 2009).

Hannah T. Joseph
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Hannah T. Joseph is Senior Counsel at Beck Reed Riden LLP, where she focuses her practice on complex commercial litigation. Specializing in the areas of trade secrets law, restrictive covenants, employee mobility, and unfair competition, she regularly litigates issues concerning the use and enforceability of noncompetition, nonsolicitation, and nondisclosure agreements, and counsels employers and employees regarding the same. She also counsels employers and employees on the identification and protection of trade secrets. Hannah has been named Super Lawyers' Rising Star in Massachusetts consecutively since 2016 and was recently recognized as "a talented lawyer to watch and a tenacious litigator" in The Legal 500 United States 2021. Hannah regularly publishes and speaks on the topics of intellectual property law and restrictive covenants, including through the American Intellectual Property Law Association, Boston Bar Association, Practising Law Institute, and Massachusetts Lawyers Weekly. In addition, Hannah co-teaches the course, *Trade Secrets and Restrictive Covenants*, at Boston University School of Law alongside Russell Beck. Hannah graduated from Binghamton University in 2007 and Boston College Law School in 2013.

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Jennifer Kenedy is a Partner at Locke Lord, LLP, full-service AmLaw 100 law firm with global reach and 20 offices designed to meet clients' needs in the United States and around the world. Jennifer is a Vice Chair of Locke Lord's Executive Committee and former Managing Partner of the firm's Chicago Office. She concentrates her practice on commercial litigation, including noncompete and trade secret misappropriation and other intellectual property litigation. Jennifer mediates, arbitrates and tries cases on behalf of clients nationwide. Jennifer speaks on and trains lawyers on ethical issues arising from litigation, particularly in the trade secret/noncompete context. For over 15 years, Jennifer has acted as national counsel on restrictive covenant and trade secret issues for multiple national companies in the financial services, insurance, and healthcare industries. She obtains and defends against injunctions in federal and state courts nationwide, and has arbitrated dozens of restrictive covenant cases before FINRA.

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Phillip C. Korovesis is a shareholder practicing in Butzel Long's Detroit office. He has been recognized by Michigan Super Lawyers (Business Litigation) and the Best Lawyers in America (Commercial Litigation). Mr. Korovesis' practice is focused on commercial disputes, with trial, litigation and consultation expertise in noncompete/trade secret disputes, product liability

defense and business and financial services industry disputes. Mr. Korovesis has successfully tried cases in state and federal courts in various parts of the country and has successfully represented clients in state and federal appellate courts. Mr. Korovesis serves as the Chair of the Firm's Trade Secret and Noncompete Specialty Team which focuses on trade secret, noncompete and business tort litigation. Mr. Korovesis is a regular presenter on trade secret and noncompete issues to lawyers and other professionals. He is an active member of the Defense Research Institute in the commercial litigation, product liability and life insurance areas. He is a former President of the Michigan Defense Trial Counsel.

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Heather Krauss is an attorney at Beck Reed Riden LLP, where she focuses her practice on all aspects of restrictive covenant, trade secret misappropriation, and employment counseling and litigation.

David Kurtz
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David Kurtz is head of the Boston office of Constangy, Brooks, Smith & Prophete LLP, a national employment law firm, where he also co-chairs the litigation department, leads the Firm's Technology & Entrepreneurial Ventures industry group and Transactional Solutions practice group, and serves as a member of the Firm's Executive Committee. David is a member of the state bars of California, Massachusetts and New York, and handles restrictive covenant disputes on behalf of employers nationwide.

Allan MacLean
MacLean Employment Law
Cambridge, Massachusetts
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Allan N. MacLean is the owner and founder of MacLean Employment Law, P.C. located in Cambridge, Massachusetts. Mr. MacLean has practiced employment law for approximately 16 years. A substantial portion of Mr. MacLean's practice focuses on counseling clients (individuals and companies) in connection with the preparation and enforcement of restrictive covenant agreements, including provisions concerning noncompetition, nonsolicitation, nondisclosure, and trade secret protection.

John F. Marsh
Bailey Cavalieri LLC
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John advises and represents a wide range of clients in many industries, from Fortune 500 companies to individuals, in trade secret and restrictive disputes throughout the United States. As Chair of the American Intellectual Property Law Association's Trade Secret Law Committee, John was actively involved in providing comments and supporting the enactment of the Defend Trade Secrets Act, the federal statute that *The Wall Street Journal* called the "most significant expansion" of federal IP law in 70 years. John has written and presented on trade secret and restrictive covenant issues and he has been quoted on those issues by *The Wall Street Journal*, *Wired*, *Inside Counsel, Law360, The National Law Journal*, *Managing IP* and *Wired*; and his blog, "The Trade Secret Litigator" (www.tradesecretlitigator.com), has been cited by publications including *The Wall Street Journal*. John is listed in the 2016-2020 editions of *The Best Lawyers of America* for Litigation – Intellectual Property and in the 2009-2020 editions of *Ohio Super Lawyers*. John graduated in 1986 from John Carroll University and is a 1989 graduate of Vanderbilt Law School.

Melissa McDonagh
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Melissa McDonagh is a shareholder with Littler Mendelson, P.C., and the Co-Chair of Littler's Unfair Competition and Trade Secrets Practice Group. She has extensive experience representing employers, on both the prosecution and defense side, in actions involving unfair business competition around the country. To protect valuable company assets, Melissa works with employers to draft multi-state compliant restrictive covenant agreements to fit a company's unique needs. Her experience includes working with companies of all sizes in a variety of industries, such as technology, medical devices, biopharmaceutical, consulting, insurance brokerage, and staffing and recruiting.

Scott McDonald
Littler Mendelson PC
Dallas, Texas
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Mr. McDonald is a Shareholder in Littler Mendelson PC. He graduated from the University of Texas School of Law in 1987 and has spent the vast majority of the past 30 years of his legal career focused on labor and employment law issues with a concentration in unfair competition and trade secret disputes. He is the author and editor of numerous books and scores of articles related to the subject, including *Unfair Competition and Intellectual Property Protection in Employment Law*, Bloomberg BNA, McDonald & Johnson (2014), and *Drafting and Enforcing Covenants Not to Compete*, Bloomberg BNA, McDonald & Lichty (2009). He is a Co-Founder of Littler's Unfair Competition and Trade Secret Practice Group, a group that was recognized in

