PREVENTING THE NONCOMPETE APOCALYPSE: WHY THE FTC HAS IT WRONG

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Abstract

For decades, noncompete agreements have attracted an overwhelming amount of scholarly criticism for unnecessarily restricting worker mobility, discouraging labor competition, and suppressing pay for low-wage workers. Though noncompetes were initially designed to protect an employer's proprietary business information from unauthorized exploitation by former employees, low-wage workers generally lack access to this information. As a result, low-wage employees are often unjustly burdened by these agreements. Unsurprisingly, state courts and legislatures increasingly scrutinized noncompete agreements. More recently, President Biden signed an executive order calling for policies that promote market competition and limit practices known to stifle it. Subsequently, the Federal Trade Commission (FTC) proposed an administrative rule that would effectively ban noncompete agreements entirely. However, banning noncompetes outright may lead to unintended consequences for the American economy, including for some low-wage workers. This article discusses the importance of protecting proprietary information in the marketplace, highlights niche industries where low-wage workers are exposed to proprietary information, explains the ineffectiveness of noncompete alternatives in protecting this information, and addresses counterarguments against noncompete enforcement for low-wage workers. Lastly, in lieu of a nationwide noncompete ban, this article proposes maintaining the status quo—tailored state-by-state noncompete regulations designed to address each unique local economy. In the face of impending FTC regulation, it is in the best interest of both the employer and the employee to prevent a noncompete apocalypse.

INTRODUCTION

On January 5, 2023, the Federal Trade Commission (FTC) proposed a new rule banning noncompete agreements nationwide, claiming noncompetes "hurt workers and harm competition."[1] If implemented, this regulation would prevent employees from entering new noncompete agreements and force employers to invalidate preexisting noncompetes.[2] It also extends this ban to independent contractors, externs and interns, apprentice workers, and sole proprietors.[3] This bold proposal follows hard on the heels of President Biden's Executive Order, which asked the Commission to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[4] In proposing this rule, current FTC Chair Lina M. Khan proclaimed that "[b]y ending this practice, the FTC's proposed rule would promote greater dynamism, innovation, and healthy competition."[5]

Noncompetes have their fair share of criticism.[6] For decades, opponents purport that noncompetes unfairly restricted employee mobility, suppressed wages, and prevented entrepreneurship and innovation.[7] Perhaps the strongest argument against noncompetes come from their impact on low-wage workers.[8]

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[1] Press Release, Fed. Trade Comm'n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition [https://perma.cc/856F-PLFV].

[2] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3511-13 (Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910.2(a)–(b)(1)).

[3] *Id.* at 3511 (to be codified at 16 C.F.R. pt. 910.1(f)).

[4] Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36992 (July 9, 2021).

[5] FTC Proposes Rule to Ban Noncompete Clauses, *supra* note 1.

[6] *E.g.*, Hazel Glenn Beh, *Non-Compete Clauses in Physician Employment Contracts are Bad for Our Health*, 14 HAWAII BAR J. 79 (2011); Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. PA. L. REV. 193 (2020); Viva R. Moffat, *Making Non-Competes Unenforceable*, 54 ARIZ. L. REV. 939 (2012).

[7] MARK A. LEMLEY & ORLY LOBEL, UNIV. OF SAN DIEGO SCH. OF L., RSCH. PAPER NO. 21-010, BANNING NONCOMPETE AGREEMENTS TO CREATE COMPETITIVE JOB MARKETS (2021).

[8] *E.g.*, Elaine Dalrymple, *Would You Like Fries with That Non-Compete? Why Restrictive Covenants Should Not be Enforced Against Low Wage Workers*, 3 WAYNE ST. U. J. BUS. L. 69 (2020); Anne M. Lofaso, *What We Owe Our Coal Miners*, 5 HARV. L. & POL'Y REV. 87, 95, 105 (2011); Sharon K. Sandeen & Elizabeth A. Rowe, *Debating*

Though noncompetes are meant to protect against unauthorized disclosure of proprietary information, most low-wage workers lack access to this information.[9] As a result, there is often little utility in enforcing a noncompete agreement against a low-wage worker, and many noncompete critics argue that, at the very least, there should be an income threshold for noncompete enforcement.

However, despite these claims, a staggering 27.8%-46.5% of private-industry workers in the United States are subject to noncompete agreements[10], and only three state legislatures have imposed similar state-wide noncompete bans.[11] Moreover, various European countries including France, Germany, Italy, the UK, Poland, and the Netherlands–countries with generally more employee-friendly employment laws than the United States[12]–still enforce these agreements under varying terms.[13] This begs the question: if noncompetes are so bad for the economy, why are they so widely used and enforced?

Contrary to the FTC's claim, when used to genuinely protect legitimate business interests, noncompete agreements do not "harm competition,"[14] but work

Employee Non-Competes and Trade Secrets, 33 SANTA CLARA HIGH TECH. L. J. 438, 440 (2017); Kurt Stanberry, *Would an FTC Ban on Non-Compete Agreements Lead to Higher Wages for American Workers?*, 54 COMP. & BENEFITS REV. 165, 166 (2022).

[9] GREGORY K. STEELE & KENNETH THORNICROFT, EMPLOYMENT OBLIGATIONS & CONFIDENTIAL INFORMATION 190 (2d ed. 2009).

[10] ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR RIGHTS (Dec. 10, 2019), https://www.epi.org/publication/noncompete-agreements/ [https://perma.cc/A7UG-FHVC].

[11] FED. TRADE COMM'N, *Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf [https://perma.cc/2HJ8-S7XZ].

[12] *See generally*, Anmarie J. Widener, *Family-Friendly Policy: Lessons from Europe-Part 1*, 36 PUB. MANAGER 57 (2007); Gerhard Bosch, *Low-Wage Work in Five European Countries and the United States*, 148 INT'L LAB. REV. 337 (2009).

