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Executive Order 14036: Promoting Competition?

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INTRODUCTION

Four million Americans left their jobs in July 2021.[1] By the end of that month, the number of open jobs reached an all-time high: 10.9 million.[2] Employees are walking out the door in record numbers as part of a trend so remarkable, we even gave it a name: the Great Resignation. With 4.3 million Americans quitting their jobs in January 2022 and 11.3 million job openings, the Great Resignation is only gaining momentum and showing no signs of slowing down.[3]

And as a consequence of employees exiting in droves, employers are hurting. According to The Work Institute, turnover costs employers approximately thirty-three percent of an employee's annual salary.[4] Other estimates indicate it could cost as much as 1.5 times a worker's salary.[5] The cumulative effect of so many workers leaving means employers are taking a serious hit; two experts estimate that employee turnover costs American businesses approximately $1 trillion.[6] Employers need a way to stop the bleeding and mitigate the significant losses they have already incurred.[7] Covenants not to compete can do just that: they allow employers to protect their assets and prevent situations like what we are seeing currently with companies hemorrhaging money due to a mass exodus of employees.[8]

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1. Ian Cook, *Who Is Driving the Great Resignation?*, HARV. BUS. REV. (Sept. 15, 2021), https://hbr.org/2021/09/who-is-driving-the-great-resignation [https://perma.cc/E6FR-NJ2B].

2. *Id.*

3. Greg Iacurci, *4.3 Million People Quit Their Jobs in January as the Great Resignation Shows No Sign of Slowing Down*, CNBC (Mar. 9, 2022, 6:05 PM), https://www.cnbc.com/2022/03/09/the-great-resignation-is-still-in-full-swing.html [https://perma.cc/2URB-NKBG].

4. Debora Roland, *Why Employers Should Fight for Employee Satisfaction During the Great Resignation*, FORBES (Mar. 15, 2022, 7:15 AM), https://www.forbes.com/sites/forbeshumanresourcescouncil/2022/03/15/why-employers-should-fight-for-employee-satisfaction-during-the-great-resignation/ [https://perma.cc/4JN6-SMG2].

5. *Id.*

6. Ryan Vet, *The Great Resignation: Why Employee Turnover is Killing Businesses*, FORBES (Dec. 7, 2021, 7:45 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2021/12/07/the-great-resignation-why-employee-turnover-is-killing-businesses/ [https://perma.cc/FZ9E-JM9V].

7. *Id.*

8. *Id.*; *see also* Michael R. Greco, *Eight Reasons Small Businesses Should Use Non-Compete Agreements*, FISHER & PHILLIPS (May 31, 2012), https://www.fisherphillips.com/news-insights/non-compete-and-trade-secrets-blog/eight-reasons-small-businesses-should-

To make matters worse, some studies show a direct correlation between quitting rate and inflation; as the number of workers quitting their jobs increases, the rate of wages and prices also increases.[9] In this situation, workers who are not bound by a noncompete may decide they want to leave their jobs and start looking for opportunities to work elsewhere. They could be enticed by a rival company who is willing to pay them more, and if their current employer values and wants to keep them, they will feel pressured to pay the employee more to retain them.[10] So "[i]n this context, if employed workers search more, wage competition among employers increases, leading to an increase in inflationary pressures; if they search less, wage competition falls and inflationary pressures decrease."[11] In other words, enforcing noncompete agreements can lead to lower rates of inflation and a better economy.

Given that covenants not to compete were designed for such a time as this, with prices increasing faster than they have since 1982 and employees exiting in record numbers, it only makes sense that employers have been enforcing these covenants more frequently.[12] Surveys show that lawsuits involving noncompetes and trade secret agreements have approximately tripled since the year 2000.[13] This increase in enforcement has garnered widespread attention with states across the country rethinking their laws

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use-non-compete-agreements.html [https://perma.cc/FZ9E-JM9V] (explaining that noncompete agreements help businesses protect client relationships and their investment in training).

9. Renato Faccini, Leonardo Melosi & Russell Miles, *The Effects of the "Great Resignation" on Labor Market Slack and Inflation*, FED RSRV. BANK OF CHI.: CHI. FED LETTER (Feb. 2022), https://www.chicagofed.org/publications/chicago-fed-letter/2022/465 [https://perma.cc/7EBA-WSEH].

10. *Id.*

11. *Id.*

12. Wayne Duggan, *Why is Inflation So High?*, FORBES ADVISOR, https://www.forbes.com/advisor/investing/why-is-inflation-rising-right-now/ [perma.cc/7TF5-TQA8] (Dec. 13, 2022); *see also* Mike Hofman, *Why Biden's New Noncompete Policy Could Amplify the 'Great Resignation'*, FORTUNE (July 9, 2021), https://fortune.com/2021/07/09/biden-executive-order-noncompete-policy-easier-to-find-job-great-resignation/ [perma.cc/Z7KA-G34J] ("The Biden administration's worker-friendly tack could accelerate the trend known as the 'Great Resignation,' in which workers are emerging from the COVID-19 pandemic ready to mix it up career-wise . . . . Against this backdrop, noncompete agreements may be one of the few barriers standing between employers and a war for talent reminiscent of the booming job market of the late 1990s. And the Biden administration is only too happy to sweep it away."); Conor Dougherty, *How Noncompete Clauses Keep Workers Locked In*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html [https://perma.cc/WU9C-R2JE].

13. Dougherty, *supra* note 12.

regarding covenants not to compete and culminated in President Biden calling for regulation at the federal level with Executive Order 14036, "Promoting Competition in the American Economy."[14]

No question—a lot of people are talking about noncompetes right now, and many have very strong opinions on both sides of the issue. But before we can move forward and decide whether covenants not to compete are a good or bad idea for employers, employees, and the overall economy, we must first go back to the beginning and understand their history.

I. A RETROSPECTIVE LOOK AT RESTRICTIVE COVENANTS

A. *The Earliest Noncompete Agreements*

Covenants not to compete go back several centuries, with the earliest noncompete on record being traced back to England in 1414, where an apprentice named John Dyer promised not to perform his trade in the same town as his former master for six months after he stopped working for him.[15] The court refused to enforce the agreement because his former master promised nothing in return for Dyer's promise.[16] Underlying the court's decision was its concern for Dyer's ability to earn a living, and the presiding judge was so opposed to the agreement, he said the former master (plaintiff) should "go to prison until he paid a fine to the King."[17]

By 1711, the English courts' perspective on noncompete agreements shifted, and in the landmark case of *Mitchel v. Reynolds*, the court enforced a noncompete agreement connected with the sale of a bakery because it was supported by consideration; and on this basis the court reasoned a partial restraint was okay.[18] A partial

14. Exec. Order No. 14,036, 3 C.F.R. 609 (2022); *see* Clifford R. Atlas & Erik J. Winton, *Takeaways from President Biden's Executive Order on Non-Competes*, JACKSON LEWIS (Jul. 15, 2021), https://www.jacksonlewis.com/publication/takeaways-president-biden-s-executive-order-non-competes [https://perma.cc/GJ6G-ZDV5] (explaining President Biden's executive order and its implications).

15. Dyer's case (1414) 2 Hen. V, fol. 5, pl.26; Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMPETITION L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/ [https://perma.cc/JW49-UX4J].

16. *See* Dyer's case (1414) 2 Hen. V, fol. 5, pl.26.

17. Beck, *supra* note 15.

18. Evan Starr, *Are Noncompetes Holding Down Wages?*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 127, 130 (Sharon Block & Benjamin H. Harris eds., 2021); Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

restraint, the court explained, meant the worker could be limited regarding where and when he could work (not within a certain geographic radius and not for a certain amount of time).[19] Because the worker would be compensated for agreeing to the restraint, the court held contracts like these could be enforced.[20] The *Mitchel* case marked the first time a court "distinguished between 'contracts in restraint of trade generally' which were considered void, and 'those limited as to time or place or persons' which 'have been regarded as valid and duly enforced.'"[21]

After originating in England, noncompete agreements then came to the United States, and for as long as they have existed in the U.S., regulation of these agreements has been left to the states.[22] The federal government has not regulated these agreements, although some lawmakers have advocated for this.[23] By 2016, members of Congress had introduced three bills seeking to ban noncompete agreements from being used against low-wage employees and other lesser-skilled workers: the Mobility and Opportunity for Vulnerable Employees Act ("MOVE Act"),[24] the Freedom for Workers to Seek Opportunity Act,[25] and the Limiting the Ability to Demand Detrimental Employment Restrictions Act ("LADDER Act").[26] Notably, none of these efforts succeeded.[27]

But senators and representatives continued to push for federal legislation and introduced the Workforce Mobility Act in 2018.[28] Here, the goal was even more ambitious: they wanted to prohibit all noncompete agreements with the exception of agreements involved in the dissolution of a partnership or sale of a business.[29]

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19. Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

20. *Id.*

21. Beck, *supra* note 15 (quoting Alger v. Thacher, 36 Mass. 51, 53 (1837)).

22. *Id.*

23. *Id.*

24. Mobility and Opportunity for Vulnerable Employees Act (MOVE Act), S. 1504, 114th Cong. (2015).

25. Freedom for Workers to Seek Opportunity Act, H.R. 4254, 114th Cong. (2015).

26. Limiting the Ability to Demand Detrimental Employment Restrictions Act, H.R. 2873, 114th Cong. (2015); *How a Federal Noncompete Law May Develop Under President Biden*, FISHER PHILLIPS (Dec. 29, 2020), https://www.fisherphillips.com/news-insights/federal-noncompete-law-biden.html [https://perma.cc/MY4T-Q2CL] (hereinafter FISHER PHILLIPS).