Lex Machina's July 18, 2018, Trade Secret Litigation Report as having handled more trade secret cases (for plaintiffs and defendants) between 2009 and 2018 than any other firm in the nation. Mr. McDonald has served on committees authoring revisions to the Texas noncompete statute, and served as an Advisor in the drafting of *Restatement of the Law – Employment Law* (ALI 2014). He has also participated in many precedent setting cases such as *Alex Sheshunoff Management Services, L.P. v. Johnson*, 209 S.W.3d 644, 648 (Tex. 2006) (as amicus curia for the Texas Assoc. of Businesses, helping correct a 10+ year misinterpretation of the Texas noncompete statute), *In Re Hewlett Packard*, 212 S.W.3d 356 (Tex. App. 2006) (establishing a new defense to pre-suit depositions in trade secret cases), and *Quantlab Technologies Ltd. v. Godlevsky*, 317 F.Supp.3d 943 (S.D. TX 2018) (establishing the standard for a large award of attorneys' fees in a trade secret case, and ultimately securing in excess of $40 million in total judgments for Quantlab after jury trial and appeal). Mr. McDonald has been consistently recognized by clients, press and his piers for exceptional service to the law and his clients. His recognition includes: BTI's Client Service All-Star Team; Best Lawyers in America (2006 - 2020) (Lawyer of the Year - Employment Law DFW (2013), Lawyer of the Year - Labor Law DFW (2015, 2017)); Law.com and Texas Lawyer ("*Dallas Lawyer Preserves $12.2M Trade Secrets Verdit at the 5th Circuit*," June 28, 2017); and Chamber's USA's America's Leading Lawyers for Business (2012 – 2019) which describes him as having "made a name for himself in the noncompete arena"). Mr. McDonald has a national practice that involves handling cases all across the nation and regularly advising clients on national unfair competition prevention and trade secret programs related to every state in the United States. He is past Chair of the Dallas Bar Association's Labor & Employment Law Section, and is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

Paul Mersino
Butzel Long
Detroit, Michigan
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Paul M. Mersino is a Director and Shareholder in the Detroit office of Butzel Long, one of the oldest law firms in Detroit, Michigan, and serves as the Chair of the Litigation Practice Department. Mr. Mersino represents public and private companies, both as plaintiff's attorney and defendant's attorney, in noncompetition and trade secret disputes across the country. He has been recognized as a *Michigan Super Lawyer* and as a Top Lawyer in Detroit by *dBusiness Magazine* in the area of Trade Secrets.

Robert B. Milligan
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Robert Milligan is a partner at Seyfarth Shaw and co-chairs Seyfarth's Trade Secrets, Computer Fraud & Noncompetes practice group. Robert's practice encompasses a wide variety of commercial litigation and employment matters, including general business and contract disputes, unfair competition, trade secret misappropriation, and other intellectual property theft. His practice focuses on trade secret, noncompete, and data protection litigation and transactional

work on a state, national, and international platform. His experience includes trials, binding arbitrations and administrative hearings, mediations, as well as appellate proceedings. Robert also provides advice to clients concerning a variety of business and employment matters, including nondisclosure, noncompete, and invention assignment agreements, corporate investigations, trade secret and intellectual property audits. He is an active in several leading trade secret organizations/committees, including within the ABA, State Bar of California, and Sedona Conference.

Daniel P. O'Meara
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Daniel P. O'Meara is a shareholder in the Philadelphia office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. and a member of Ogletree's international Unfair Competition and Trade Secrets practice group. Mr. O'Meara has served as lead counsel in over 500 trade secret, restrictive covenant and duty of loyalty cases in state and federal courts across the nation. He is the author of three books concerning employment law, and regularly speaks and writes about issues of unfair competition. Mr. O'Meara has served as adjunct faculty within the Management Department of the Wharton School for over twenty-five years, and for six years was the co-host of In the Workplace, a weekly radio show on SiriusXM, Business Radio Powered by the Wharton School. He has been named a Pennsylvania Superlawyer for every year since 2005.

Jason F. Orlando
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Jason F. Orlando, Esq., an attorney at Murphy Orlando LLC in New Jersey and a Harvard Law School graduate, represents global companies and executives in New Jersey state and federal courts in noncompete and nonsolicitation agreement enforcement actions and matters involving the misappropriation of trade secrets. In addition to his work in the areas of intellectual property and employee mobility, Mr. Orlando has represented Fortune 500 companies, public entities, police unions, closely-held corporations, and individuals in a variety of commercial, criminal, and employment litigation matters. Prior to co-founding Murphy Orlando in 2009, Mr. Orlando served as a Special Assistant Attorney General for the State of New Jersey. Mr. Orlando has taught New Jersey State and Local Government Law and Urban Law and Policy at Rutgers Law School-Newark as an Adjunct Professor.

Eric Ostroff
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Eric Ostroff is the managing partner of Meland Budwick, P.A., where he co-chairs the firm's Trade Secrets and IP practice group. He focuses his practice on trade secrets and

noncompete/restrictive covenant litigation, representing both plaintiffs and defendants in these matters, throughout the country. He has written and spoken extensively about trade secrets and restrictive covenants and is frequently sought out by the media for commentary on these issues.

Christopher Pardo
Hunton Andrews Kurth
Boston, Massachusetts
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Recognized by the Boston Business Journal as a "40 Under 40" honoree in 2020, a "Top Lawyer Under 40" by the Hispanic National Bar Association in 2019, and a Super Lawyers Rising Star in Massachusetts every year since 2013, Christopher M. Pardo represents a broad range of corporate clients nationwide in complex employment litigation and high-stakes commercial lawsuits. A member of the bar in Massachusetts, Florida, New York, Connecticut, Ohio and Maine, Chris represents businesses and their executives across a broad spectrum of industries, providing timely and thoughtful preventative advice to his clients, with a particular focus in the areas of trade secret litigation and restrictive covenant agreements. Additionally, Chris oversees and manages labor and employment diligence in M&A matters, and regularly advises clients with respect to strategic business planning and handling multifaceted employment situations. Chris is the Co-Chair of the Hispanic National Bar Association's Labor and Employment Committee, a member of the Boston Bar Association's Labor and Employment Steering Committee, and the Co-Chair of the Minority Lawyers Subcommittee at Hunton Andrews Kurth.

Dean Pelletier
Pelletier Law, LLC
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Dean has been practicing intellectual property law for more than 25 years and focuses on leveraging patents and trade secrets. Dean's litigation, trial and appellate experience includes experience in federal and state courts and at the International Trade Commission. Dean represented Amsted Industries, the prevailing trade secret owner, in *TianRui v. ITC*, 661 F.3d 1322 (Fed. Cir. 2011). Dean is a member of the Illinois bar, a registered U.S. patent attorney, a member of the Trial Bar for the Northern District of Illinois and actively involved with the American Intellectual Property Law Association (Trade Secret Law Committee) and Sedona Conference (Working Group 12 on Trade Secrets).