[13] *See generally*, Johan Den Hertog, *Noncompetition Clauses: Unreasonable or Efficient?*, 15 EUR. J. L. ECONS. 111 (2003); Erik Stam, *The Case Against Non-Compete Agreements* (Utrecht Univ. Sch. of Econ. Working Paper No. 19-20, at 6, 2019) ("Noncompetes are allowed in all European Countries"); Nuna Zekić, *Non-Compete Clauses and Worker Mobility in the EU*, WOLTERS KLUWER (Nov. 30, 2022), https://global-workplace-law-and-policy.kluwerlawonline.com/2022/11/30/non-compete-clauses-and-worker-mobility-in-the-eu/ [https://perma.cc/S6DP-Z7GF].

[14] FTC Proposes Rule to Ban Noncompete Clauses, *supra* note 1.

to prevent *unfair* competition.[15] Unfair activities like trade secret misappropriation stunts innovation, monopolizes industry, and decreases employment opportunities—the very issues the FTC has a statutory mandate to prevent.[16] Noncompetes help to protect this valuable information and promote healthy competition.[17] Though there is evidence noncompete agreements unnecessarily restrict some low-wage workers[18], a nationwide non-compete ban is far from a "no brainer."[19] Contrary to conventional wisdom, there are several industries with low-wage workers who have access to proprietary information.

This paper argues there is no "one size fits all" approach to regulating noncompete agreements in the United States. In doing so, this paper will challenge conventional wisdom on noncompete agreements and low-wage workers, highlight industries where low-wage workers have access to proprietary information, address the benefits of noncompetes to both employers and employees, confront proposed alternatives to noncompetes, and recommend maintaining tailored state-by-state noncompete regulation in-place of the FTC's nationwide ban. Overall, anticipating the mountain of litigation this proposed rule will inevitably attract[20], this paper aims to convey a more robust understanding of

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[15] Griffin Toronjo Pivateau, *Preserving Human Capital: Using the Noncompete Agreement to Achieve Competitive Advantage*, 4 J. BUS. ENTREPRENEURSHIP & L. 319, 331 (2011).

[16] Jon Chally, *The Law of Trade Secrets: Toward a More Efficient Approach*, 57 VAND. L. REV. 1270–1271 (2004); *see* 15 U.S.C. § 45(a)(2) ("The [FTC] is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

[17] *Id.*

[18] Kurt Stanberry, *Would an FTC Ban on Non-Compete Agreements Lead to Higher Wages for American Workers?*, 54 COMP. & BENEFITS REV. 165, 166–167 (2022).

[19] Press Release, Chris Murphy, Murphy: Non-Competes Are Used to Control Workers, Keep Wages Down, and Stifle Economic Growth, (Feb. 1, 2023), https://www.murphy.senate.gov/newsroom/press-releases/murphy-non-competes-are-used-to-control-workers-keep-wages-down-and-stifle-economic-growth [https://perma.cc/J532-NEY9] (U.S. Senator Chris Murphy discussing the impact noncompete agreements have on low-wage workers).

[20] Ryan Strasser & Carson Cox, *FTC Noncompete Ban Could Open State Litigation Floodgate*, LAW360 (Jan. 30, 2023), https://www.law360.com/articles/1570312/ftc-noncompete-ban-could-open-state-litigation-floodgate [https://perma.cc/49BR-2SDE]; Sandeep Vaheesan, *The Fight Over Non-Competes is Heating Up. The FTC Must Stand Strong*, TIME (Jan. 23, 2023), https://time.com/6249347/fight-over-non-compete-clauses/ [https://perma.cc/UX5Q-DCGK]; Chelsey Cox, *U.S. Chamber of Commerce Threatens to*

noncompete agreements to litigators and policymakers, potentially preventing a noncompete apocalypse.

I. BACKGROUND

A. History of Noncompete Enforcement

Black's Law Dictionary defines a noncompete agreement as "a promise in a sale-of-business, partnership, or employment contract, not to engage in the same type of business for a stated time in the same market as the buyer, partner, or employer."[21] In the employment context, noncompetes have been used since the early 15th century to restrict employees from competing against their former employer in the same geographic region.[22] Almost 300 years later, *Mitchel v. Reynolds* established America's modern regulatory analysis for these agreements.[23] The Court held that noncompete agreements were distinct from agreements that generally restricted trade and should be enforced as long as they were reasonably "limited as to time or place or persons."[24] The agreement's "reasonableness" considers the "fair protection" of the parties' interests, as well as the "interests of the public."[25]

Taking these interests into consideration, subsequent caselaw in the United States closely scrutinize noncompete agreements under this time, place, and person limitation to lighten its restriction on employee mobility.[26] For example, in *Progressive Techs., Inc. v. Chaffin Holdings, Inc.*, the Eighth Circuit determined that a noncompete agreement barring an employee from working in the video

Sue the FTC Over Proposed Ban on Noncompete Clauses, CNBC (Jan. 12, 2023), https://www.cnbc.com/2023/01/12/us-chamber-of-commerce-threatens-to-sue-the-ftc-over-proposed-ban-on-noncompete-clauses.html [https://perma.cc/WJL4-DQA5].

[21] Covenant Not to Compete, BLACK'S LAW DICTIONARY (11th ed. 2019).

[22] Bill C. Berger, *From Dyer's Case to Hard Bargains: Six Centuries of Covenants Not to Compete*, 36 COLO. LAW. 39, 39 (2007).

[23] Mitchel v. Reynolds, 24 Eng. Rep. 347 (1711); Nat'l Soc. of Pro. Eng'rs v. United States, 435 U.S. 679, 689 (1978) ("The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business.").