27. FISHER PHILLIPS, *supra* note 26.

28. *Id.*

29. *Id.*

This legislation ignited significant opposition for failing to acknowledge the ways in which noncompete agreements can help—rather than hinder—both employers and employees. As one litigation partner handling employment disputes has noted:

> [Covenants not to compete] are also used legitimately by companies to restrict executives and other high-level, highly-compensated employees from taking strategic plans, scientific know-how, specific customer knowledge and other valuable information to competitors. Thus, while the [Workforce Mobility Act] may seek to protect employees who want to leave, noncompetes can legitimately protect both the company and its employees who want to stay.[30]

Perhaps we should take a cue from this failed attempt at legislation and note that a flat-out ban on noncompetes is not a workable solution to economic competition. Perhaps the federal government should not even step in at all, and states should continue to call the shots in noncompete regulation. Giving states discretion has worked because it acknowledges that these agreements call for nuance: what works in one situation might not work in another, and what works in one state might not work in another. For instance, Hawaii decided to ban noncompetes for workers in the technology industry because of the "unique and limited" nature of Hawaii's geographic area.[31] Because other states are not islands, the concerns Hawaii has about these covenants might not apply to them.[32]

With freedom to make their own policy decisions on noncompetes, states have been able to wield these tools in a way that benefits their state's employers *and* employees, which is why that system should stay in place and the federal government should not intervene. And if it does intervene, it should do so in a way that still gives states most of the room to regulate, recognizing that, on

30. Richard Schoenstein, *The Workforce Mobility Act: The Wrong Solution for Non-Compete Litigation*, N.Y.L.J. (July 13, 2018), https://www.law.com/newyorklawjournal/2018/07/13/the-workforce-mobility-act-the-wrong-solution-for-non-compete-litigation/ [https://perma.cc/K5BV-JSK3].

31. *Hawaii Enacts New Restrictions on Noncompete and Nonsolicitation Agreements for Employees of Technology Businesses*, OGLETREE DEAKINS (Aug. 17, 2015), https://ogletree.com/insights/hawaii-enacts-new-restrictions-on-noncompete-and-nonsolicitation-agreements-for-employees-of-technology-businesses/ [https://perma.cc/T9ZB-2KNT].

32. *See* Robert B. Milligan, *Hawaii Bans Non-Compete and Non-Solicit Agreements with Technology Workers*, SEYFARTH (July 6, 2015), https://www.tradesecretslaw.com/2015/07/articles/trade-secrets/hawaii-bans-non-compete-and-non-solicit-agreements-with-technology-workers/ [https://perma.cc/3MVG-8QTQ].

balance and within reason, noncompetes can offer procompetitive advantages that make them worth keeping.

Notwithstanding the advantages they offer, noncompetes have garnered significant opposition over the past few years. The sandwich chain, Jimmy John's, faced a massive lawsuit after it required employees to enter into noncompete agreements prohibiting them from taking a job with a competing business for two years after leaving Jimmy John's, and also from working within two miles of a Jimmy John's (for which sandwiches accounted for more than ten percent of the revenue).[33] Expressing a sentiment that many would support, New York's Attorney General Eric Schneiderman said, "Noncompete agreements for low-wage workers are unconscionable."[34] And I do not disagree. Whether noncompetes are appropriate or not depends on the context, and for workers who are already limited by the amount of money they are making, further limiting them through a noncompete agreement is entirely unreasonable. But that does not mean these agreements are always unreasonable, and in other situations not involving low wage workers, they often make a lot of sense.[35]

Despite all the bad press they receive, noncompetes have done a lot of good.[36] Part II will explore some of the most commonly cited arguments against covenants not to compete, followed by reasons why we should not be so quick to let them go.

II. ARGUMENTS AGAINST NONCOMPETES

Some argue that noncompete agreements prevent employers from investing in human capital.[37] However, this is a weak argu-

33. Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html [https://perma.cc/TR69-2FMH].

34. *Id.*

35. *See* Ryan Nunn, *Non-Compete Contracts: Potential Justifications and the Relevant Evidence*, BROOKINGS (Feb. 4, 2020), https://www.brookings.edu/testimonies/non-compete-contracts-potential-justifications-and-the-relevant-evidence/ [https://perma.cc/2AY9-9WD3].

36. Paul Wong, Yun Ling & Emily Walden, *Noncompete Agreements: Might They Be Procompetitive in Healthcare?*, COMPETITION POL'Y INT'L (May 11, 2020), https://www.competitionpolicyinternational.com/non-compete-agreements-might-they-be-procompetitive-in-healthcare/ [http://perma.cc/CS8P-9Y2B] (stating that noncompetes can be procompetitive in healthcare because they encourage investment).

37. Matt Marx & Lee Fleming, *Non-Compete Agreements: Barriers to Entry . . . And Exit?*, 12 INNOVATION POL'Y & ECON. 39, 45 (2012) (stating that "because noncompetes

ment because firms are naturally incentivized to reward employees who add value to their firm, and they use a variety of means of compensation (promotions, bonuses, salary increases) to reward high performing employees. As one author put it, this kind of system is "unsurprising: in a competitive market, any firm that includes noncompete clauses in its employment package has a rational self-interest in adopting incentive structures that correct for any underperformance effects that could arise as a result."[38]

Agglomeration economies, which refer to the economic benefits that accrue when firms are in close proximity to each other, provide another ground for opposition to noncompetes.[39] Some argue noncompetes shouldn't be used because they restrict the mobility of research and development personnel, which can "impede the agglomeration economies that arise from the regular dissemination of knowledge within an industry."[40] But whether a "free flowing pool of human . . . capital" and technical knowledge can outweigh the harms firms suffer, creating a positive social impact over time, is debatable. This would require the harmful effects stemming from the uncompensated transfer of human capital to be exceeded by other benefits associated with that capital's unrestricted circulation, and it is unclear that here the benefits exceed the harms.[41]

In light of the objections to noncompetes, perhaps one solution would be for firms to take a flexible approach to these agreements. For instance, firms could ask employees to agree to paying a fee if they leave before a specified date.[42] This seems like a viable

restrict the market for the most relevant outside job opportunities, firms are under less pressure to pay competitive wages"). *But see id.* at 52–53 (stating that "firms are more likely to invest in the human capital of their employees under strong enforcement and, as also might be expected, managers are less likely to invest personally"); Ryan Nunn & Matt Marx, *The Chilling Effect of Non-Compete Agreements*, ECONOFACT (May 20, 2018), https://econofact.org/the-chilling-effect-of-non-compete-agreements [http://perma.cc/3KTA-GKBK] (stating that "lower worker turnover resulting from noncompetes might make firms more eager to invest in training their workers").

38. Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87, U. CHI. L. REV. 953, 972 (2020).

39. Riley Zipper, *Everything You Always Wanted to Know About Agglomeration (But Were Afraid to Ask)*, INCONTEXT (Mar. 2020), https://www.incontext.indiana.edu/2020/mar-apr/article1.asp [http://perma.cc/5US2-EFLW].

40. Barnett & Sichelman, *supra* note 38, at 973.

41. *Id.* at 969.

42. *Employee Training: Payment Obligations and Strategies for Employers*, HOPKINS CARLEY, https://www.hopkinscarley.com/blog/client-alerts-blogs-updates/employment-law-client-alerts/employee-training-payment-obligations-and-strategies-for-employers [https://p

solution because it allows both parties to get what they want; the employee is free to leave as they wish, and the firm is reimbursed for training expenses and any other losses they incur in the event the employee leaves before the firm has had time to recoup its investment in the employee.

A. *Employment-at-Will and the Question of Fairness*

In employment-at-will contexts, where employees can be fired at any time for any reason, covenants not to compete can seem unfair at first glance. The U.S. District Court for the Eastern District of Missouri Federal Court addressed this in *Durrell v. Tech Electronics, Inc.*, in which the plaintiff, Robert Durrell, filed a claim asking the court to declare his noncompete agreement unenforceable so he could seek employment elsewhere.[43] The court held that "[a]n offer of at-will employment, or the continuation of at-will employment is simply not a source of consideration under Missouri contract law."[44]

So, what would count as consideration? Another case out of Missouri suggests access to a company's key customers or trade secrets might potentially be adequate to make a noncompete agreement enforceable.[45] In *JumboSack Corp. v. Buyck*, the Missouri Court of Appeals stated: "Missouri courts have recognized that continued at-will employment constitutes consideration for a non-compete agreement where the employer allows the employee, 'by virtue of

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erma.cc/N9FE-ZWYN] (explaining that employers can "[p]ay the cost of training in exchange for the employee's agreement to reimburse if she resigns within a defined period of time– Employers can also offer to pay the cost of training up front in exchange for the employee's promise to repay the company some or all of the cost if she resigns before a specified date.").

43. Durrell v. Tech Elecs, Inc., No. 4:16 CV 1367 CDP, 2016 U.S. Dist. LEXIS 157689, at *1 (E.D. Mo. Nov. 15, 2016); *see also* Matt Johnston, *Non-Competes Are Not Always Conducive to At-Will Employment*, JOHNSTON BUS. L. GRP. (2017), https://johnston-legal.com/2017/04/20/non-compete-always-conducive-will-employment/ [https://perma.cc/9HDM-UHHY].

44. *Durrell*, 2016 U.S. Dist. E.D. Mo. LEXIS 157689, at *11.

45. JumboSack Corp. v. Buyck, 407 S.W.3d 51, 55 (Mo. Ct. App. 2013); *see also* Taylor D. Sztainer, *Non-Compete Agreements: An Effective Tool to Protect Legitimate Business Interests*, MOSS & BARNETT (Oct. 1, 2014), https://www.lawmoss.com/publication-non-compete-agreements-an-effective-tool-to-protect-legitimate-business-interests [https://perma.cc/G7EZ-WFDU] (listing the following as possible forms of consideration: a bonus, raise, promotion, share in ownership, access to trade secrets or other confidential information, employer contributions to a 401(k) plan, profit sharing, or an agreement that the employee can be terminated only for cause instead of at-will).

employment[,] to have continued access to [its] protectable assets and relationships.'"[46]

Some might see enforcing noncompete agreements for at-will employees who have been let go as rubbing salt in the wound; employees can be let go at any time, and then if or when they are let go, they are limited in where they can work. But viewed from the employer's perspective, giving the employee ongoing access to protectable assets and relationships is also unfair. Presumably, the employee would not have had access to these assets and relationships but for his or her employment, so it seems fair that the employee's access to these things should end when the employment relationship ends. One possible solution is to make sure at-will employees understand the terms of the noncompete agreement they are being asked to sign. If the employer is clear and precise with its terms, and if the terms are intended to serve a legitimate business purpose, it seems fair for an employer to expect an employee who has signed it to abide by the terms of the noncompete.