C. Max Perlman
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C. Max Perlman is a Boston-based business litigator and employment lawyer with more than 25 years' experience representing companies and executives in sophisticated lawsuits in federal and state courts around the country. Mr. Perlman has extensive experience in cases involving noncompetition and nonsolicitation agreements and misappropriation of trade secrets. In addition

to handling many of these cases in state and federal courts at the preliminary injunction phase, Mr. Perlman has the rare experience of conducting a jury trial in a noncompetition case, a case that he won, resulting in a seven-figure award for his client, and has served as mediator in noncompetition and trade secret disputes. Mr. Perlman litigates restrictive covenant and trade secret cases for clients in a range of sectors, including high-tech, medical and bio-tech, aviation, transportation/logistics, professional services, industrial/manufacturing, and venture capital. His clients range from large international corporations with thousands of employees to small, recently-funded companies and their founders. Mr. Perlman frequently lectures about restrictive covenant and trade secret law, including at Boston University School of Law, Harvard University Law School, Boston Bar Association, and Massachusetts Continuing Legal Education, where he is a member of the Board of Trustees.

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

James Pooley
James Pooley, A Professional Law Corporation
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Jim Pooley focuses on trade secret law and management, as an advocate, advisor, testifying expert and neutral. He is an author or co-author of several major IP works, including his treatise Trade Secrets (Law Journal Press) and the Patent Case Management Judicial Guide (Federal Judicial Center). His most recent business book is Secrets: Managing Information Assets in the Age of Cyberespionage (Verus Press 2015). The Senate Judiciary Committee relied on Jim for expert testimony and advice regarding the 2016 Defend Trade Secrets Act. From 2009 to 2014 Jim served as Deputy Director General of WIPO in Geneva, where he managed the international

patent system. He is a past President of AIPLA and Chairman of the National Inventors Hall of Fame. He currently serves as Chair of the Sedona Conference Working Group 12 on Trade Secrets. In 2016 Jim was inducted into the IP Hall of Fame for his contributions to IP law and practice.

Stephen Riden
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Stephen Riden is a founding partner of Beck Reed Riden LLP, a litigation and employment boutique in Boston. His practice is in commercial litigation, and he represents corporate and individual clients in a wide array of commercial disputes across the country. Prior to starting Beck Reed Riden LLP, he was a senior counsel with Foley & Lardner LLP. Steve is a graduate of Boston College and Boston College Law School.

Tobias E. Schlueter
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Tobias Schlueter is a shareholder in the Chicago office of Ogletree, Deakins, Nash, Smoak and Stewart, P.C. He is the Chairperson of Ogletree's international Unfair Competition and Trade Secrets practice group. Mr. Schlueter has an extensive and proven track record of litigating high stakes cases involving unfair competition claims (including restrictive covenants (noncompete, nonsolicit and confidentiality), trade secrets, duties of loyalty, tortious interference, and civil conspiracy). He also routinely advises clients, including Fortune 100 companies, about their unfair competition matters. He extensively speaks and writes about these issues. Under Mr. Schlueter's leadership over the past five years, Ogletree has handled over 1,500 unfair competition, trade secrets, and restrictive covenant cases for more than 1,000 clients. From 2018-2020, Ogletree was the most active trade secrets law firm in the United States, representing both plaintiffs and defendants. Mr. Schlueter is rated by Chambers USA as a Top Ranked / Leading Lawyer in Labor & Employment (2017, 2018, 2019, 2020 and 2021). Mr. Schlueter is also recognized as a Best Lawyer in America (2017, 2018, 2019, 2020 and 2021) for Employment Law – Management. In 2020 and 2021, Super Lawyers recognized Mr. Schlueter as an Illinois "Super Lawyer." Super Lawyers previously named Mr. Schlueter as an Illinois Rising Star for 2011, 2012, 2013 and 2014.

Mark Shank
Diamond McCarthy LLP
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Mark Shank is well-known and respected in Texas and across the nation as a trial lawyer, strategist, arbitrator, mediator and negotiator. He has significant experience in a multitude of industries as an advocate in commercial litigation, employment disputes and arbitration matters.

With his remarkably broad background in high-stakes controversies, Mark is transitioning his practice focus toward alternate dispute resolution, regularly serving as an arbitrator or mediator in a wide range of business and employment disputes. He is a licensed AAA arbitrator and a Fellow of the College of Commercial Arbitrators and the Chartered Institute of Arbitrators – two of the most prestigious ADR professional organizations. Clients also call on Mark to serve as an independent investigator in corporate malfeasance and workplace misconduct matters. Mark continues to help clients on both sides of the docket facing difficult business issues, such as departing employees, high-exposure contract claims, officer and director liability, employment discrimination, wage and hour disputes and retaliation cases. He also has deep experience in litigation involving covenants not-to-compete, confidentiality and trade secrets. In addition, Mark represents clients in disputes and transactions concerning executive compensation and related issues. Mark is in high demand as a lecturer on current arbitration, business, employment and trade secret issues. He is also a prolific author, including the definitive book on Texas law as it treats departing employees. A stalwart of numerous bar associations and foundations in Texas, Mark previously served as Director of the State Bar of Texas and President of the Dallas Bar Association. Board Certified in Civil Trial Law and Labor and Employment Law by the Texas Board of Legal Specialization.

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

John Siegal
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John Siegal is a Chambers-ranked business litigator who serves as co-head of BakerHostetler's national Noncompete & Trade Secrets Practice Group. He is the founding chair of the Trade Secrets Committee of the New York City Bar Association and a member of the Sedona Conference Working Group on Trade Secrets. He has litigated noncompete and trade secrets cases in federal or state courts in more than a dozen states and frequently handles noncompete and related arbitrations at FINRA. His writings on trade secrets and noncompete issues have been published in the *New York Law Journal*, the *National Law Journal,* as well as in various trade publications and academic law reviews.

Peter A. Steinmeyer
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Peter A. Steinmeyer is the Managing Shareholder of Epstein Becker Green's Chicago office and a co-chair of its Trade Secrets and Employee Mobility subpractice group. He frequently writes and speaks about workforce mobility issues, and he advised the Illinois Chamber of Commerce in its negotiations over the recently passed Illinois noncompete reform bill. Mr. Steinmeyer's recent publications include: "Illinois Noncompete Reform Balances Employee and Biz Interests" (coauthor), *Law360* (June 2021); "Hiring from a Competitor: Practical Tips to Minimize Litigation Risk" (coauthor), *Thomson Reuters Practical Law* (May 2021); and "Trade Secrets Law 25 Years After PepsiCo Disclosure Case" (coauthor), *Law360* (Jan. 2021).

Linda K. Stevens
Smith O'Callaghan & White
Chicago, Illinois
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Linda K. Stevens is an experienced litigator and counselor who helps clients protect their intellectual property and resolve their commercial disputes. Much of Ms. Stevens' work relates to employee departures, noncompetition and confidentiality covenants, trade secrets, and allegations of employee raiding and other unfair competition. Ms. Stevens is frequently asked to speak, write, and teach regarding her areas of concentration. She has held leadership positions in the trade secret and noncompetes area. For more than a decade, Ms. Stevens chaired her former firm's Trade Secrets and Restrictive Covenants Client Service Team, and she chaired an American Bar Association Trade Secrets subcommittee for many years, as well. After thirty years of large law firm practice, Ms. Stevens is now Of Counsel with Smith O'Callaghan & White in Chicago and an adjunct professor at Illinois Institute of Technology's Chicago-Kent School of Law.