[24] Alger v. Thacher, 36 Mass. (19 Pick.) 51, 53 (1837).

[25] Horner v. Graves, 131 Eng. Rep. 284, 287 (1831).

[26] Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 678 (2008).

security industry throughout Arkansas for a period of five years was "likely too long" and fails "stricter scrutiny."[27] The Supreme Court of Nevada in *Shores v. Glob. Experience Specialists, Inc.*, found that a noncompete agreement preventing an employee from working for any trade show competitor nationwide was unreasonable in geographical scope, and "must be limited to geographical areas in which the employer has particular business interests."[28] Additionally, the Missouri Court of Appeals in *Sigma-Aldrich Corp. v. Vikin* held that a noncompete was unenforceable when it prevented an employee from working in any capacity for any global competitor because of its failure to specify a "limitation regarding the class of person with whom contact is prohibited."[29] Over time, close judicial scrutiny of these agreements has helped to prevent harmful enforcement of noncompetes and better balances employment interests.[30]

Noncompetes have also been subject to varying state regulation.[31] For instance, eight states and the District of Columbia have instituted notice requirements for non-compete agreements.[32] Maine, for example, requires that an employer give an employee at least three business days to review a noncompete agreement before the signing deadline.[33] Ten states have implemented a wage threshold for enforcing noncompetes.[34] Maryland invalidates noncompete agreements for employees making less than $15 an hour[35], while Oregon

[27] Progressive Techs., Inc. v. Chaffin Holdings, Inc., 33 F.4th 481, 486 (8th Cir. 2022).

[28] Shores v. Glob. Experience Specialists, Inc., 422 P.3d 1238, 1240 (Nev. 2018).

[29] Sigma-Aldrich Corp. v. Vikin, 451 S.W.3d 767, 772 (Mo. Ct. App. 2014).

[30] 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, 135–148 (2008).

[31] Roy Maurer, *State Laws Limiting Noncompetes Vary Significantly*, SHRM, Mar. 31, 2022, https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/state-laws-limiting-noncompetes-vary-significantly.aspx [https://perma.cc/SH7P-YCSE].

[32] Russell Beck, *Keeping Up with Noncompete Notice Requirements – Eight States Plus D.C. Now Have Them*, FAIR COMPETITION L., Jul. 8, 2022, https://faircompetitionlaw.com/2022/07/08/keeping-up-with-noncompete-notice-requirements-eight-states-plus-d-c-have-them/ [https://perma.cc/F6QY-KD3E].

[33] ME. STAT. tit. 26, § 599-A.4 (2019).

[34] Ivy Waisbord, *Prohibitions on Non-Compete Agreements for Low-Wage Workers*, ABA (Feb. 4, 2022), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2022/prohibitions-on-non-compete-agreements-low-wage-workers/ [https://perma.cc/F3VA-Y5HK].

[35] MD. CODE ANN., LAB. & EMPL. § 3-716.

invalidates noncompete agreements for employees making over $100,533 annually.[36] At one extreme, California bans all noncompetes except for those involving departing business owners.[37] At the other extreme, Georgia passed a statute in 2010 *expanding* noncompete enforceability despite longstanding hostility in the Georgia's judiciary.[38] Strikingly, in 2015, Hawaii enacted innovative noncompete legislation than banned noncompetes for all employees in just the technology sector.[39] State legislatures across the United States have taken varying approaches to noncompete regulation depending on the distinctive needs of their constituents and regional economies.[40]

B. Purpose and Benefits of Noncompetes

Noncompetes restrict employee mobility to help prevent former employees from disclosing proprietary information to nearby industry competitors.[41] Proprietary information may include business plans, customer lists, techniques, trade secrets, or other special knowledge or skills vital to business operations that were learned during employment.[42] Many courts uphold reasonable noncompetes that genuinely protect business interests.[43] For example, in *Combs v. Elite Title*

[36] OR. REV. STAT. § 653.295 (2023).

[37] CAL. BUS. & PROF. CODE § 16600 (Deering 2023).

[38] 6 O.C.G.A. §§ 13-8-53(d), 54(b); Eric Smith & Jerry Newsome, *Georgia's Reenacted Restrictive Covenants Statute – A New Era in Georgia Noncompete Law Has Finally Arrived*, LITTLER (May 16, 2011), https://www.littler.com/georgias-reenacted-restrictive-covenants-statute-%E2%80%93-new-era-georgia-noncompete-law-has-finally [https://perma.cc/47RC-EM2N].

[39] HAW. REV. STAT. § 480-4(d) (2015).

[40] Maurer, *supra* note 31; Christina L. Wu, *Noncompete Agreements in California: Should California Courts Uphold Choice of Law Provisions Specifying Another State's Law*, 51 UCLA L. REV. 593, 599–600 (2003).

[41] Daniel Aobdia, *Employee Mobility, Noncompete Agreements, Product-Market Competition, and Company Disclosure*, 23 REV. ACCT. STUD. 296, 302 (2017).

[42] *See* William G. Porter II & Michael C. Griffaton, *Using Noncompete Agreements to Protect Legitimate Business Interests*, 69 DEF. COUNS. J. 194, 194 (2002) ("In today's business environment, all information that provides a competitive advantage, which includes not only trade secrets but also much of other confidential information, has become increasingly important.").