Even in the context of at-will employment, noncompete agreements seem fair and reasonable when viewed in relation to the freedom of contract principle. Delaware, in particular, respects the parties' freedom to contract in cases involving noncompetes.[47] Rather than striking them out altogether, Delaware takes a blue pencil approach to modify terms of a noncompete agreement that it finds unreasonable.[48] Specifically, in Delaware the courts "respect[] the rights of parties to freely contract and to be able to rely on the enforceability of their agreements . . . . [Delaware] courts will enforce the contractual scheme that the parties have arrived at through their own self-ordering . . . . Upholding freedom of contract is a fundamental policy of [the] state."[49]

Beyond the idea that parties should have the freedom to create their own arrangements through freedom of contract, several other

46. *JumboSack Corp.*, 407 S.W.3d at 55–56.

47. Anat Maytal, *Breaking Up is Hard to Do: The Role of Non-Compete Agreements When Employees Leave to Work for the Competition*, AM. BAR ASS'N (Aug. 14, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2018/08/03_maytal/ [https://perma.cc/367M-4HRD] (quoting Ascension Ins. Holdings v. Underwood, No. 9897-VCG, 2015 Del. Ch. LEXIS 19, at *14–15 (Jan. 28, 2015)).

48. *Id.* For an explanation of the "blue pencil" terminology, see *infra* Section IV.A.

49. *Id.*

justifications exist for these agreements and show the value they provide for both employers and employees.[50]

III. ARGUMENTS FOR COVENANTS NOT TO COMPETE

As one of their primary advantages, noncompetes allow employers to solve the "holdup problem," in which one party to a contract takes advantage of the other after an investment has been made.[51] Essentially, workplaces have a strong interest in protecting trade secrets and certain business practices.[52] While the employee is working for the employer, the employer has a strong incentive to share this information because it makes the employee more productive.[53] But if the employee discovers another employer will pay them more to do the same job, the employee would then have an incentive to leave and take the employer's trade secrets and valuable information with them.[54]

Firms that can foresee this consequence could be unwilling to share private information and business practices with employees without the protection of a noncompete agreement.[55] Through such agreements, companies "get an assurance that workers are unlikely to leave for some period of time, allowing the firm to capture more of the increased productivity from [the] costly training it provides, and workers receive more training than they otherwise would."[56]

In this way, noncompete agreements allow companies to make investments in their workforce that benefit both them and their employees.[57] With lower recruitment and training costs, some

50. Bradley Adler, *Employee Benefits of a Noncompete*, WORKFORCE.COM (Dec. 1, 1999), https://workforce.com/news/employee-benefits-of-a-noncompete [https://perma.cc/TU6M-UB55].

51. Josh Wright, *Holdup Problem, Airline Edition,* TRUTH ON THE MARKET (Nov. 18, 2011), https://truthonthemarket.com/2011/11/18/holdup-problem-airline-edition/ [https://perma.cc/6YWX-7NCB].

52. OFF. OF ECON. POL'Y U.S. DEP'T OF THE TREAS., NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 7 (2016) [hereinafter ECONOMIC EFFECTS].

53. *Id.*

54. *Id.*

55. *Id.* at 8.

56. *Id.* at 8.

57. John M. McAdams, Non-Compete Agreements: A Review of the Literature 3 (Dec. 31, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3513639 [https://perma.cc/UZC6-GNTY].

companies with noncompete agreements are able to offer a wage premium to employees for signing.[58]

Additionally, noncompete agreements can serve a screening purpose for employers.[59] Because it can be considerably expensive for firms to hire and then lose workers, requiring employees to sign a noncompete agreement allows firms to screen out people who do not plan to continue working for the company long term.[60] Without a noncompete agreement, it might not be obvious to employers which employees are planning on leaving in a short period of time, but an employee who is undeterred by a noncompete agreement is likely someone who plans to stay.[61]

"Lock-in," which refers to the ways these agreements keep employees bound to the firms enforcing them, also explains why some employers use noncompete agreements.[62] Proponents of the lock-in theory argue that noncompetes are advantageous for employers because they reduce worker mobility and increase tenure.[63] One source explained this as follows:

> If firm A spends money and resources training an employee to be a skilled basket weaver, this skill is valuable to any firm hiring basket weavers. However, if the employee has signed an enforceable agreement promising not to engage in basket weaving for five years after leaving the employment of firm A, the employee has effectively agreed to work for firm A or to cease weaving baskets for five years. If he is much more valuable as a basket weaver than in any other trade, he will continue to work for A. Thus, restrictive covenants in a labor contract effectively enable parties to contract for long periods of time.[64]

Although noncompetes can be an effective means of increasing tenure, they can sometimes lead to a flat or declining wage, which could also lead one to wonder what would incentivize employees to sign them.[65] In some cases, employees might not understand what

58. *Id.* at 18.

59. *Id.* at 7 (stating that noncompete agreements "may also reduce turnover through a screening mechanism: workers who are more likely to leave a job after a short stay will tend to select out of applying for jobs where non-competes are a requirement").

60. ECONOMIC EFFECTS, *supra* note 52, at 8.

61. *Id.* at 8–9 (explaining that by giving up the option to seek out better job offers, employees send a credible signal of commitment to employers).

62. McAdams, *supra* note 57, at 5.

63. *Id.*; *see* Dougherty, *supra* note 12.

64. Paul H. Rubin & Peter Shedd, *Human Capital and Covenants Not to Compete*, 10 J. LEGAL STUD. 93, 95 (1981).

65. McAdams, *supra* note 57, at 5.

they are agreeing to, or they might have agreed to it if they were offered additional compensation or some other kind of consideration for signing the noncompete.[66]

A. *Human Capital and Agglomeration Economies*

The fact that human capital is an economic asset is another important consideration in the enforcement of noncompetes.[67] Firms in close proximity to each other all have an advantage when they can draw on a "free-flowing pool of human and intellectual capital."[68] As discussed earlier, in the agglomeration economy, one firm becomes more efficient when other similar firms come to that location.[69] For instance, in Silicon Valley "any firm connected to the personal networks through which information and employees flowed . . . could benefit from the best innovation produced in the entire cluster rather than the best innovation produced by their own proprietary research and development efforts."[70]

But this poses a problem: when employees in an agglomeration economy move from firm to firm, some knowledge spillovers are inevitable.[71] Even when the firm has protected valuable trade secrets, some general information that is still valuable to the firm generally comes out.[72] So in this sense, the firm is hurt by not only the proprietary information to which competitors can gain access, but also the general information that employees take with them when they leave. And then there's more. In addition to giving competitors access to valuable information, when employees leave, firms lose human capital they invest in training their employees, and they must then pay substantial costs to recruit and train replacement employees.[73]

Because the loss of employees and competitors accessing trade secrets could create a significant setback for firms, they often rely

66. *Id.*

67. Barnett & Sichelman, *supra* note 38, at 957.

68. *Id.* at 969.

69. *See id.*

70. Bruce Fallick, Charles A. Fleischman & James B. Rebitzer, Job Hopping in Silicon Valley: The Micro Foundations of a High Technology Cluster 2 (June 14, 2004) https://www.oecd.org/unitedstates/32124907.pdf [https://perma.cc/8JW6-3235].

71. *See id.* at 2.

72. *Id.* at 4–5.

73. *See* Barnett & Sichelman, *supra* note 38, at 1027–28.

on nondisclosure and confidentiality agreements to bolster common law protection of trade secrets.[74] Noncompetes also protect other legitimate business interests that give them procompetitive justifications.

B. *Protection for Employers' Legitimate Business Interests*

Along with protecting trade secrets, noncompete agreements can protect the goodwill (an intangible asset) of a business.[75] Employees often cultivate this goodwill throughout their interactions with customers, but importantly, they do so as agents of the company. Thus, that goodwill belongs to the company.[76]

Beyond their advantages, perhaps noncompetes are better understood by looking at the implications of a world without them. Without noncompete agreements, employers of low-wage workers could face higher costs.[77] Two researchers, Matthew Johnson and Michael Lipsitz, hypothesized that "when the minimum wage rises, employers of low-wage labor will recoup some of their losses by expanding the use of noncompete clauses."[78] Looking at the beauty industry, they confirmed this hypothesis, finding noncompete clauses to be more prevalent in states requiring higher wages.[79] In this way, noncompetes allow employers to recoup some of the funding they have allocated to employees through lawfully required higher wages.[80]

This presents a perplexing dilemma when viewed in light of the New York Attorney General's statement that "noncompete

74. Steven D. Gordon, *Non-Disclosure Agreements and Trade Secrets: 12 Points to Consider*, HOLLAND & KNIGHT (Nov. 16, 2021), https://www.hklaw.com/en/insights/publications/2021/11/nondisclosure-agreements-and-trade-secrets-12-points-to-consider [https://perma.cc/U7CA-HWT2].

75. Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J., 107, 112–13 (2008).

76. *Id.* at 116.

77. Stephen L. Carter, *Taking a Hammer to Noncompete Agreements Might Hurt Workers*, BQ PRIME (Aug. 29, 2021, 8:00 AM), https://www.bloomberg.com/opinion/articles/2021-08-29/trashing-noncompete-agreements-might0hurt-low-wage-workers [https://perma.cc/8DY2-JCTW].

78. *Id.* (citing Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. Hum. Res. 689 (2022).

79. *Id.*

80. *Id.*

agreements for low-wage workers are unconscionable."[81] That might be true, but it is also true that the money employers are paying their employees has to come from somewhere. According to Yale Law School Professor Stephen L. Carter, "[p]rohibiting the clauses for low wage workers, despite its allure, might drive employers to find other means to recoup their losses; they might even, as the study of the salon industry implies, just employ fewer people."[82] Employing fewer people would mean more jobless people, and just as a rising tide lifts all boats in the harbor, when companies thrive, more people are hired and can thrive too.[83]

C. *How Noncompetes Benefit Employees*

It is not just employers who benefit from enforcing these agreements—employees can benefit too. In another trickle-down effect, noncompetes lower the cost of training, which incentivizes employers to train their employees.[84] Evidence suggests that, in states that more stringently enforce noncompete agreements, more firms sponsor their new employees' training.[85] Because the resources required for training can be costly, employers could stand to lose a significant amount of money if, after investing in an employee's training, the employee was to leave and work for a competitor company.[86] In that kind of situation, firms would be more likely to hire experienced employees and less inclined to hire novices who might require more extensive training.[87] Therefore, keeping noncompetes can mean more job opportunities for people who are not as far along in their careers.[88]

Aside from creating more jobs and allowing better training, noncompetes can benefit employees in other ways as well. Economist

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81. Whitten, *supra* note 33.