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

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

Kyle Vieira
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Kyle Vieira is a business litigator whose practice focuses on trade secrets and restrictive covenant litigation. He has represented corporate clients on matters concerning, among other things, the enforceability of noncompetition, nondisclosure, and nonsolicitation agreements, trade secret misappropriation, unfair competition, breach of fiduciary duties, and interference with contracts. Kyle is also well-versed in e-discovery and has written articles and participated in Boston Bar Association panels on the topic.

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Jason Weber is a Dallas-based shareholder at Polsinelli and a member of the firm's Restrictive Covenants, Enforcement and Trade Secrets (RCETS) practice. Jason is Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization and focuses his practice on business disputes and employment-related consulting and litigation. He has extensive experience enforcing and defending against restrictive covenants, both in Texas and nationally, and is a contributing author in the forthcoming Texas Litigator's Guide to Departing Employee Cases (2021).

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Erik is co-chair of the Litigation Department at Seyfarth Shaw's Boston office and a member of the firm's Trade Secrets, Computer Fraud & Noncompetes practice group. He has a national litigation practice, representing companies of all sizes and in various industries throughout the United States in high-stakes commercial litigation involving theft of trade secrets, breach of restrictive covenant agreements, employee raiding, breach of fiduciary duty and the duty of loyalty, and unfair competition. He also advises clients with respect to the protection of trade secrets and proprietary information; the drafting, implementation, and enforcement of post-employment restrictive covenants and commercial NDAs; and the hiring of executives, key employees, and strategic groups from competitors. Erik is a nationally-recognized trade secrets attorney, regularly publishing articles and speaking on related topics locally and nationally. He has been quoted in the *Washington Post* and *Law360* among other national publications. Erik currently serves as Vice Chair of the American Intellectual Property Law Association (AIPLA) Trade Secrets Law Committee, Co-Lead of the Monetary Remedies in Trade Secrets Disputes Drafting Committee for The Sedona Conference Working Group on Trade Secrets, and Co-Chair of the American Bar Association's Restrictive Covenants/Tortious Interference Sub-Committee of the Business Torts and Unfair Competition Committee. *Legal500* recommended Erik in its 2017, 2018, and 2019 editorials naming Seyfarth's Trade Secrets group as one of the top four in the country. Prior to joining Seyfarth, Erik clerked for the Honorable Peter W. Hall of the United States Court of Appeals for the Second Circuit.

Neal Weinrich
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Neal F. Weinrich is a shareholder at Berman Fink Van Horn P.C. in Atlanta, Georgia. He concentrates his practice on commercial litigation involving restrictive covenants, trade secrets, computer fraud and other competition-related issues. He represents employers and employees from a wide variety of industries in unfair competition disputes in courts in Georgia and other jurisdictions, as well as in arbitral forums. Recognized by Super Lawyers as a Rising Star in Georgia since 2012, he writes and speaks frequently on various issues that arise in competition-related cases. He is also the co-founder of and a regular contributor to Georgia Noncompete and Trade Secret News (www.georgia-noncompete.com). Neal currently serves as the Vice-Chair of the Trade Secret Committee of the State Bar of Georgia's Intellectual Property Section, as well as Vice-Chair of the Labor & Employment Committee of the Atlanta Bar Association. Neal is also on the Drafting Committee on Covenants Not to Compete for the Uniform Law Commission. In the past, Neal served as the Vice-Chair of the Digital Forensics Subcommittee of the Trade Secret Law Committee of the American Intellectual Property Law Association and as co-chair of the Ethics and Professionalism Committee of the Young Lawyers Division of the

State Bar of Georgia. Neal graduated from Tulane University in 2003 and from Emory University School of Law in 2006.

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

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

Attachment B

State	If Permitted and Statute	Protectable / Legitimate Interests	Standards	Exemptions	Continued Employment is Sufficient Consideration	Reformation Blue Pencil Red Pencil Purple Pencil	Enforceable Against Employees Terminated w/o Cause
Alabama	Yes. Ala. Code § 8-1-190-197 (*§ 8-1-1 repealed effective 1/1/2016*)	Trade secrets; confidential information; commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients; customer, patient, vendor, or client goodwill; specialized and unique training involving substantial business expenditure specifically directed to a particular agent, servant, or employee (if identified in writing as consideration for the restriction).	Must be in writing, signed by all parties, and be supported by adequate consideration. Must preserve a protectable interest. A two-year restriction is presumptively reasonable. Employee has burden of proving undue hardship, if raised as a defense.	Professionals	Yes (pre-amendment)	Reformation	Yes, likely (pre-amendment)
Alaska	Yes	Trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of his or her business practices; methods; profit margins; costs; other confidential information (that is confidential, proprietary, and increases in value from not being known by a competitor; other valuable employer data that the empoyer has provided to an employee that an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness.	Factors: limitations in time and space; whether employee was sole contact with customer; employee's possession of trade secrets or confidential information; whether restriction eliminates unfair or ordinary competition; whether the covenant stifles employee's inherent skill and experience; proportionality of benefit to employer and detriment to employee; whether employee's sole means of support is barred; whether employee's talent was developed during employment; whether forbidden employment is incidental to the main employment.	-	Undecided	Reformation	Undecided

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State	If Permitted and Statute	Protectable / Legitimate Interests	Standards	Exemptions	Continued Employment is Sufficient Consideration	Reformation Blue Pencil Red Pencil Purple Pencil	Enforceable Against Employees Terminated w/o Cause
Arizona	Yes	Trade Secrets; confidential information; customer relationships.	No broader than necessary to protect the employer's legitimate business interest; not unreasonably restrictive; not contrary to public policy; ancillary to another contract.	Broadcasters; maybe physicians	Yes	Blue Pencil	Undecided
Arkansas	Yes. AR Code 4-75-101	Trade secrets; intellectual property; customer lists; goodwill with customers; knowledge of business practices; methods; profit margins; costs; other confidential information (that is confidential, proprietary, and increases in value from not being known by a competitor); training and education; other valuable employer data (if provided to employee and an employer would reasonably seek to protect or safeguard from a competitor in the interest of fairness).	Limited with respect to time and scope in a manner that is not greater than necessary to defend the protectable business interest of the employer. The lack of a geographic limit does not render the agreement unenforceable, provided that the time and scope limits appropriately limit the restriction. Factors to consider include the nature of the employer's business interest; the geographic scope, including whether a geographic limit is feasible; whether the restriction is limited to specific group of customers or others; and the nature of the employer's business. A two-year restriction is presumptively reasonable unless clearly demonstrated otherwise.	Various professionals (medical, veterinary, social workers, others)	Yes	Reformation (mandatory)	Undecided, but it can be a factor.
California	No, except maybe as to trade secrets. Cal. Business & Professions Code §§ 16600-16602.5	Trade secrets.	Uncertain status as to trade secrets.	-	-	-	-
Colorado	Yes. Colo. Rev. Stat. § 8-2-113	Trade secrets; recovery of training expenses for short-term employees.	Must fall within statutory exception (executive or management employees and professional staff or to protect trade secrets or recover cost of training); be reasonable; and be narrowly-tailored.	Physicians (damages not barred)	Yes	Reformation	Undecided