[43] *See, e.g.*, Christopher J. Sullivan & Justin A. Ritter, *Banning Noncompetes in Virginia*, 57 U. RICH. L. REV. 235, 267 (2022) ("Employers worry that rogue employees will learn their trade secrets and disclose them to a competitor. They worry that rogue employees will learn about their customers and take those customers with them when they

Co., Inc., the Court of Appeals of Arkansas upheld a title company's noncompete agreement where an employee had access to a confidential software program, customer lists, and pricing information.[44] The employer intentionally kept this information hidden from competitors and required employees to maintain confidentiality.[45] In upholding the agreement, the court stated that "protectable interests exist when an employer's confidential information or trade secrets are at issue."[46] In *Aspect Software, Inc. v. Barnett*, the U.S. District Court of Massachusetts issued a preliminary injunction against a noncompete employee when the employee joined a competitor after learning proprietary information about the prior employer's strategic decisions, technological developments, negotiations, product specs, and company software.[47]

Noncompete agreements help to prevent unfair competition by protecting proprietary business information.[48] Unfair trade practices can drive competitors out of an industry, discourage entrepreneurship, and stall innovation.[49] In the long run, less competition results in lower wages and benefits, and less employment opportunities for the labor market. It also leads to lower-quality goods and services

leave. These worries align with what Virginia has historically identified as legitimate business interests when upholding noncompete agreements."); Griffin Toronjo Pivateau, *Enforcement of Noncompetition Agreements: Protecting Public Interests through an Entrepreneurial Approach*, 46 ST. MARY'S L. J. 483, 498 (2015) ("In common law jurisdictions, a noncompetition agreement will be upheld only 'if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interests of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public."); Adam V. Buente, *Enforceability of Noncompete Agreements in the Buckeye State: How and Why Ohio Courts Apply the Reasonableness Standard to Entrepreneurs*, 8 ENTREPREN. BUS. L. J. 73, 87 (2013) ("Courts across the country then moved to a more accepting approach towards noncompete agreements, so long as the agreements protected a legitimate business interest and were not in restraint of trade.").

[44] Combs v. Elite Title Co., Inc., 646 S.W.3d 230, 237–38 (Ark. Ct. App. 2022).

[45] *Id.* at 232.

[46] *Id.* at 235.

[47] Aspect Software, Inc. v. Barnett, 787 F. Supp. 2d 118, 122, 134–35 (D. Mass. 2011).

[48] Ralph Anzivino, *Drafting Restrictive Covenants in Employment Contracts*, 94 MARQ. L. REV. 499, 499 (2010).

[49] *See* Chally, *supra* note 16, at 1270 ("[T]he law must protect commercial secrets to insure that those secrets will be developed.").

at inflated prices for consumers.[50] As a result, noncompetes are necessary for maintaining healthy levels of competition, which is in the best interest of both the employer and employee.[51]

C. Noncompetes and Low-Wage Work

As noncompete opponents explain, many of the noted benefits of noncompete agreements do not typically apply to low-wage work.[52] This is mainly because low-wage workers seemingly lack access to proprietary information.[53] Still, almost a third of noncompetes cover workers making less than $13 an hour.[54] These workers include janitorial staff[55], home health aides[56], house cleaners[57], and, perhaps more infamously, Jimmy John's deli workers and Amazon warehouse employees.[58] It seems that instead of legitimately preventing unfair competition, these agreements unnecessarily restrict low-wage workers' mobility.

In *Brentlinger Enterprises v. Curran*, a car dealership sought to enforce a noncompete against a former car salesman.[59] The dealership claimed a former salesman had access to proprietary pricing, advertising, and inventory information while employed with the company.[60] However, most of the information that the

[50] *Does Competition Create or Kill Jobs?*, WORLD BANK BLOGS (Nov. 18, 2015), https://blogs.worldbank.org/psd/does-competition-create-or-kill-jobs [https://perma.cc/HZ3S-AQ9R].

[51] Chally, *supra* note 16, at 1270–71.

[52] *See generally*, *supra* note 8.

[53] Dalrymple, *supra* note 8, at 93.

[54] Najah A. Farley, *How Non-Competes Stifle Worker Power and Disproportionately Impede Women and Workers of Color*, NAT. EMP. L. PROJECT (May 18, 2022), https://www.nelp.org/publication/faq-on-non-compete-agreements/ [https://perma.cc/4MDD-35GN].

[55] Sophie Quinton, *Why Janitors Get Noncompete Agreements, Too*, PEW CHARITABLE TRUST (May 17, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/17/why-janitors-get-noncompete-agreements-too [https://perma.cc/AY7S-PSJ2].

[56] *Id.*

[57] Andrea Hsu, *Many Workers Barely Recall Signing Noncompetes, Until They Try to Change Jobs*, NPR (Jan. 13, 2023), https://www.npr.org/2023/01/13/1148446019/ftc-rule-ban-noncompetes-low-wage-workers-trade-secrets [https://perma.cc/B96S-JJ5R].

[58] Max Fraser, *A Not-So-Free Market in Bad Jobs*, 27 NEW LAB. F. 88, 88 (2018).

[59] Brentlinger Enterprises v. Curran, 785 N.E.2d 994 (2001).

[60] *Id.* at 1001.

dealership considered as "classified" was public knowledge in the industry.[61] The Court of Appeals of Ohio refused to issue an injunction against the employee, noting that the former car salesman was not an "invaluable and virtually irreplaceable employee," and the information he held had "limited value." The agreement likely imposed an "undue hardship" on his ability to find alternative employment.[62] Like *Brentlinger Enterprises*, some courts will refuse to enforce noncompete agreements involving low-wage, low-skill workers.[63] Regardless, some companies still require low-wage workers to sign noncompetes.[64] Many of these workers either have no knowledge that they are subject to a noncompete agreement, are presented with the agreement only after starting employment with the company, or do not have the opportunity to negotiate their agreements.[65] As a result, scholars and activists alike are pushing for, at the very least, a federally mandated noncompete ban for low-wage workers.[66]

However, contrary to popular belief, not all low-wage workers lack access to proprietary information.[67] Notably, there are several niche industries where low-wage employees *should* be subject to noncompete agreements.[68] The following section will discuss these niche industries in more detail and consider the unintended consequences a noncompete ban will have on both the employer and low-wage worker.