82. Carter, *supra* note 77.

83. L. Randall Wray & Marc-André Pigeon, *Can a Rising Tide Raise All Boats? Evidence from the Clinton-Era Expansion*, 34 J. ECON. ISSUES 811, 811 (2000) ("[T]here are several potential measures of the degree to which the Clinton rising tide might have raised the boats of those at the bottom. One obvious candidate would be unemployment rates, which have declined across the board since 1992.").

84. Harrison Frye, *The Ethics of Noncompete Clauses*, 30 BUS. ETHICS Q. 229, 238 (2020).

85. Nunn, *supra* note 35.

86. *Id.*

87. Frye, *supra* note 84, at 238.

88. *Id.*

Thomas Schelling has noted that limiting exit options can actually improve an employee's position, so having exit options limited by a noncompete is not necessarily a disadvantage.[89] Schelling illustrates this through the classic game of chicken and shows that limiting your options can compel others to act according to your preference through the following hypothetical[90]:

> Suppose player A could no longer swerve (he makes a show of throwing his steering wheel out the window). What this means for B is that he either keeps the course and crashes into A (disaster!), or swerves and avoids collision (not good, but better than a disaster!). B, being no dummy, swerves and avoids the collision. A stays the course while B swerves. A gets his most preferred option.[91]

In the above example, the person who was restricted was the person who got what they wanted. Researcher and author Harrison Frye provides an additional example of how this works in the context of negotiating for a used car. According to Frye, if you are negotiating for a used car on behalf of a friend, and the friend says he will not pay above a certain amount, the salesman is limited in how much he can ask for the car.[92]

Along with inducing the employer to act according to the employee's preference, some studies also suggest these agreements can give employees bargaining power with their employer precisely because employees agreeing to noncompetes have tied their hands.[93] Once the firm has assurance that the investment will not be stolen, it becomes more likely to invest in the worker.[94] As Frye explained: "[w]hen bargaining with others, sometimes the fact that one party cannot retreat allows them to do better by the bargain than they might have been able to otherwise."[95] Because employees pay a price by limiting their exit options, they can use this to their advantage and attain more bargaining power by agreeing to a noncompete. Frye noted: "[t]here is some evidence in the [U.S.] context that, when [noncompete agreements] are utilized prior to the

89. *Id.* at 234. (citing THOMAS SCHELLING, THE STRATEGY OF CONFLICT, 24 (1960)).

90. *Id.*

91. *Id.*

92. *Id.*

93. Brian Albrecht, *In Defense of Noncompetes*, ECON. FORCES (July 15, 2021), https://pricetheory.substack.com/p/in-defense-of-non-competes [http://perma.cc/55F5-78GN].

94. *Id.*

95. Frye, *supra* note 84, at 233–34.

employee accepting the job and during the negotiation process, employees see an increase in their wages."[96]

"A rising tide lifts all boats in the harbor."[97] When companies do not suffer losses from employees leaving and working for their competitors, they are able to enjoy higher profits and have more money to invest in their employees. Without having to worry that an employee is going to leave right after being trained, noncompetes lower the cost of training (by sparing the employer from having to hire a replacement employee).

And more effective training means more effective employees: improving in their skills can bolster an employee's sense of well-being and confidence.[98] According to the *Houston Chronicle*, "Job satisfaction generally increases and self-esteem improves when employees better understand the workings of the company."[99] Training has been shown to boost morale and employees' loyalty to their company.[100] Given this, and the way training improves performance, it is not surprising that training can lower turnover rates.[101] Because noncompete agreements give firms the financial margin to cover the cost of training, and because training can lead to higher rates of tenure, giving firms the freedom to enforce noncompete agreements and the resulting ability to cover the cost of training can mean that more employees stay at their jobs and are happy to do so.[102]

96. *Id.* at 239 (citing Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompetes in the U.S. Labor Force*, 64 J.L. & ECON. 53, 75 (2018)).

97. James R. Hines Jr., Hilary Hoynes & Alan B. Krueger, *Another Look at Whether a Rising Tide Lifts All Boats*, *in* THE ROARING NINETIES: CAN FULL EMPLOYMENT BE SUSTAINED? 493, 493 (Krueger & Solow, eds., 2001) ("A bottom-line finding of our paper is that President Kennedy's shibboleth ['A rising tide lifts all boats'] continues to hold water: the benefits of strong economic growth for the disadvantaged are at least as great as they are for the more advantaged, and the costs of a downturn are borne disproportionately by the disadvantaged."). *But see* The Daily Take Team, *A Rising Tide Only Lifts All Boats When Everyone Has a Boat*, TRUTHOUT (Aug. 27, 2014), https://truthout.org/articles/a-rising-tide-only-lifts-all-boats-when-everyone-has-a-boat/ [https://perma.cc/Z4UA-BQ6H] (using data from Scandinavian countries to argue that to fight poverty in the U.S., we should redistribute wealth from those on top to those on the bottom).

98. Frye, *supra* note 84, at 238.

99. Jerry Shaw, *Effects of Training on Employee Performance*, HOUS. CHRON., https://smallbusiness.chron.com/effects-training-employee-performance-39737.html [https://perma.cc/H78P-J5ZL] (Mar. 9, 2019).

100. *Id.*

101. *Id.*

102. *Id.*

Companies also benefit from training because workers who are trained well work more productively, and as a result, bring in more profits.[103] And notably, along with being cost effective for employers, noncompete clauses are also beneficial for the economy. Without losing money from employees leaving after training, employers have more money to put towards hiring employees.[104] And more money for jobs means noncompetes can in effect create more jobs.

Thanks to the lowered training costs, employers also might be more open to hiring less skilled workers.[105] This creates more opportunities for novices because they are less likely to be screened out; when training is more expensive, firms may only be able to afford to hire already-expert-level employees.[106]

Considering the ripple effect that comes with enforcing noncompetes in which employers, employees, and the economy all thrive, it could be a misunderstanding to view these devices as a restraint on trade. Perhaps they are better understood as commitment devices or a "Ulysses contract," named for the story of Ulysses asking to be tied to his ship's mast so he could avoid being lured by the siren's song and jumping into the sea to his death.[107] Like Ulysses, who knew he needed a way to honor his commitment, avoid temptation, and do what would ultimately be best for himself, noncompete agreements can serve the same purpose for employees.

In addition to serving as a commitment device, noncompetes allow firms and employees to signal their intentions to each other. Firms have different cultures with different values.[108] "Relational firms want committed employees."[109] Agreeing to a noncompete allows employees to signal their commitment and show their interest in working for a relational firm.[110] Consequently, employers can differentiate employees who have signaled their interest from

103. *Id.*

104. Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repaying Agreements*, 54 DUKE L.J. 1295, 1297 (2005).

105. Frye, *supra* note 84, at 238.

106. *Id.*

107. *Id.* at 235.

108. *Id.* at 236.

109. *Id.*

110. *Id.*

those who have not, and are able to screen out employees who do not plan on being loyal to their company.[111]

Most states (with the exception of Montana) have employment-at-will, in which employees can be terminated at any time for any reason; however, employment generally comes with tremendous benefits and provides employees with a sense of security.[112] They can count on the fact that, in exchange for their work, they will be receiving regular paychecks. Noncompete agreements also allow employers to feel a sense of security; they can count on the employees they have hired—employees they saw potential in and were willing to take a chance on—to stay on board and continue working for them beyond their training period.[113]

Because of the value noncompetes provide both employees and employers (better training and more job opportunities for employees who may not yet be "highly skilled," and security for the employers who hire these employees), we should think twice before banning noncompetes entirely.[114] Under some circumstances, they make sense.[115] As with anything in the law, facts matter. And because the enforceability of noncompete agreements hinges so heavily on facts, individual states—who are in the best position to conduct a fact-specific inquiry—should be the ones to regulate these agreements. Whatever President Biden's intentions were with this executive order, Federal Trade Commission ("FTC") regulation does not seem to be a viable solution. To understand why, this Comment will later examine the scope of FTC rulemaking authority and how that authority might be applied to regulate noncompetes. Part IV looks at how these agreements have been handled by courts and the changes to the legal landscape of noncompete law in Washington, D.C. and the states.

111. *Id.*

112. *Employment Law — Just Cause vs. At-Will Employment*, BORRELLI & ASSOCS. (Aug. 8, 2019), www.employmentlawyernewyork.com/new/lates/just-cause-at-will.html [https://perma.cc/D63G-RUUL].

113. Frye, *supra* note 84, at 236.

114. *Id.* at 236–37.

115. *Id.* at 237; Barnett & Sichelman, *supra* note 38, at 1041.

IV. THE LAW OF NONCOMPETES

A. *Court Treatment and Enforcement of Noncompetes*

Courts generally approach noncompete agreements in one of two ways: with a "red pencil" or a "blue" one.[116] Under the "red pencil" doctrine, also known as the no modification approach, states either refuse to enforce noncompetes entirely, or they refuse to enforce noncompetes with any unenforceable provision.[117]

Under the second approach, the "blue pencil" doctrine, states modify noncompetes with unreasonably broad provisions to make them enforceable.[118] Whether courts apply this strictly or liberally depends on the jurisdiction.[119] For instance, North Carolina takes a strict stance, limiting what courts may do to enforce the noncompete; this means that North Carolina courts can choose not to enforce a severable part of the agreement, but aside from this, cannot rewrite the agreement.[120] Florida, however, applies it liberally, requiring courts to modify unreasonable restrictions and enforce the modified form of the agreement.[121]

Whether they use a "red pencil" or "blue pencil," some courts have drastically shifted their stance on noncompetes over time, which is especially true in Virginia.[122] In *Home Paramount Pest Control Cos. v. Shaffer*, for example, the Supreme Court of Virginia found the contract at issue to be overbroad and unenforceable despite the fact that, twenty-two years earlier, it found nearly identical restrictive terms enforceable in *Paramount Termite Control v. Rector*.[123]

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116. *See* ECONOMIC EFFECTS, *supra* note 52, at 5.