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Connecticut	Yes	Trade secrets; confidential information; customer relationships.	Factors: time; geographic reach; fairness of protection afforded to employer; extent of restraint on employee; extent of interference with public interest.	Broadcasters; security guards; limited as to physicians	Yes, likely	Blue Pencil	Yes
Delaware	Yes	Trade secrets; confidential information; customer relationships.	Reasonable in time and geographic reach; protects legitimate economic interests; survives balance of equities.	Physicians	Yes	Reformation	Yes
DC	Yes *[NEW LEGISLATION IS PENDING AMENDMENT AND FUNDING]*	Trade secrets; confidential knowledge; fruits of employment.	Reasonable in time and geographic area; necessary to protect legitimate business interests; promisee's need outweighs promisor's hardship. [Follows Restatement (Second) of Contracts, §§ 186-88.] *[NEW LEGISLATION - SUBJECT TO PENDING AMENDMENTS - WILL CHANGE THE RULES ONCE FUNDED; EFFECTIVE DATE TBD. THIS SECTION WILL BE UPDATED WHEN THE LAW CHANGES]*	Broadcasters	Yes (if employment continued for sufficient duration)	Reformation	Undecided
Florida	Yes. Fla. Stat. Ann. §§ 542.335	Trade secrets; confidential business information; substantial customer relationships and goodwill; extraordinary or specialized training.	Legitimate business interest; reasonably necessary to protect legitimate business interest. [Rebuttal presumptions exist.]	Mediators; physician specialists (where they are exclusive in a county)	Yes	Reformation (mandatory)	Undecided

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Georgia	Yes. Ga. Const., Art. III, Sec. VI, Par. V(c), as amended; OCGA §§ 13-8-50-59. [*NOTE*: Pre-amendment law was more restrictive and applies to pre-amendment agreements]	Trade secrets (per OCGA § 10-1-761); valuable confidential information that does not otherwise qualify as a trade secret; substantial relationships with specific prospective or existing customers, patients, vendors, or clients; customer, patient, or client goodwill associated with: an ongoing business, commercial, or professional practice, a specific geographic location; or a specific marketing or trade area; and extraordinary or specialized training. [Statute anticipates additional legitimate business interests.]	Reasonable in time, space, and scope; justified by a legitimate business interest; applied to employees who regularly solicit customers, engage in sales, perform the duties of a key employee, or have the duty of managing a department and regularly direct the work of employees and have the authority to hire or fire them. [Statute provides presumptions for reasonableness of time and geography.]	-	Yes	Blue Pencil (according to the Northern District).	Yes, but it's a factor to consider.
Hawaii	Yes. Haw. Rev. Stat. § 480-4	Trade secrets; confidential information.	Reasonable in time, space, scope.	Employees in a technology business [effective as of 1/1/2015]	Yes, likely	Reformation	Undecided

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Idaho	Yes. Idaho Code §§ 44-2701-2704	Trade secrets; technologies; intellectual property; business plans; business processes and methods of operation; goodwill; customers; customer lists; customer contacts and referral sources; vendors and vendor contacts; financial and marketing information; potentially others.	Applicable to "key employee"; reasonable as to duration, geographical area, type of employment or line of business, and does not impose a greater restraint than is reasonably necessary to protect the employer's legitimate business interests; reasonable as to covenantor, covenantee, and public. Rebuttable presumptions of reasonableness: 18 months; geographic area restricted to areas employee provided services or had significant presence or influence; limited to line of business in which employee worked. Presumption that employee is "key employee" if in highest paid 5% employees in company.	Non-"key employees." ("Key employees" are those who have gained a high level of inside knowledge, influence, credibility, notoriety, fame, reputation or public persona as a representative or spokesperson of the employer, and as a result, have the ability to harm or threaten an employer's legitimate business interests.)	Yes (but if no additional consideration, noncompete is limited to 18 months)	Reformation	Yes

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Illinois	Yes 820 I.L.C.S. §§ 90/1 et seq.	For agreements pre-January 1, 2022: Legitimate business interests are based on the totality of the facts and circumstances of the case. Trade secrets, confidential information, and near permanent business relationships are factors. For agreements entered on or after January 1, 2022: "the employee's exposure to the employer's customer relationships or other employees, the near-permanence of customer relationships, the employee's acquisition, use, or knowledge of confidential information through the employee's employment, the time restrictions, the place restrictions, and the scope of the activity restrictions." The bill is also express that "[n]o factor caries any more weight than any other" and that the "factors are only non-conclusive aids in determining the employer's legitimate business interest, which in turn is but one component in the 3-prong rule of reason, grounded in the totality of the circumstances."	For agreements pre-January 1, 2022: No greater than required to protect a legitimate business interest; does not impose undue hardship on the employee; not injurious to the public; and reasonable in time, space, and scope. [May require two years of employment before any noncompete can be enforced.] For agreements entered on or after January 1, 2022: Noncompete "is illegal and void unless (1) the employee receives adequate consideration, (2) the covenant is ancillary to a valid employment relationship, (3) the covenant is no greater than is required for the protection of a legitimate business interest of the employer, (4) the covenant does not impose undue hardship on the employee, and (5) the covenant is not injurious to the public," and the employee (a) is advised "in writing to consult with an attorney" and (b) provided with the covenant at least 14 calendar days' notice (though the notice is waivable). Adequate consideration is defined as: "(1) the employee worked for the employer for at least 2 years after the employee signed an agreement containing a covenant not to compete . . . or (2) the employer otherwise provided consideration adequate to support an agreement to not compete . . . , which consideration can consist of the period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves." [*Attorney's fees to prevailing employee*.]	Broadcasters; government contractors; physicians; low-wage workers For agreements entered on or after January 1, 2022: The "low-wage" exception changes to a wage threshold (all earnings from the employer) of $75,000 (increasing to $80,000 by 2027, $85,000 by 2032, and $90,000 by 2037); individuals covered by collective bargaining agreements under the Illinois Public Labor Relations Act or the Illiinois Educational Labor Relations Act or employed in construction (unless they "primarily perform management, engineering or architectural, design, or sales functions for the employer or . . . are shareholders, partners, or owners in any capacity of the employer").	Yes (if employment continued for sufficient duration)	For agreements pre-January 1, 2022: Reformation For agreements entered on or after January 1, 2022: Reformation (purple pencil)	For agreements pre-January 1, 2022: Yes For agreements entered on or after January 1, 2022: No, if the employer enters a noncompete with an employee who is terminated, furloughed or laid off "as the result of business circumstances or govermental orders related to the COVID-19 pandemic," unless the employee is paid the equivalent of their base salary (less earnings from new employment).