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[61] *Id.* at 1000–01.

[62] *Id.* at 1002, 1004–05.

[63] Aaron M. Fix et al., *Recent Developments in Litigation and Regulation Related to No-Hire and Employee Non-Compete Agreements: Implications for Franchise Systems*, NEWSL. DISTRIB. & FRANCHISING COMM. SECTION ANTITRUST L., (ABA), Feb. 2018, at 1, 5.

[64] *See* Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143, 162 (2021) ("[A] policy in which NCAs are not enforced in court may not dissuade firms from using them"); Stewart J. Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 IND. L. J. 275, 281 ("Noncompete agreements are common even in states that will not enforce them . . . . [M]ore hourly workers have noncompetes than do salaried workers because there are many more hourly workers in the workforce.").

[65] Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECONS. 53, 53, 60 (2021).

[66] Chris Marr, *Red State Lawmakers Look at Noncompete Bans for Low-Wage Workers*, BLOOMBERG L. (Feb. 9, 2022), https://news.bloomberglaw.com/daily-labor-report/red-state-lawmakers-look-at-noncompete-bans-for-low-wage-workers [https://perma.cc/44HN-ZMGR].

[67] *See infra* Part III.

[68] *See infra* Part III.

II. LOW-WAGE WORKERS WITH ACCESS TO PROPRIETARY INFORMATION

While some employers unnecessarily and predatorily use noncompetes against low-wage workers, low-wage employees in some industries have access to proprietary information. As mentioned, noncompete agreements are necessary to protect businesses from unfair competition through unauthorized use and exposure of this information. This section will explore instances where noncompetes legitimately protect confidential economic information from unauthorized use by low-wage workers in the beauty, oil and gas, and casino industries. In turn, banning these agreements entirely—even for low-wage workers—will likely result in unintended consequences for both the employer and employee.

A. Beauty Industry

The earliest days of noncompete agreements involved the beauty industry.[69] According to the U.S. Bureau of Labor Statistics, beauty industry employees make a median hourly wage of $16.28—over 25% less than the national median.[70] However, these employees still have access to proprietary information.[71] Employers in the beauty industry use noncompetes to prevent former employees from releasing confidential customer lists to nearby competitors and to prevent workers from using their former employer's customer lists to start their own neighboring competing businesses.[72] Various state courts nationwide have routinely considered customer lists comparable to trade secrets and, thus, worthy of noncompete protection.[73] Overall, protecting customer lists in this industry is

[69] Paul Drzaic, *To Compete, or Noncompete: Beware of this Relic of the Old Economy When Developing Your Career*, 33 MATERIALS RSCH. SOC'Y 643, 643 (2008).

[70] *Barbers, Hairstylists, and Cosmetologists: Pay*, U.S. BUREAU LAB. STAT., https://www.bls.gov/ooh/personal-care-and-service/barbers-hairstylists-and-cosmetologists.htm#tab-5 [https://perma.cc/6EML-6PPY].

[71] Matthew S. Johnson & Michael Lipsitz, *Why Are Low-Wage Workers Signing Noncompete Agreements?*, 57 J. HUM. RES. MGMT. 689, 696 (2022).

[72] Charles M.R. Vethan, *The Development of the Texas Non-Compete: A Tortured History*, 45 TEX. J. BUS. L. 169 (2013).

[73] *See, e.g.*, Lamorte Burns & Co. v. Walters, 770 A.2d 1158, 1166 (N.J. 2001); AYR Composition, Inc. v. Rosenberg, 619 A.2d 592, 597 (N.J. Super. Ct. App. Div. 1993); Victoria's Secret Stores, Inc. v. May Dep't Stores Co., 157 S.W.3d 256, 262 (Mo. Ct. App. 2004); Mounce v. Jeronimo Insulating, LLC, 625 S.W.3d 367, 373 (Ark. Ct. App. 2021); Nobles-Hamilton v. Thompson, 883 So. 2d 1247, 1250 (Ala. Civ. App. 2003).

necessary to prevent unfair competition, encourage small business entrepreneurship, and incentivize employee investment.[74]

Noncompetes prevent large corporations from unfairly competing against small businesses.[75] Because the beauty industry is primarily centered around services rather than goods, providers such as hairstylists, hairdressers, and cosmetologists sell services that are highly localized to their customer base.[76] As a result, repeat customers are particularly vital for small businesses in maintaining a steady flow of business.[77] Startup companies, furthermore, often have limited resources when compared to larger, more resourceful competitors; beauty startups thus jeopardize their survival by revealing valuable resources (such as customer lists) to larger competitors.[78] Nail salons, for example, already have razor thin profit margins—with salon owners taking home anywhere between $41,000-$61,000 depending on locale.[79] Restrictive covenants such as noncompetes prevent salon workers from joining larger corporations, revealing proprietary information, and exploiting the client relationships and beauty practices developed in smaller salons.[80] Eliminating noncompete agreements will likely stunt small business

[74] *See* BRIAN T. YEH, CONG. RSCH. SERV., R43714, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION 3 (2014) ("[T]echnologies that companies rely on to give them an economic advantage over their competitors [include] customer lists.").

[75] Buente, *supra* note 43, at 80.

[76] Evan P. Starr, *Three Essays on Covenants Not to Compete* 53 (2014) (unpublished Ph.D. dissertation, University of Michigan).

[77] *Id.*

[78] *See* Hyo Kang & Lee Fleming, *Non-Competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study*, 29 J. ECON. & MGMT. STRATEGY 663, 667–68 (2020) ("Given that startups often have no reputation and few complimentary assets, their ideas and intellectual property are often their only advantages, and they may be attracted to legal regimes where they can more easily keep an employee from departing, particularly to a better-resourced competitor.")