117. *Id.* at 14.

118. Jessica Weltge, *Blue Penciling Noncompete Agreements in Arkansas and the Need for a Public Policy Exception*, 2017 ARK. L. NOTES 1954, ¶ 5 (2017), http://media.law.uark.edu/arklawnotes/2017/03/16/blue-penciling-noncompete-agreements-in-arkansas-and-the-need-for-a-public-policy-exception/ [https://perma.cc/Z6XJ-48NV].

119. *Id.*

120. *Id.* ¶ 11.

121. *Id.* ¶ 12.

122. *See* Kevin E. Martingayle, *Non-Competition Agreements in Virginia in the Aftermath of* Home Paramount Pest Control v. Shaffer, 47 U. RICH. L. REV. 457, 457 (2012).

123. *Id.*; *Home Paramount Pest Control Cos. v. Shaffer*, 282 Va. 412, 718 S.E.2d 762 (2011); *Paramount Termite Control v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989).

While this outcome surprised some, it was not so much a drastic outcome as it was the latest decision in a long line of cases where the court strictly scrutinized widely restrictive language in covenants not to compete.[124] Starting with the 2001 case *Simmons v. Miller*, the Supreme Court of Virginia has consistently found broad restrictions unenforceable.[125]

Throughout all of these cases, including the 2011 *Home Paramount Pest Control* case, the Supreme Court of Virginia used the same three-prong test.[126] Under this test, the court asks three questions: (1) is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest; (2) from the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood; and (3) is the restraint reasonable from the standpoint of a sound public policy.[127]

Using this test, the supreme court ruled in favor of employers seeking to enforce noncompete agreements in several 1990s cases.[128] So, why the different ruling in *Simmons*? The employer in this case was seeking to enforce a noncompete agreement that would last for three years, which the court held was too long of a restriction.[129] This, combined with the fact that the agreement banned the employee from participating in "any business similar to the type of business conducted by [the] [e]mployer," led the court to hold that the agreement was too broadly restrictive to be enforceable.[130]

The three-prong test is also a "totality of the circumstances" test—the court in *Simmons* explained that any one factor is not dispositive and noted that "in determining the reasonableness and enforceability of restrictive covenants, trial courts must not consider function, geographical scope and duration as three separate

124. *Id.* at 457–458.
125. *Id.* at 458; *Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001).
126. *See e.g.*, *Simmons*, 261 Va. at 580, 544 S.E.2d at 678; *Home Paramount Pest Control Cos.*, 282 Va. at 415, 718 S.E.2d at 763–64.
127. *Simmons*, 261 Va. at 580, 544 S.E.2d at 678.
128. *See* Martingayle, *supra* note 122, at 458.
129. *Simmons.*, 261 Va. at 580, 544 S.E.2d at 678.
130. *Id.* at 581, 544 S.E.2d at 678.

and distinct issues. Rather these limitations must be addressed together."[131]

In *Simmons*, the facts plus the language of the agreement led the court to hold that the agreement did more than was necessary to protect the employer's business interests and was unnecessarily harsh to the employee.[132] The court reached this same outcome in the 2001 case *Motion Control Systems, Inc. v. East*.[133] The agreement at issue defined a "'similar business' as 'any business that designs, manufactures, sells, or distributes motors, motor drives or motor controls,'" and the court held this broad, blanket-like restriction would restrict the employee from activities that were not even reasonably related to the employer.[134]

The following year, the court reached a similar conclusion in *Modern Environments, Inc. v. Stinnett*: the court held that the agreement was overbroad and unenforceable because it contained language forbidding the employee from working for a competitor in "any capacity."[135] This case suggests that Virginia employers attempting to enforce noncompetes with broad, blanket-like prohibitions using the word "any" are likely not going to be received well by the court.[136] But Virginia has not banned noncompetes entirely and, as will be discussed in the following Section, many other states also still allow them.[137]

In fact, most states enforce noncompete agreements for employees other than low-wage workers.[138] A few states—California, North Dakota, Oklahoma, and Washington, D.C.—have prohibited noncompete agreements entirely or almost entirely.[139] The fact

131. *Id.*

132. *Id.* at 582, 544 S.E.2d at 678–79.

133. *Motion Control Systems, Inc. v. East*, 262 Va. 33, 546 S.E.2d 424 (2001).

134. *Id.* at 37–38, 546 S.E.2d at 426.

135. *Modern Environments, Inc. v. Stinnett*, 263 Va. 491, 495–95, 561 S.E.2d 694, 696 (2002).

136. *See* Martingayle, *supra* note 122; Christopher J. Sullivan & Justin A. Ritter, *Banning Noncompetes in Virginia*, 57 U. RICH. L. REV. 235 (2022).

137. *See Virginia Law on Non-Compete Agreements*, ERLICH L., https://www.erlichlawoffice.com/virginia-law-on-non-compete-agreements.html [https://perma.cc/YXF3-VEX3].

138. *See* RUSSELL BECK, BECK REED RIDEN LLP EMPLOYEE NONCOMPETES: A STATE-BY-STATE SURVEY (2021), https://faircompetitionlaw.com/wp-content/uploads/2021/06/Noncompetes-50-State-Survey-Chart-20210627.pdf [https://perma.cc/P6NR-RULL].

139. Janet A. Hendrick & Angela M. Buchanan, *Is This The End of Noncompete Clauses in America*?, PHILLIPS-MURRAH, https://phillipsmurrah.com/2021/08/is-this-the-end-of-non-compete-clauses-in-america/ [https://perma.cc/X8VV-HTR4].

that states have chosen different approaches to governing noncompetes underscores an important point: for as long as noncompetes have been used in the U.S., states have had a choice about whether to enforce them or not.[140] "From sea to shining sea," states taking such different approaches suggests that noncompetes call for nuance.

B. *Noncompete Legislation in Washington, D.C. and the States*

Before President Biden issued Executive Order 14036 "Promoting Competition in the American Economy," legislators in our nation's capital already had noncompetes at the forefront of their minds.[141] Earlier that year, the Council of the District of Colombia enacted the Ban on Non-compete Agreements Amendment Act of 2020, prohibiting employers from requesting or requiring an employee to sign an agreement with a provision not to compete.[142] By the time the bill was enacted, changes were already in the works; in response to concerns from employers, councilmember Elissa Silverman proposed a bill that would restrict employees from not only using, but also disclosing, confidential information and trade secrets (where-as the original bill only bans the use of this information).[143]

While the bill was pending, the D.C. Council's Committee on Labor and Workforce Development held a hearing to solicit input from business leaders on their concerns about the proposed legislation.[144] Critics of the bill requested that it allow post-employment restrictions "on key employees, like senior executives or employees with access to sensitive information."[145] Without these restrictions, business leaders argued, employers may not have an incentive to

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140. Steven D. Gordon, *How Will President's New Executive Order on Non-Compete Agreements Affect Employers?*, HOLLAND & KNIGHT (Jul. 12, 2021), https://www.hklaw.com/en/insights/publications/2021/07/how-will-presidents-new-executive-order-on-noncompete-agreements [https://perma.cc/NL8U-QB8E].

141. Nathaniel M. Glasser, Brian W. Steinbach, Maxine Adams & Eric I. Emanuelson, Jr., *DC Proposes Amendments to Recently Enacted Noncompete Ban*, NAT'L L. REV. (Aug. 6, 2021), https://www.natlawreview.com/article/dc-proposes-amendments-to-recently-enacted-non-compete-ban [https://perma.cc/6HHR-RPGZ].

142. 68 D.C. Reg. 782 (Jan. 15, 2021) (codified as amended at D.C. Code §§ 32-581.01 to .05 (2023)); Glasser et al., *supra* note 141.

143. Glasser et. al., *supra* note 141.

144. *Id.*

145. *Id.*

train employees who could leave and work for a competing business at any time.[146]

To strike a balance between employee mobility and creating a stable environment for employers, Councilmember Brooke Pinto suggested using noncompete agreements for certain classes of employees. Specifically, Pinto suggested amending the Act to allow noncompete agreements for employees who make more than $80,000 a year and limiting them to six months or less.[147]

Pinto's suggested changes were incorporated into the Non-Compete Clarification Amendment Act of 2022 Bill 24-256, the Non-Compete Conflict of Interest Clarification Amendment Act of 2021.[148] This amendment, enacted into law in August 2022, was introduced to "clarify the conflicts that conflicts of interest in the workplace would not violate District restriction on the use of non-compete provisions."[149] The amendment defines "non-compete provision," in part, to exclude any provision

> **(B)** That prohibits or restricts an employee from:
>
> **(i)** Disclosing, using, selling, or accessing the employer's confidential employer information or proprietary employer information;
>
> **(ii)** Accepting money or a thing of value for performing work for a person other than the employer, during the employee's employment with the employer, because the employer reasonably believes the employee's acceptance of money or a thing of value under such circumstances will:
>
> **(I)** Result in the employee's disclosure or use of confidential employer information or proprietary employer information;
>
> **(II)** Conflict with the employer's, industry's, or profession's established rules regarding conflicts of interest;

146. *Id.*
147. *Id.*
148. 69 D.C. Reg. 9910 (Aug. 5, 2022) (codified as amended at D.C. Code §§ 32-581.01 to .05 (2023))
149. *B24-056 – Non-Compete Conflict of Interest Clarification Amendment Act of 2021,* COUNCIL OF D.C.: LEGIS. INFO. MGMT. SYS., https://lims.dccouncil.gov/Legislation/B24-0256 [https://perma.cc/A7DV-8YVN].