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Indiana	Yes	Trade secrets; confidential information; goodwill.	Reasonably necessary to protect the employer, not unreasonably restrictive of the employee and not against public policy. Clear and specific (not general) restraint must be reasonable in light of the legitimate interests to be protected; reasonableness is measured by totality of interrelationship of the interest, and the time, space, and scope of the restriction, judged by the needs for the restriction, the effect on the employee, and the public interest. Physician noncompetes entered into on or after July 1, 2020, must contain specific provisions concerning communications with patients, access to patient information, and a "buy-out" option. *See* Ind. Code § 25-22.5-5.5.	-	Yes	Blue Pencil	Yes
Iowa	Yes	Trade secrets; goodwill; special training or peculiar knowledge that would unjustly enrich an employee at the expense of the former employer.	Whether the restriction is reasonably necessary to protect the employer's business, unreasonably restrictive (time and space), and prejudicial to the public interest.	Franchisees (where franchisor does not renew)	Yes	Reformation	Yes, but it's a factor to consider.
Kansas	Yes	Trade secrets; confidential business information; loss of clients; goodwill; customer contacts; referral sources; reputation; special training.	Reasonable under the circumstances: protects a legitimate business interest; no undue burden on the employee; not injurious to public interest or welfare; reasonable in time and space.	Accountants (limited)	Yes	Reformation	Yes
Kentucky	Yes	Confidential business information; customer lists; competition; investment in training.	Reasonable in scope and purpose; reasonableness determined by the time, space, and "charter" of the restriction; no undue hardship; does not interfere with public interest.	-	No, although threatened loss of job might be a factor.	Reformation	Yes, but it can be a factor.

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Louisiana	Yes. La. Rev. Stat. Ann. § 23:921	Trade secrets; financial information; management techniques; extensive training (if such training is unrecouped through employee's work).	No more than two years; specifies the specific geographic reach (by parishes, municipalities, or their respective parts); defines employer's business; strict compliance with statute.	Automobile salesmen; real estate broker's licensees (procedural requirements)	Yes	Blue Pencil, if allowed by the noncompete	Yes, likely
Maine	Yes Me. Rev. Stat. Ti. 26, c. 7, § 599-A	Trade secrets; confidential information; goodwill.	No broader than necessary to protect the employer's legitimate business interest; reasonable as to time, space, and interests to be protected; no undue hardship to employee. In addition, *for agreements signed on or after September 18, 2019*: employee must receive notice of noncompete by time of offer and a copy of the agreement 3 business days in advance of the deadline to sign; and the employee (except certain physicians) must be employed at least a year or remain employed for at least six months after signed, whichever is longer.	Broadcast industry (presumption); low-wage workers (earning less than or equal to 400% of the federal individual poverty level - $49,960 as of 2019)	Yes	Reformation	Yes, likely
Maryland	Yes Md. Code, Lab. & Empl. § 3-716	Trade secrets; routes; client lists; established customer relationships; goodwill; unique services.	Duration and space no wider than reasonably necessary to protect legitimate interests; no undue hardship to employee; not contrary to public policy; ancillary to the employment.	*Effective 10/1/2020:* Low-wage employees, *i.e.*, employees earning less than $15 per hour or $31,200 annually	Yes	Blue Pencil	No, likely

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Massachusetts	Yes. Mass. Gen. Laws c. 149, § 24L (applies only to agreements signed on or after October 1, 2018)	Trade secrets; confidential information; goodwill.	Narrowly tailored to protect legitimate business interest; limited in time, space, and scope; consonant with public policy. Additional requirements added by 2018 statute: must be signed by both parties; provided to employee 10 business days in advance (or prior to a formal offer, if earlier); state that the employee has the right to consult counsel; and satisfy consideration requirements. Presumptions of necessity of the agreement and reasonableness as to place and scope apply.	Broadcasters; physicians; nurses; social workers; psychologists. Additional exemptions added by 2018 statute: FLSA nonexempt employees; student interns/short-term student employees; employees who have been terminated without cause or laid off; and employees that re 18 years old or younger	No (per new statute; yes before)	Reformation	No (per new statute; yes before)
Michigan	Yes. Mich. Comp. Laws § 445.774a	Trade secrets; confidential business information; goodwill.	Must have an honest and just purpose and to protect legitimate business interests; reasonable in time (no more than one year), space, and scope or line of business; not injurious to the public.	-	Yes	Reformation	Yes
Minnesota	Yes	Trade secrets; confidential business information; goodwill; prevention of unfair competition.	No broader than necessary to protect the employer's legitimate business interest; does not impose unnecessary hardship on employee.	-	No	Reformation (though called "blue pencil")	Yes
Mississippi	Yes	Trade secrets; confidential business information; goodwill; ability to succeed in a competitive market.	Reasonableness and specificity of restriction, primarily, in time and space; hardship to employer and employee; public interest.	-	Yes (though questioned if employee terminated shortly after)	Reformation	Yes, absent bad faith or arbitrary basis for termination

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Missouri	Yes. 28 Mo. Stat. Ann. § 431.202 (related)	Trade secrets; confidential business information; customer or supplier relationships, goodwill, or loyalty; customer lists; protection from unfair competition; stability in the workforce.	Reasonably necessary to protect legitimate interests; reasonable in time and space; not an unreasonable restraint on employee; purpose served; situation of the parties; limits of the restraint; specialization of the business. [Absence of legitimate business interest impacts duration, which can be no more than one year.]	Secretaries (limited); clerks (limited)	No	Reformation	Yes
Montana	Yes. Mont. Code Ann. §§ 28-2-703-05	Trade secrets; proprietary information that would provide an employee with an unfair advantage; goodwill; customer relationships.	Partial or restricted in its operation by being limited in operation either as to time or place; supported by "some good consideration"; protects a legitimate business interest; reasonable, affording only a fair protection to the interests of the party in whose favor it is made, and not so large in its operation as to interfere with (or impose an unreasonable burden upon) the employer, the employee, or the interests of the public.	-	No	Blue Pencil, likely	No
Nebraska	Yes	Trade secrets; confidential information; goodwill.	Reasonably necessary to protect legitimate interests; not unduly harsh or oppressive to employee; not injurious to the public. Considerations include: inequality in bargaining power; risk of loss of customers; extent of participation in securing and retaining customers; good faith of employer; employee's job, training, health, education, and family needs; current employment conditions; need for employee to change his calling or residence; relation of restriction to legitimate interest being protected.	-	Yes, likely	Red Pencil	Undecided