[79] Mariel Loveland, *How Much Money Can a Salon Owner Make a Year?*, BIZFLUENT (Nov. 21, 2018), https://bizfluent.com/info-7737274-much-hair-stylists-make-year.html [https://perma.cc/7RK6-X9HC]; *Salon Owner Salary*, SALARY, https://www.salary.com/research/salary/recruiting/salon-owner-salary [https://perma.cc/XXX2-UKRT].

[80] *See* Johnson & Lipsitz, *supra* note 71, at 696 ("Salons present a ripe setting to understand the use of NCAs. The benefits and costs of NCAs are clear in this industry. Client attraction, client retention, and on-the-job training are essential to production. NCAs protect investment in these inputs by limiting workers' ability to leave, which benefits salon owners.").

development.[81] Consequently, entrepreneurs are less likely to enter the beauty industry, decreasing the number of available jobs altogether.[82]

Without noncompete enforcement, beauty salons are less willing to invest in employee training and development.[83] Although salon employees typically pay out-of-pocket for initial state licensure requirements, salons are generally known to freely provide well-developed in-house training.[84] Salons may also partially cover external training.[85] Employer-sponsored trainings are known to increase employee wages, positively impact job satisfaction, and prevent burnout.[86] Likewise, investing in training and development increases productivity and innovation for the employer.[87] According to a 2017 study that analyzed the impact of noncompetes on hair salons, "states with higher [noncompete agreement] enforceability have been shown to have higher rates of firm sponsoring training, and employees signing [noncompete agreements] are more likely to receive such

[81] *See* Buente, *supra* note 43, at 79 (small businesses' "temporal and monetary investment in new employees has the potential to be a great waste if a company has high employee turnover . . . . [P]erhaps the most significant investment a company makes in human capital involves company knowledge, trade secrets and industry experience.").

[82] *See* Robert Unikel, *Bridging the Trade Secret Gap: Protecting Confidential Information Not Rising to the Level of Trade Secrets*, 29 LOY. U. CHI. L.J. 841, 847 (1998) ("In the absence of legal protection for valuable, independently developed information, businesses would be less likely to commit their finite resources to the creation of new technology because there is no guarantee that they will benefit from that development.").

[83] Michael Lipsitz, *The Costs and Benefits of Noncompete Agreements* 31 (2009) (Ph.D. dissertation, Boston University); JOHN M. MCADAMS, NON-COMPETE AGREEMENTS: A REVIEW OF THE LITERATURE, FED. TRADE COMM'N 20 (2019).

[84] *See* Helen Ruth Aspaas, *Minority Women's Microenterprises in Rural Areas of the United States of America: African American, Hispanic American and Native American Case Studies*, 61 GEOJOURNAL 281, 284 (2004) ("Many of the service sector businesses require investments in infrastructure and possible training of employees."); T. C. Melewar & Tim Storrie, *Corporate Identity in the Service Sector*, 46 PUB. REL. Q. 20, 23 (2001) ("[A]ll staff follow a structured training plan, which . . . includes monthly training on client service, product knowledge and retail skills as well as on care hairdressing techniques.").

[85] *Who Should Pay for Salon Education?*, ICON SALON SYS., https://www.iconbc.com/articles/who-should-pay-for-salon-education/ [https://perma.cc/2SKT-S4DF] ("For years, the mantra for salons and education was 'if you want training, I'll pay half.'").

[86] Daniel Parent, *Wages and Mobility: The Impact of Employer-Provided Training*, 17 J. LAB. ECON. 298, 298 (1999); Benoit Dostie, *The Impact of Training on Innovation*, 71 ILR REV. 64, 83 (2018).

[87] Dostie, *supra* note 86, at 83.

training."[88] Noncompete enforcement helps incentivize employer-sponsored training because employees are less able to move their newly acquired skills elsewhere.[89] For example, in *Penzone, Inc. v. Koster*, a hair salon spent hundreds of thousands of dollars annually on employee training and development.[90] The salon employees were required to sign relatively moderate noncompetes, restricting them from competing within nine miles for eight months post-employment.[91] After multiple years with the company, an employee who had been hired directly from cosmetology school left the company to start her own independent practice.[92] She proceeded to provide services to at least 95 of her former employer's clients.[93] As a result, the employer pursued preliminary injunctive relief, claiming that the noncompete breach resulted in lost clientele and revenue.[94] Ohio's Tenth District Court of Appels upheld the noncompete, recognizing that it would "allow [the employer] to protect the investment it has made in training and marketing to attract and retain clientele."[95] However, without noncompete enforcement, beauty industry employers are disincentivized to invest in additional employee training out of fear that a competitor will reap its benefits.[96] Because continued training for salon employees is often costly, banning noncompetes will also create a financial barrier to entry for many aspiring beauty

[88] Johnson & Lipsitz, *supra* note 71, at 710.

[89] Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 MGMT. SCI. 425, 427–28 (2011).

[90] Penzone, Inc. v. Koster, No. 07AP-569, 2008 WL 256547, at *4 (Ohio Ct. App. Jan. 31, 2008).

[91] *Id.*

[92] *Id.* at *1.

[93] *Id.* at *2.

[94] *Id.* at *5.

[95] *Id.* at *4.