> **(III)** Constitute a conflict of commitment if the employee is employed by a higher education institution; or
>
> **(IV)** Impair the employer's ability to comply with District or federal laws or regulations; a contract; or a grant agreement; . . . .[150]

By excluding provisions that prohibit an employee's "disclos[ure], us[e], [sale], or access[]" of their employer's sensitive information, D.C. employers may still be able to enforce confidentiality agreements.[151]

Washington, D.C.'s path towards change (enacting a total ban on noncompetes and then amending it to widen the scope of confidentiality agreements allowed under the law) suggests a mindful approach to regulating noncompetes. In enacting the amendment, the city acknowledges that, in some instances at least, there is a strong policy argument for keeping noncompetes.

Like Washington, D.C., its neighboring state Virginia has also recently passed legislation regulating noncompetes.[152] On July 1, 2020, House Bill 330 went into effect, amending the Code of Virginia to make it illegal to enforce noncompete agreements for low-wage employees.[153] A "low-wage employee," for purposes of the Code, is an individual "who earns less than the average weekly wage" in Virginia (currently $1,204 weekly or $62,608 yearly).[154]

Under Virginia's new law, employers may not restrict employees "from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client."[155] This phrasing could prompt the question: what if an employee does initiate contact with or solicits the customer or client? In that instance, the Code seems to suggest that non-solicitation agreements might still be upheld against low-wage employees,

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150. D.C. CODE § 32-581.01(15)(B) (2023).

151. *Id.* § 32-581.01(15)(B)(i) (2023).

152. Tevis Marshall, *Virginia Bans Noncompete Agreements Against Low-Wage Workers*, OGLETREE DEAKINS (May 27, 2020), https://ogletree.com/insights/virginia-bans-noncompete-agreements-against-low-wage-employees/ [https://perma.cc/5988-533J].

153. *Id.*; H.B. 330, Va. Gen. Assembly (Reg. Sess. 2020) (enacted as 2020 Va. Acts ch. 948).

154. Marshall, *supra* note 152.

155. VA. CODE ANN. § 40.1-28.7:8(A) (Cum. Supp. 2022).

provided that the agreements are drafted in a way that does not prevent an employee from accepting unsolicited business offers from former clients or customers.[156]

And like Washington, D.C.'s amendment broadening what is acceptable as a confidentiality agreement, Virginia also acknowledges the importance of protecting confidential information. Under the new Virginia law, nondisclosure agreements are allowed if their purpose is to "prohibit the taking, misappropriating, threatening to misappropriate, or sharing of certain information, including trade secrets."[157]

Importantly, Virginia's tightening of restrictions on covenants not to compete only applies to agreements enforced against low-wage employees: noncompete agreements generally are still valid and enforceable.[158] This enforceability depends on the employer being able to prove three criteria.[159] First, the restriction imposed by the agreement "is no greater than is necessary to protect the employer's legitimate business interest."[160] Second, the employer must prove the agreement is not excessively oppressive or severe in restricting the employee's ability to earn income or find another job.[161] And third, the promise agreed to must not violate Virginia's public policy.[162]

Virginia's new law marks the first time the Commonwealth has imposed statutory regulation of noncompetes. Historically, case law governed these agreements, and the Supreme Court of Virginia has significantly shifted its treatment of noncompete agreements, as previously discussed. Notwithstanding how courts view covenants not to compete, Virginia's new law suggests the state acknowledges that, while noncompete agreements might not make sense for low-wage employees, they could still serve a viable purpose for employers wishing to retain employees who do not fall into this low-wage category.

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156. *See id.*

157. *Id.* § 40.1-28.7:8(C).

158. *See id.* § 40.1-28.7:8.

159. *Virginia Law on Non-Compete Agreements*, *supra* note 137.

160. *Id.* (citing Assurance Data, Inc. v. Malyvec, 286 Va. 137, 144, 747 S.E.2d 804, 808 (2013)).

161. *Id.*

162. *Id.*

Like Virginia's statute banning noncompetes enforced against low-wage employees, new legislation in Nevada prohibits employers in the state from enforcing noncompete agreements against hourly-wage employees.[163] The Nevada Legislature passed Assembly Bill 47 on May 25, 2021, amending its noncompete statute, § 513.195, in three notable ways.[164] First, it amended the statute to expressly state that an employer may not bring an action "restrict[ing] a former employee from providing services to a former client or customer under the circumstances outlined in § 613.195(2)(a)-(c)."[165] Second, as mentioned above, it prohibits covenants not to compete for hourly-wage employees, not including tips or gratuities.[166] Third, it requires the court to

> award costs and attorney's fees to the employee in an action to enforce or challenge a non-competition covenant if the court finds that the non-competition covenant applies to an employee paid on an hourly wage basis or that the employer has impermissibly restricted or attempted to restrict the employee from providing services to a former customer or client.[167]

Oregon recently passed Senate Bill 169, which adds additional requirements for employers seeking to enforce noncompete agreements[168] Senate Bill 169's changes to noncompete agreements includes the following three changes. First, noncompliant covenants are no longer just voidable—they are now "void and unenforceable."[169] Second, under the old law, employees could be restricted for a maximum of eighteen months.[170] The new law shortens the post-employment restrictive time period to twelve months, and it states that any agreement for longer than that is "void and may not be enforced" by an Oregon court.[171] Lastly, employees' salaries must

163. Montgomery Y. Paek & Diana G. Dickinson, *Nevada Modifies Statute Governing Noncompetition Agreements*, LITTLER MENDELSON (June 4, 2021), https://www.littler.com/publication-press/publication/nevada-modifies-statute-governing-noncompetition-agreements [https://perma.cc/M95V-RWFS].

164. *Id.* (citing A.B. 47, 81st Assemb., 2021 Sess. (Nev. 2021)).

165. A.B. 47, 81st Assemb., 2021 Sess. (Nev. 2021).

166. *Id.*

167. Paek & Dickinson, *supra* note 163.

168. 2021 Or. Laws ch. 75; James M. Barrett, *Oregon Enacts New Modifications to Noncompete Law for 2021*, NAT'L L. REV. (June 2, 2021), https://www.natlawreview.com/article/oregon-enacts-new-modifications-to-noncompete-law-2021 [https://perma.cc/34KJ-E245].

169. 2021 Or. Laws ch. 75.

170. *Id.*

171. *Id.*

now exceed $100,533 to be bound by a noncompete, which is a change from the previous law's reliance on the Census Bureau's data.[172]

Colorado stepped up its regulation of noncompetes with the passage of a new law, Senate Bill 21-271, that makes it a misdemeanor criminal offense to violate the state's non-compete law.[173] This law was enacted in Colorado Revised Statutes section 8-2-113, and makes voidable covenants not to compete unless they fall into one of four classifications: (1) contracts for the purchase and sale of a business or the assets of a business; (2) contracts for the protection of trade secrets; (3) contractual provisions to provide for recovering the expense of training and educating an employee who has worked for the employer for less than two years; or (4) executive and management personnel, officers, and employees who constitute professional staff to executive and management personnel.[174] Importantly, although the state's new law attempts to crack down on the use of noncompete agreements, nothing in it prohibits employers from enforcing confidentiality agreements.[175]

Unlike the aforementioned states that allow noncompete agreements in some instances, California takes a strict stance and bans noncompetes entirely (although whether this law is strictly enforced is debatable).[176] For years, Google enforced nonsolicitation agreements against former employees who were trying to recruit current employees to come and work with them.[177] That all changed in 2019, when the company implemented a policy waiving "its right to prohibit former employees from soliciting current

172. *Id.*

173. Vance O. Knapp & Douglas N. Marsh, *Colorado Criminalizes Violations of Statute on Noncompete Agreements*, ARMSTRONG TEASDALE: THOUGHT LEADERSHIP (Feb. 17, 2022), https://www.armstrongteasdale.com/thought-leadership/colorado-criminalizes-violations-of-statute-on-noncompete-agreements [https://perma.cc/SR3B-TP66].

174. Colo. Rev. Stat. § 8-2-113.

175. For a discussion of the new law, in which the absence of an outright ban on confidentiality agreements means these provisions could be enforceable, see generally Rachel Powitzky Steely & Michael F. Ryan, *Employers Beware: Colorado Criminalizes Enforcement of Overbroad Noncompetes*, NAT'L L. REV. (Jan. 24, 2022), https://www.natlawreview.com/article/employers-beware-colorado-criminalizes-enforcement-overbroad-non-competes [https://perma.cc/ZR5Z-L3LF].

176. Barnett & Sichelman, *supra* note 38, at 966, 992 (suggesting that differences in noncompete enforcement between Silicon Valley and Boston tend to be exaggerated).

177. Hassan A. Kanu, *Google Ends 'No Poaching' Requirement for Former Employees*, BLOOMBERG L. (June 12, 2019), https://news.bloomberglaw.com/daily-labor-report/google-ends-no-poaching-requirement-for-former-employees [https://perma.cc/5XWT-LRZU].

employees."[178] Although Google instituted this waiver hoping to avoid litigation, it might still be liable for previously enforcing these agreements against employees; this suggests that, however laissez-faire California courts have been in the past few years, they have taken regulation of noncompetes seriously.[179]

The state's law governing noncompetes comes from section 16600 of the California Business and Professions Code, and it states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[180] Despite this strict prohibition, California allows an exception for trade secrets and has held a noncompete agreement is valid when its purpose is to protect an employer's customer lists.[181] In *Gordon v. Landau*, for example, the Supreme Court of California upheld an agreement preventing an employee from soliciting business through the customer's confidential information.[182]

Also notably, California includes noncompete agreements in the contracts of executive employees.[183] Data from "[t]wo studies that focus on adoption rates of noncompetes in executive employment agreements at large publicly traded firms find these clauses in fifty-eight to sixty-two percent of agreements with firms headquartered in California, as compared to rates of seventy to eighty-four percent at the same types of firms headquartered in other states."[184] According to a 1984 treatise, "[d]espite the clear language of' California's statute, 'the California courts do not regard all covenants not to compete invalid . . . per se.'"[185]

Agreements between employers and employees, for example, are considered vertical agreements and are not per se unlawful.[186] According to law firm partner James Tierney, who was involved in an antitrust lawsuit against Silicon Valley companies in 2015, these types of agreements are permitted provided they are "reasonable

178. *Id.*
179. *Id.*
180. CAL. BUS. & PROF. CODE § 16600 (West 2022).
181. Barnett & Sichelman, *supra* note 38, at 983.
182. *Gordon v. Landau*, 321 P.2d 456 (Cal. 1958).
183. *Id.* at 991–92.
184. *Id.* at 980.
185. *Id.* at 981 (quoting Melvin F. Jager, *Trade Secrets Law* § 13.01[2] (1989)).
186. Kanu, *supra* note 177.

and necessary to the employee-employer relationship," and "narrow in scope."[187] Vertical agreements are subject to analysis under a rule of reason, and they can be enforceable if the employer shows "some harm to competition."[188] Tierney also explained these agreements "are common, especially among high-level managers who could potentially leave for a competitor and hire subordinates."[189]

The California Uniform Trade Secrets Act ("UTSA") serves as an important exception to the state's law banning noncompete agreements.[190] Under the UTSA, codified at section 3426 of the California Civil Code, a trade secret is information that: (1) "[d]erives independent economic value" from being unknown by either members of the public or individuals who could "obtain economic value from its disclosure or use," and (2) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."[191] Like Colorado's exception for nondisclosure agreements, California's exception for trade secrets suggests that lawmakers acknowledge that, in some instances, employers should be able to enforce agreements protecting their business interests.