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Nevada	Yes. Nev. Rev. Stat. § 613.195-200 [*effective June 3, 2017*]	Trade secrets; goodwill.	Void unless: (a) supported by valuable consideration; (b) not greater than required to protect employer; (c) no undue hardship on employee; and (d) appropriate in relation to the consideration. Cannot restrict employee from providing service to customer/client if (a) customer/client was not solicited; (b) customer/client voluntarily chose to leave or seek services from employee; and (c) employee otherwise complies with time, geographical area, and scope of noncompete. [*Effective 10/1/2021: Attorney's fees for the employee if the employer ignored the exemption or used the noncompete to prevent solicitation of customers in violation of the statute.*]	Pre-10/1/2021: none *Effective 10/1/2021*: employees "paid solely on an hourly wage basis, exclusive of any tips or gratuities"	Yes (pre-amendment)	Pre-10/1/2021: Reformation (mandatory) Effective 10/1/2021: Reformation (mandatory), and revised noncompete must "not impose undue hardship on the employee"	Undecided, except in connection with reduction in force, "reorganization or similar restructuring of the employer," in which case employee must be paid "salary, benefits or equivalent compensation," including severance.
New Hampshire	Yes. RSA 275:70, 275:70-a	Trade secrets; confidential business information; goodwill; employee's special influence over the employer's customers; contacts developed during employment..	Not greater than necessary to protect the employer's legitimate business interests; no undue or disproportionate hardship to employee; not injurious to public interest; new employees must be given a copy of the noncompete prior to acceptance of offer for employment.	Physicians (RSA 329:31-a (*effective 8/5/2016*)); low-wage employees, *i.e.*, those earning less than or equal to 2x minimum the applicable wage - federal or state for tipped workers (*effective 9/8/2019*).	Yes	Reformation	Undecided
New Jersey	Yes	Trade secrets; confidential business information; goodwill in existing customers; preventing employee from working with customer at lower cost than working through employer.	Protects a legitimate business interest; not undue burden on employee; not injurious to the public; not overbroad in time, space, and scope.	In-house counsel; psychologists	Yes	Reformation	Yes, but it's a factor to consider.

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Employee Noncompetes
A State-by-State Survey

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New Mexico	Yes. N.M.S.A. 1978, §§ 24-1I-1-5 (creates healthcare practitioner exemption only)	Maintaining workforce; limitation of competition (but not to stifle competition); customer relationships.	Reasonable as applied to the employer, employee, and public; not great hardship to employee in exchange for small benefits to employer.	Healthcare practitioners (dentists, osteopathic physicians, physicians, podiatrists, certified registered nurse anethetists) to the extent they are providing clinical health care services. [Exemption has limits (including that it does not apply to a covered medical professional if they are a shareholder, owner, partner, or director of a health care practice) and is effective only to agreements from 7/1/2015 and after.]	Yes, likely	Undecided	Undecided
New York	Yes	Trade secrets; confidential information; goodwill; on-air persona of broadcasters; employee's unique or extraordinary services.	Reasonable in time and space, and no greater than is required for the protection of the legitimate interest of the employer; does not impose undue hardship on the employee; not injurious to the public.	-	Yes	Reformation	Cases are split
North Carolina	Yes. N.C. Gen. Stat. § 75-4	Trade secrets; confidential business information; goodwill.	In writing; part of an employment contract; reasonably necessary to protect legitimate business interest; reasonable in time and space; not against public policy.	Physicians, possibly (in underserved areas)	No	Blue Pencil	Yes, likely
North Dakota	No. N.D. Cent. Code § 9-08-06	-	-	-	-	-	-

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Ohio	Yes	Trade secrets; confidential information; customer relationships; prevention of the use of proprietary customer information to solicit customers.	Not greater than necessary to protect the employer's legitimate business interests; no undue hardship to employee; not injurious to public interest. Considerations: absence or presence of limitations as to time and space; whether employee is sole contact with customer; employee's possession of trade secrets or confidential information; purpose of restriction (elimination of unfair competition vs. ordinary competition and whether seeks to stifle employee's inherent skill and experience); proportionality of benefit to employer as compared to the detriment to the employee; other means of support for employee; when employee's talent was developed; whether forbidden employment is merely incidental to the main employment.	-	Yes	Reformation	Yes
Oklahoma	No. OK Stat. § 15-219A	-	-	-	-	-	-

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Oregon	Yes. Or. Rev. Stat. § 653.295	Trade secrets; confidential business or professional information; investment in certain on-air broadcasters; customer contacts and goodwill.	Noncompete must be provided at least two weeks before employment or with a bona fide advancement; employee is in an executive, administrative, or professional role and meets minimum compensation threshold; restricted in time or space; application of restriction should afford only a fair protection of the employer's interests; must not interfere with public interest. *As of January 1, 2016*, noncompetes are limited to 18 months. [Qualifying garden leave clauses are enforceable.] *Effective January 1, 2020*, a signed, written copy of the employee's noncompete must be sent within 30 days following termination of employment. *Noncompetes entered on or after January 1, 2022, cannot be longer than 12 months, and employees subject to them must have "annual gross salary and commissions" exceeding $100,533 (adjusted annually for inflation); failure to satisfy the statutory requirements renders the nonocmpete void.*	Home healthcare workers. *Though not listed as exemptions, a salary threshold applies. For agreements entered into before January 1, 2022: an "employee's annual gross salary and commissions" must "exceed[] the median family income for a four-person family" applies; for agreements entered on or after January 1, 2022, the "employee's annual gross salary and commissions" must "exceed[] $100,533, adjusted annual for inflation . . . ."*	No	Reformation	Undecided
Pennsylvania	Yes	Trade secrets; confidential information; goodwill; investment in specialized training; unique or extraordinary skills; patient referral base.	Reasonably necessary to protect the employer's legitimate interests; reasonable in time and space.	-	No	Reformation	Yes, but it's a factor to consider.

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Rhode Island	Yes R.I. Gen. Laws §§ 28-59-1–3	Trade secrets; confidential information; customer lists; goodwill; training in unique or special services.	Narrowly tailored to protect a legitimate business interest; reasonably limited in activity, geography, and time; does not impose undue burden on employee in light of the need to protect the employer's legitimate business interests; not likely to harm the public interest.	Physicians. *Effective 1/15/2020* (*with retroactive effect*): employees who are 18 years old or younger; student interns/short-term student employees; FLSA nonexempt employees and other low-wage employees, *i.e.*, employees earning no more than 2.5x the federal poverty level (currently $31,225 – based on the employee's "regular" hours, *i.e.*, non-overtime, non-weekend, non-holiday hours).	Undecided, but likely	Reformation	Undecided
South Carolina	Yes	Business and customer contacts; existing employees; existing payroll deduction accounts.	Necessary to protect legitimate business interest; reasonably limited in time and space; not unduly harsh and oppressive to employee's efforts to earn a living; reasonable from standpoint of public policy.	-	No	Blue pencil, likely. (SC S.Ct rejected blue pencil doctrine by name, but case involved reformation; SC Ct. App. has since permitted step-down provisions.)	Undecided