[96] *See* Samila & Sorenson, *supra* note 89, at 427 ("[O]nce employees have received the training, they might market their newly gained skills to other firms, seeking higher salaries. Rational employers, recognizing this problem, may therefore refuse to develop these more general skills—despite their value to the firm and to society.").

workers.[97] This adverse effect will likely disproportionately affect low-income minority women.[98]

B. Oil and Gas Industry

Though the oil and gas industry is often associated with high earning occupations, it also comprises many low-wage, unskilled field workers.[99] Oil field workers including truck drivers, oil and gas extractors, minors, and general support staff make average salaries between $28,000-$34,000 annually.[100] Despite their low pay, field workers are exposed to vital trade secret information.[101] Oil and gas trade secrets include geological, geophysical, operational, production, land, and

[97] *See* Thomas W. Hazlett & Jennifer L. Fearing, *Occupational Licensing and the Transition from Welfare to Work*, 19 J. LAB. RSCH. 277, 288 (1998) ("[L]icensing—restricting market access to those who are uncertified—may limit entry below the socially optimal level. This is highly likely where occupations are allowed to 'self-regulate,' erecting quotas or fixed entry costs for potential competitors."); *see generally* Brenna Goyette, *Top 10 Fashion & Beauty Certifications*, RESUMECAT (Jan. 3, 2023), https://resumecat.com/blog/fashion-and-beauty-certifications [https://perma.cc/T36X-KCV9].

[98] *See* Adia M. Harvey, *Personal Satisfaction and Economic Improvement*, 38 J. BLACK STUD. 900, 903 (2008) ("[H]air salons make up, by far, the largest number of Black-owned businesses . . . . [L]arge numbers of Black women have entered the hair industry as workers and entrepreneurs. As such, this is a field in which Black female entrepreneurs remain easily located.").

[99] *See generally* Elka Torpey, *Resources Work: Careers in Mining, Oil, and Gas*, 57 OCCUPATIONAL OUTLOOK Q. 22, 26 (2013).

[100] *What is an Oil Field Roustabout?*, ZIPPIA, https://www.zippia.com/oil-field-roustabout-jobs/ [https://perma.cc/7UY6-7CFU]. The U.S. Bureau of Labor Statistics, including a more expansive list of roustabout services, has the median salary as high as $43,590—still more than $18,000 less than the national average. *Compare Occupational Employment and Wages, May 2022: 47-5071 Roustabouts, Oil and Gas*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/current/oes475071.htm [https://perma.cc/7CSL-BEHP], *with May 2022 National Occupational Employment and Wage Estimates*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/current/oes_nat.htm#00-0000 [https://perma.cc/82NJ-VYXG].

[101] *See* Lee Grossman, *Oil and Gas Law: When it Comes to Restrictive Employment Covenants, Whose Idea of Reasonable is Correct, the Oil Company's or the Landman's*, 81 N.D. L. REV. 555, 557 (2005) ("The research and discovery procedure involved in finding an oil and gas field includes many people in the overall operation. Those looking for oil expose their secrets and plans to more people in different occupations than any other industry.").

drilling information and data.[102] Maintaining trade secret confidentiality is crucial for survival in the industry.[103] As a result, oil companies may require employees to sign noncompete agreements to protect the employer's financial interests.[104]

Trade secret breaches are already quite common in the oil and gas industry and litigation is often pursued to recover damages.[105] In *J.C. Energy v. Hall*, an oil and gas company sued a former oil field employee in federal court for misappropriating proprietary information learned on the job.[106] In 2013, the employee was hired to perform general support tasks as an inspector.[107] Though the employee had experience in "construction, maintenance roustabout services, and gas plant operations," he had no prior experience as an inspector.[108] The company gave the employee extensive in-house training in its techniques including weld mapping, and the employee was exposed to the company's business relationships, future work plans, and prospective buyers.[109] Afterward, for monetary consideration, the company required its employees to sign noncompete agreements to protect its business interests, and the employee subsequently agreed to all its terms.[110] However, while employed with the company, the employee

[102] *Trade Secret Protections: Energy Companies May Need to Re-evaluate their Protocols*, OIL & GAS J. (Jan. 1, 2014), https://www.ogj.com/home/article/17293594/trade-secret-protections [https://perma.cc/3XA2-BKMK].

[103] John Craven, *Fracking Secrets: The Limitations of Trade Secret Protection in Hydraulic Fracturing*, 16 VAND. J. ENT. & TECH. L. 395, 401–02 (2014) ("Oil and gas companies claim that public disclosure would allow their competitors to use reverse engineering to determine the composition of fracking fluids and free ride off their efforts, depriving companies of the economic benefits that flow from developing proprietary technologies.").

[104] Grossman, *supra* note 101, at 555.

[105] Joseph G. Thompson III & John A. Garza, *Trade Secrets in the Oil and Gas Context: Litigation and Discovery Issues*, UNIV. TEX. SCH. L. CONTINUING LEGAL EDUC. (Mar. 25–26, 2021), https://utcle.org/ecourses/OC8599/get-asset-file/asset_id/51342 [https://perma.cc/4TE2-NX3K].

[106] J.C. Energy, LLC v. Hall, No. 14-CV-236-ABJ, 2015 WL 5698419, at *3 (D. Wyo. Sept. 28, 2015).

[107] *Id.* at *1. *See also Petroleum Inspector Salary*, ZIPPIA, https://www.zippia.com/petroleum-inspector-jobs/salary/ [https://perma.cc/2GP6-4ENR] (Petroleum inspectors make an entry level salary of $29,000, with the largest percentage at $41,250).

[108] *J.C. Energy, LLC*, 2015 WL 2598419, at *1.

[109] *Id*.