And yet, states across the country, from Virginia to California, have imposed stricter scrutiny on noncompete agreements. And in the midst of this national dialogue regarding what's acceptable and what's not in a noncompete agreement, President Biden added to the conversation in a potentially monumental way with executive order 14036.

V. EXECUTIVE ORDER 14036: PROMOTING COMPETITION? OR PREVENTING IT?

A. *The Details of the Executive Order*

In issuing executive order 14036, President Biden asked the FTC to act to "curtail the unfair use of noncompete clauses and other clauses or agreements that may unfairly limit worker mobility."[192] To be clear, the executive order itself does not change the

187. *Id.*
188. *Id.*
189. *Id.*
190. CAL. CIV. CODE § 3426.
191. *Id.* § 3426.1(d).
192. Exec. Order No. 14,036, 3 C.F.R. 615 (2022).

law on these agreements, it only compels the FTC to act to regulate them.[193]

Additionally, despite the fact that the White House Press Sheet and other news reports describe the order as impacting only covenants not to compete, the actual language of the order suggests otherwise and implies a much broader interpretation.[194] With the words "and other clauses or agreements that may unfairly limit worker mobility," presumably other restrictive covenants could also be called into question (such as nonsolicitation agreements) alongside covenants not to compete.[195]

The language of the executive order provides other clues about the extent to which a rule might be enforced, specifically through the use of the qualifier "unfair."[196] The order compels the FTC to regulate "the unfair use of noncompete clauses and clauses or agreements that may unfairly limit worker mobility," leading to the inference that an agreement might not be banned if it is not deemed to be unfair.[197] If it takes a cue from the states, the FTC might note that most states that amended their noncompete laws limited the situations in which they can be used, but they did not ban them entirely.[198]

But regardless of what approach it takes, it is not entirely clear whether the FTC has the authority to promulgate regulations at all. Whether you think it does or not largely depends on your view of the non-delegation doctrine.

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193. *Id.*

194. *See* 3 C.F.R. 615 (2022): FACT SHEET: Executive Order on Promoting Competition in the American Economy, The White House (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/57QP-QVUU]; Atlas & Winton, *supra* note 14..

195. 3 C.F.R. 615 (2022).

196. *Id.*

197. *Id.*

198. *See* Atlas & Winton, *supra* note 14 (suggesting that most states have taken a nuanced approach to noncompete regulation).

B. *The Non-Delegation Doctrine and President Biden's Executive Order*

"All legislative powers herein granted shall be vested in a Congress of the United States."[199] The Supreme Court has interpreted Article I of the U.S. Constitution to mean Congress is prohibited from delegating its legislative power to other government branches. This interpretation explains why, in *Loving v. Virginia*, the Supreme Court held "the lawmaking function belongs to Congress and may not be conveyed to another branch or entity."[200]

Rooted in the principle of separation of powers, the non-delegation doctrine reflects James Madison's belief that distinctly dividing power among the government's three branches was essential to protecting the liberty of the American people.[201] In Federalist No. 47, he wrote: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[202] Madison made these arguments to the colonists when they were debating whether to approve the proposed Constitution, and so the very notion of separation of powers could be a key reason why the colonists chose to adopt it.[203]

Although non-delegation doctrine is rooted in our Nation's founding documents, the Court did not address it until 1935.[204] In *A.L.A Schechter Poultry Corporation v. United States*, the Supreme Court of the United States held that Congress acted unconstitutionally in granting the President the power "to approve 'codes of fair competition' proposed by trade or industry groups."[205] In its opinion, the Court explained this delegation was unconstitutional

199. U.S. CONST. art. 1. § 1, cl. 1.

200. Loving v. United States, 517 U.S. 748, 758 (1996).

201. Peter J. Wallison, *An Empty Attack on the Nondelegation Doctrine*, FEDERALIST SOC'Y (Apr. 22, 2021), https://fedsoc.org/commentary/fedsoc-blog/an-empty-attack-on-the-nondelegation-doctrine [https://perma.cc/WT3H-KYYN].

202. THE FEDERALIST NO. 47 (James Madison).

203. Wallison, *supra* note 201.

204. James M. Rice, Note, *The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations*, 105 CALIF. L. REV. 539, 547 (2017).

205. *Id.* (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935)).

because it would allow the President to have "unfettered discretion to make whatever laws he thinks may be needed."[206]

And yet, moving forward from the time of the New Deal, the Supreme Court has regularly held the Constitution permits regulatory authority to be delegated to executive branch agencies.[207] This authorization has allowed executive branch agencies to promulgate thousands of regulations each year.[208] While regulations promulgated by executive agencies can appear similar to exercising legislative authority, the Supreme Court has explained "they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive power.'"[209]

This is true, the Court has held, as long as the regulation the agency attempts to promulgate contains an intelligible principle.[210] First established by Chief Justice John Marshall, the intelligible principle standard states that when Congress delegates power to another branch, it must include a "general provision" guiding "those who act" to "fill up the details."[211] This means Congress cannot give an agency complete lawmaking freedom, but after establishing a law, Congress may give the agency authority to set forth the details of how that law will function.[212] And under this approach, Congress would need to first establish a law before the FTC could then step in and flesh out the details.[213]

But assuming Congress did establish a law, even then it might not be within the FTC's power to make a rule around noncompete agreements, at least not a very broad one. The FTC's chief purpose

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206. *A.L.A. Schechter Poultry*, 295 U.S. at 537–38.

207. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001).

208. Clyde Wayne Crews Jr., *How Many Rules and Regulations Do Federal Agencies Issue?* FORBES (Aug. 15, 2017, 12:48 PM), https://www.forbes.com/sites/waynecrews/2017/08/15/how-many-rules-and-regulations-do-federal-agencies-issue/ [https://perma.cc/Z53U-LKPJ].

209. Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) (slip op. at 13–14 n.4) (citing Art. II § 1, cl. 1); *see also* Field v. Clark, 143 U.S. 649 (1892) ("Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law.").

210. *See* Wayman v. Southard, 23 U.S. 1, 43 (1825); *See also Intelligible Principle Law and Legal Definition,* USLEGAL, https://definitions.uslegal.com/i/intellligible-principle/ [https:// perma.cc/Y825-9UJ3].

211. *Wayne*, 23 U.S. 1, 43 (1825).

212. *Id.*

213. *See id.*

is to serve "as an expert case-by-case adjudicator of competition issues."[214] A broad-based rule would fail to consider the specific facts surrounding each noncompete agreement; depending on the facts involved, a noncompete that could be considered unreasonable in one instance might be very reasonable in another.

Many noncompete agreements often serve legitimate business purposes that would get swept aside if the FTC were to implement a broad rule banning them.[215] This explains why numerous lawyers and business groups, among them the U.S. Chamber of Commerce, have written public comment letters urging the FTC to avoid making a federal rule limiting noncompetes.[216] Even the American Bar Association's ("ABA") Antitrust Law Section questioned how wise it would be to create a broad federal rule banning noncompetes, considering these documents are contracts, and as such, governed by state contract law.[217]

Affirming the ABA's stance, one news source noted, "A complete ban could raise questions about the FTC's power to limit contracts, which are governed by state law."[218] Even one of the FTC's own commissioners, Noah Phillips, expressed doubt as to whether the FTC could make a rule banning or limiting non-compete agreements entirely.[219] If it did successfully issue and enforce such a

214. MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER COMMERCE, PUSHING THE LIMITS? A PRIMER ON FTC COMPETITION RULEMAKING 10 (2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf [https://perma.cc/3YCS-TSD4].

215. *See* Erin Mulvaney & Chris Marr, *Biden Noncompete Order Risks Legal Disputes Over FTC Overreach*, BLOOMBERG L. (Jul. 12, 2021, 5:21 AM), https://news.bloomberglaw.com/daily-labor-report/biden-noncompete-order-risks-legal-disputes-over-ftc-overreach [https://perma.cc/A9TJ-4LP9]; GLENN SPENCER & SEAN HEATHER, U.S. CHAMBER OF COMMERCE, PUBLIC COMMENTS REGARDING NON-COMPETE CLAUSES USED IN EMPLOYMENTS CONTRACTS (2020), https://www.uschamber.com/assets/archived/images/us_chamber_of_commerce_ftc_march_102020-_non-compete.pdf [https://perma.cc/6U87-6GNY] .

216. Spencer & Heather, *supra* note 215.

217. ABA, ANTITRUST LAW SECTION, COMMENTS OF THE ANTITRUST LAW SECTION OF THE AMERICAN BAR ASSOCIATION IN CONNECTION WITH THE FEDERAL TRADE COMMISSION WORKSHOP ON "NON-COMPETES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES" (2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/comment-42420-ftc.pdf [https://perma/.cc/GM2Y-KTKP] (hereinafter COMMENTS OF THE ABA).