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South Dakota	Yes. S.D. Codified Laws §§ 53-9-8, *et seq*.	Trade secrets; protection from unfair competition; existing customers.	Restriction in the same business or profession as that carried on by employer and does not exceed two years and in a specified geographic area; reasonableness in time, space, and scope is a factor in certain circumstances.	-	Yes	Reformation, likely	Yes, but it's a factor to consider.
Tennessee	Yes	Trade secrets; confidential information; retention of existing customers; specialized training.	Reasonable in time and space and necessary to protect legitimate interest; public interest not adversely affected; no undue hardship to the employee.	Physicians (in certain circumstances).	Yes (if employment continued for appreciably long period)	Reformation	Yes, but it's a factor to consider.
Texas	Yes. Tex. Bus. & Com. Code §§ 15.50-.52	Trade secrets; confidential or proprietary information; goodwill; specialize training.	Reasonable in time, space, and scope; does not impose a greater restraint than necessary to protect legitimate business interest. **In December 2011, the Texas Supreme Court withdrew its June 2011 landmark decision, but still eliminated the requirement that the consideration given by the employer in exchange for the noncompete must give rise to the interest protected by the noncompete, and held that the consideration for the noncompete agreement must be reasonably related to the company's interest sought to be protected.*	Physicians (in certain circumstances)	No	Reformation (mandatory)	Yes
Utah	Yes. Utah Code Ann. §§ 34-51-101-301 [Certain changes apply to agreements starting May 10, 2016 and others May 14, 2019]	Trade secrets; goodwill; extraordinary investment in training or education.	Carefully drawn to protect only the legitimate interests of the employer, reasonable based on geography, duration, and nature of the employee's duties in light of the legitimate business interests to be protected. One year limit for agreements entered on or after May 10, 2016.	Broadcasters (under certain circumstances)	Yes	Undecided	Yes

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Vermont	Yes	Trade secrets; confidential information; goodwill; relationships with customers.	Necessary to protect legitimate business interest; not unnecessarily restrictive to employee; limited in time, space, and/or industry; not contrary to public policy.	Beauticians and cosmetologists (by their school)	Yes	No, but possibly if contract provides.	Undecided
Virginia	Yes	Trade secrets; confidential information; knowledge of methods of operation; protection from detrimental competition; customer contacts.	Narrowly drawn (no greater than necessary) to protect the employer's legitimate business interest; reasonable in time, space, and scope; not unduly harsh or oppressive (or burdensome on the employee) in curtailing the employee's ability to earn a livelihood; not against, and reasonable in light of, sound public policy. *Effective 7/1/2020: a notice must be posted.*	*Effective 7/1/2020*: "Low-wage" employees, *i.e.*, employees earning less than approximately $52,000 annually; likely not applicable to salespersons.	Yes	Red Pencil, but severable portions can be enforced if remaining restrictions are otherwise enforceable.	Yes
Washington	Yes RCW §§ 49.62.005–900	Customer information and contacts; goodwill.	Restriction is necessary to protect employer's business or goodwill; restriction is no greater than reasonably necessary to secure employer's business or goodwill; reasonable in time and space; injury to public does not outweigh benefit to employer. *Effective* 1/1/2020: notice must be provided before acceptance of offer or before agreement becomes effective (whichever applies); independent consideration for mid-employment agreements; and presumption (rebuttable by clear and convincing evidence to the contrary) that a noncompetes with a duration longer than 18 months are unreasonable and unenforceable; must not avoid Washington law; must not require adjudication outside of Washington; attorney's fees to employee if noncompete violates the statute.	Broadcasters (under certain circumstances). *Effective 1/1/2020*: Employees earning less than or equal to $100,000 for employees and independent contractors earning less than or equal to $250,000 (both adjusted for inflation); employees who are laid off (unless paid base salary, less new earnings). *Also effective 1/1/2020*: cannot prohibit moonlighting for low-wage workers, *i.e.*, those earning less than 2x minimum hourly rate.	No	Reformation	Yes, likely

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West Virginia	Yes	Trade secrets; confidential or unique information; customer lists; direct investment in employee's skills; goodwill.	Ancillary to a lawful contract; not greater than reasonably necessary to protect legitimate business interest; reasonable in time and space; no undue hardship on employee; not injurious to public.	-	No	Reformation	Undecided
Wisconsin	Yes. Wis. Stat. Ann. § 103.465	Trade secrets; confidential business information; customer relationships.	Necessary to protect legitimate business interest; reasonable in time and space; not harsh or oppressive to the employee; not contrary to public policy.	-	Yes, if continued employment is conditioned on signing the agreement.	Red pencil, but, courts (and legislature) may be moving toward a more tolerant approach.	Undecided
Wyoming	Yes	Trade secrets; confidential information; special influence of employee over customers to the extent gained during employment.	Restraint must be ancillary to otherwise valid agreement and fair; no greater than necessary to protect legitimate business interests; reasonable in time and space; no undue hardship on employee; employer's need outweighs harm to employee and public; not injurious to public.	-	No	Reformation	Yes, likely.

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Employee Noncompetes
A State-by-State Survey

State	If Permitted and Statute	Protectable / Legitimate Interests	Standards	Exemptions	Continued Employment is Sufficient Consideration	Reformation Blue Pencil Red Pencil Purple Pencil	Enforceable Against Employees Terminated w/o Cause
	Chart covers employee noncompetes only. It does not cover noncompetes arising from the sale of a business or in other contexts.	*The interests identified above are those expressly identified by statute or case law. Other protectable interests may exist.* *Where trade secrets are not expressly referenced but confidential information is, they are protected insofar as confidential information is a broader category that includes trade secrets.* *Customer lists are frequently included within the category of trade secrets or confidential information, assuming the particular customer list satisfies the requirements to be protectable as such. Some states, however, separately identify them as protectable interests.*	*Consideration for a noncompete is always required, as is the requirement that a noncompete be ancillary to an otherwise lawful agreement. These requirements are typically satisfied when the agreement is entered into at the inception of an employment relationship.*	*Attorneys and certain persons in the financial services industry are subject to industry regulations not addressed in this chart.*	*The continued employment issue addresses only at-will employment relationships.*	*Reformation is sometimes called "Judicial Modification," the "Rule of Reasonableness," the "Reasonable Alteration Approach," or the "Partial-Enforcement" rule. Red Pencil is sometimes called the "All or Nothing" rule. "Purple pencil" is a reformation approach with an express good faith (of the drafter) requirment.*	*Addresses only not-for-cause terminations and assumes no breach or bad faith by the employer.*

Originally drafted in 2010, this chart is updated periodically and is current as of the date indicated.
Please contact Russell Beck (*rbeck@beckreed.com* | 617-500-8670) if you would like to receive updates.

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