218. Mulvaney & Marr, *supra* note 215.

219. Carrie G. Amezcua, *Is the FTC Going to Make Employer-Employee Noncompete Clauses Illegal?*, BUCHANAN, INGERSOL, & ROONEY (Jan. 27 2020), https://www.bipc.com/is-the-ftc-going-to-make-employer-employee-non-compete-clauses-illegal [https://perma.cc/7V3X-VN4G].

rule, it would be a first; the only other time the FTC issued a competition rule was in 1968, but it was repealed before ever being enforced.[220] There are several possible ways the FTC can make such a rule.

C. *FTC Rulemaking Authority*

Under the Federal Trade Commission Act, two possible rulemaking procedures exist.[221] First, the FTC can engage in informal rulemaking under section 6(g) of the Act.[222] Section 6(g) allows the FTC "to make rules and regulations for the purposes of carrying out the provisions of this subchapter."[223] The scope of the FTC's informal rulemaking authority is not entirely clear, but one appellate court decision (*National Petroleum Refiners Ass'n*) provides some context for this and confirmed that the FTC has statutory authority to promulgate binding, substantive rules.[224]

But the statutory basis for section 6(g) rulemaking raises some concerns. The Antitrust Law Section of the ABA has stated:

> [T]he Commission's [section 6(g)] rulemaking authority is buried within an enumerated list of investigative powers, such as the power to require reports from corporations and partnerships, for example. Furthermore, the [Federal Trade Commission] Act fails to provide any sanctions for violating any rule adopted pursuant to [s]ection 6(g). These two features strongly suggest that Congress did not intend to give the agency substantive rulemaking powers when it passed the Federal Trade Commission Act.[225]

Essentially, the structure of the Act suggests that section 6(g) rulemaking authorizes the FTC with investigative and procedural authority, but not the authority to make substantive rules in and of themselves.[226]

The Supreme Court case *AMG Capital Management* further substantiates this point. In this case, the Court came to the unanimous

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220. *Id.*

221. ALDEN ABBOTT & ANDREW MERCADO, MERCATUS CTR., FTC RULEMAKING ON NON-COMPETE AGREEMENTS 4 (2021), https://www.mercatus.org/research/policy-briefs/ftc-rulemaking-noncompete-agreements [https://perma.cc/YW6B-UH6T]

222. Federal Trade Commission Act of 1914 § 6(g), 15 U.S.C. § 46(g).

223. *Id.*

224. National Pretolrum Refiner Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).

225. COMMENTS OF THE ABA, supra note 217, at 54.

226. *Id.*

conclusion that, although section 13(b) of the Federal Trade Commission Act allows the FTC to seek a permanent injunction, monetary damages are not authorized.[227] Focusing on the text of the statute, the Court emphasized that language discussing permanent injunctions was buried in a provision that addresses injunctive relief, but not monetary relief.[228] Likewise, section 6(g) is also buried within a section that addresses other topics.[229]

Also, only two years after *National Petroleum Refiners Ass'n* was decided, Congress amended the Federal Trade Commission Act by adding section 18.[230] The fact that section 18 contains specific rulemaking provisions while section 6(g) was left unchanged further suggests that the FTC's informal rulemaking authority is questionable at best.[231] Because section 6(g) rulemaking authority is nowhere near well established, the FTC could likely face an uphill battle if it opts to regulate noncompetes using section 6(g) authority.[232]

Of course, even without general objections to the FTC's power to promulgate rules under section 6(g), there could still be opposition to a specific rule proposed by the FTC. As discussed earlier, to survive scrutiny under the non-delegation doctrine, there must be an intelligible principle directing the FTC as it makes rules regarding unfair methods of competition.[233] Without that intelligible principle, noncompete rulemaking may not be upheld.[234]

Additionally, the court might find the proposed rule is "arbitrary and capricious"; in which case, it would also be struck down.[235] If the Court finds the FTC failed to adequately think through procompetitive aspects justifying the practice it condemned, the Court might come to this conclusion.[236]

Rulemaking is also problematic because, unlike adjudication which treats each case individually, rulemaking attempts to "paint

227. AMG Capital Mgmt., LLC v. FTC, 141 S.Ct. 1341 (2021)
228. *Id.* at 1348.
229. 15 U.S.C. § 46(g).
230. 15 U.S.C. § 57a.
231. *See* ABBOTT & MERCADO, *supra* note 221, at 5.
232. *See id.*
233. Wayman v. Southard, 23 U.S. 1, 43 (1825).
234. *Id.*
235. Chevron, U.S.A., Inc. v. NRDC, Inc.467 U.S. 837, 844 (1984).
236. *Id.*

with a broad brush." Under this approach, practices are condemned that very likely could have procompetitive advantages. This would have the unfortunate effect of banning conduct that would actually promote competition, in direct opposition of what President Biden, through his executive order, is trying to do.[237]

D. *Unfair or Deceptive Acts or Practices Rulemaking*

Alternatively, the FTC could instead regulate noncompetes through unfair or deceptive acts or practices ("UDAP") rulemaking.[238] Under this approach, the FTC could claim that certain covenants not to compete constitute unfair acts.[239] To succeed with this, under section 5(n), the FTC would need to acknowledge the ways noncompete clauses benefit consumers and the competitive process more generally.[240]

Noncompetes benefit consumers by lowering costs and providing better training for employees, which in turn creates a stronger, higher-quality workforce. And because these procompetitive benefits exist, broadly banning noncompete agreements most likely would not work and would not stand up to judicial review. An outright ban on noncompetes assumes that these covenants only come with costs to employees. It completely fails to consider the tremendous advantages noncompetes can provide to firms, employees, and competition generally.

E. *The Possibility of a Limited Rule*

Even though the FTC might not be able to broadly ban all noncompetes, it could potentially propose a more targeted rule that would survive judicial review.[241] For instance, the FTC could propose a UDAP rule making it mandatory for employers to notify

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237. *See* 3 C.F.R. 615 (2022).

238. *See* Federal Trade Commission Act of 1914 § 5, 15 U.S.C. § 45.

239. *See* ABBOTT & MERCADO, *supra* note 221, at 7.

240. *See* Federal Trade Commission Act of 1914 § 5(n), 15 U.S.C. § 45(n).

241. *See* ABBOTT & MERCADO, *supra* note 221, at 7–8; *see also* Cassidy Mara, *Biden Order: Consider a Federal Rule on Noncompetes*, AKERMAN (Sept. 28, 2021), https://www.akerman.com/en/perspectives/hrdef-biden-order-consider-a-federal-rule-on-non-competes.html [https://perma.cc/K3YG-53DS] (stating that the "[u]se of rule-making to adopt a sweeping federal rule governing non-compete agreements would be an extraordinary departure from current practice," to imply that a targeted rule might pass).

employees that the job they are considering is subject to a noncompete agreement before they officially accept the position.[242]

This would most likely survive the cost-benefit test because it provides a significant benefit to employees—making them fully aware of the conditions that come with the position they might accept—without imposing an unbearable cost on employers.[243] In fact, arguably advance notice is just as beneficial for employers as it is for employees because, if after signing the employee leaves, it gives the employer a stronger case for enforcing the noncompete.

Under this approach, in states allowing noncompete agreements, employers would be able to continue enforcing these covenants just as they were doing: they could apply them to the same employees, and they could maintain the same protection for their trade secrets and intellectual property. True, they might lose some employees who do not want to be subject to a noncompete. But for effective businesses who have a lot to offer their employees, this should not keep them from attracting the best talent and keeping them at their companies.

CONCLUSION

How President Biden's executive order will ultimately take shape still remains to be seen. In January 2023, the FTC proposed a new rule banning noncompetes through UDAP rulemaking.[244] The proposed rule is not limited. Rather, with one exception, it would ban nearly all noncompete agreements and explicitly preempt any state laws governing noncompetes.[245] While the public comment period concluded in April 2023, the FTC has yet to indicate whether it will implement this proposed rule, and if implemented, it remains to be seen whether this proposed rule would survive the inevitable legal challenges.

In light of the non-delegation doctrine, some might question whether the FTC has the authority to make a federal rule at all.[246]

242. *See* ABBOTT & MERCADO, *supra* note 221, at 8–10.

243. *See id.*

244. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910).

245. *Id.*

246. OHLHAUSEN & RILL, *supra* note 214, at 2 (noting that "Congress has made no such grant for unfair methods of competition rulemaking, instead empowering FTC to undertake

Others might say it could be Constitutional for the FTC to promulgate such a federal rule, as long as there is "an intelligible principle" behind it, and as long as it is not so broad as to ban noncompetes that serve legitimate business purposes and have anti-competitive justifications.[247] Based on what we know about how noncompete agreements impact employers, employees, and the economy generally, a federal rule should reflect the nuance that these agreements call for. Banning them for low-wage workers might be appropriate, and a rule requiring advance notice might be appropriate as well. But aside from that, these agreements should be seen as what they really are—commitment and signaling devices that serve several procompetitive purposes.

And with so many employees walking out the door and leaving their jobs in the wake of the Great Resignation, for the sake of everyone involved and the economy generally, we should think twice before banning noncompetes entirely and letting these agreements be the next to go too.

Holly E. Fredericksen *

case-by-case administrative adjudication of competition cases to shape the law"); *see also* Mulvaney & Marr, *supra* note 215 (stating that "[t]he chamber and ABA letters also raised doubts about the FTC's legal authority for rulemaking to govern noncompetes").

247. ALDEN ABBOTT, MERCATUS CTR., FTC COMPETITION REGULATION: A COST-BENEFIT APPRAISAL 6 (2021), https://www.mercatus.org/publications/antitrust-and-competition/ftc-competition-regulation-cost-benefit-appraisal [https://perma.cc/ZFK5-F95G]; *see also U.S. Federal Trade Commission Considers Rulemaking on Non-Compete Clauses in Employment Contracts*, GIBSON DUNN (Jan. 28, 2020), https://www.gibsondunn.com/us-federal-trade-commission-considers-rulemaking-on-non-compete-clauses-in-employment-contracts/ [https://perma.cc/E6JS-4WCW] (explaining that "[c]ourts have held that the FTC has authority to adopt rules defining unfair methods of competition").

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