[110] *Id*. at *2.

started his own oil and gas corporation to perform similar work in the same locations and made an agreement with his employer's prospective client.[111] In turn, the employee collected nearly $500,000 from his newly formed business relationship.[112] The employer sued the employee seeking a permanent injunction pursuant to the noncompete agreement as well as damages.[113] The district court held "[t]he covenant not to compete is reasonable as a matter of law," and there was "no dispute of material fact on the issue of breach in the Plaintiff's favor."[114]

Similar to the beauty industry, without noncompete protection, oil and gas employers are less likely to invest in employee training.[115] Sensibly, an employer is less willing to provide employee training when a noncompete ban makes it easier for employees to use newly acquired skills and proprietary information to start a competing business.[116] Consequently, less training opportunities result in less income mobility for low-wage oil field workers.[117] Moreover, entering the oil and gas industry is already a risky decision considering the high fixed costs, fluctuating regulations, and dangerous working conditions.[118] With the additional risk of potentially losing hundreds of thousands of dollars in revenue to current or former low-wage oil field workers, entrepreneurs may be less willing to enter the

[111] *Id*. at *3.

[112] *Id.* at *3.

[113] *Id*. at *9.

[114] *Id*. at *8–9.

[115] Samila & Sorenson, *supra* note 89, at 427.

[116] *Id*.

[117] Maite Blázquez Cuesta & Wiemer Salverda, *Low-Wage Employment and the Role of Education and On-the-Job Training*, 23 LABOUR 5, 31 (2009) ("[G]enerally, movements up the earnings distribution are more likely again among workers with tertiary education or receiving on-the-job training, compared with other employees.").

[118] *See generally*, Jay Wagner & Kit Armstrong, *Managing Environmental and Social Risks in International Oil and Gas Projects: Perspectives on Compliance*, 3 J. WORLD ENERGY L. & BUS. 140 (2010).

market.[119] As a result, jobs in this industry will continue to diminish, disproportionately impacting rural communities.[120]

C. Casino Industry

Casinos also employ low-wage workers with access to proprietary information.[121] The casino industry routinely requires employees to sign noncompetes to protect employer interests.[122] For example, casino slot technicians make an average annual salary of $36,261[123] yet have access to slot machine diagnostics containing information on logs, play history, slot machine configuration, and theoretical payback and hold percentages.[124] Employers grant technicians slot machine access to service machines, but there is growing concern this information warrants protection to prevent unauthorized disclosure to market competitors.[125] Information on theoretical payback and hold percentages

[119] *See J.C. Energy, LLC*, 2015 WL 2598419, at *1, *3 (discussing how a former employee used his former employer's proprietary information to "collect[] more than $475,000" from his former employer's only customer); Mungo Hardwicke-Brown, *Confidentiality and Dispositions in the Oil and Gas Industry*, 35 ALBERTA L. REV. 356, 356 (1997) ("The protection of confidential information is an important component of many transactions in the oil and gas industry and, due to the nature of the industry, there are issues with respect to confidential information that are unique."); Grossman, *supra* note 101, at 555 ("Protecting confidential information and other intellectual property is vital to gaining an edge on the competition, because finding the oil before your competitor is crucial to staying in business.").

[120] Adam Mayer, Stephanie A. Malin, & Shawn K. Olson-Hazboun, *Unhollowing Rural America? Rural Human Capital Flight and the Demographic Consequences of the Oil and Gas Boom*, 39 POPULATION & ENV'T 219, 220 (2018) ("Evidence suggests that [Oil and Gas Extraction] boom has had modest positive effects on income in rural areas and has possibly led to increased job growth.").

[121] *See infra* notes 123–143.

[122] Daniel Rothberg, *With Restrictive Ruling on Noncompetes, Casinos Could be Force to Adjust*, LAS VEGAS SUN (Aug. 10, 2016), https://lasvegassun.com/news/2016/aug/10/noncompete-agreements-nevada-supreme-court/ [https://perma.cc/9HBS-TE2V].

[123] *What is a Slot Technician?*, ZIPPIA, https://www.zippia.com/slot-technician-jobs/ [https://perma.cc/WS7L-HEQ2]. No slot technician salary information is available with the U.S. Bureau of Labor Statistics.

[124] Kevin Johnson, *The House Advantage: Trade Secret Protections on the Casino Floor*, 8 UNLV GAMING L. J. 121, 121 (2018).

[125] *Id*. at 121–125.

(percentages "dictat[ing] the amount that the machine will pay out over time"[126]) can reveal an employer's operations and allow a competitor to unfairly implement a counter strategy to maximize profits.[127] The presence of unfair competition artificially lowers profits for the industry.[128]

In 2013, an employee revealed slot information from multiple casinos to a competitor. The Nevada Gaming Commission fined the competitor $1 million for negatively affecting the "integrity of gaming operations in the state."[129] Compromised integrity in the gambling industry negatively impacts consumer activity and further lowers casino profits.[130] Overall, slot machine earnings constitute 65-80% of total gambling revenue for casinos nationwide.[131] Removing noncompete protection over slot machine information will likely disincentivize new competitors from entering the industry.[132] Less market competition leads to decreased job opportunities for casino workers generally.[133]

Another low-wage casino position typically associated with proprietary information are casino hosts.[134] Casino hosts make annual salaries between

[126] *Id*. at 121.

[127] *Id.* at 123.

[128] *Id.* at 141.

[129] Jason Hidalgo, *Peppermill Facing $1M Fine for Accessing Competitors' Slots*, RENO GAZETTE J. (Feb. 14, 2014, 9:00 PM), https://www.rgj.com/story/money/gaming/2014/02/15/peppermill-facing-1m-fine-for-accessing-competitors-slots/5498589/ [https://perma.cc/5EEL-GPZ7].

[130] *See* Lisa Farrell, *Operator Integrity and Trustworthiness are Essential to Consumer Confidence in the Gambling Industry*, RMIT UNIV. (June 2, 2022), https://www.rmit.edu.au/news/acumen/gambline_consumer_confidence [https://perma.cc/9F52-SLEB] ("Gambles are games of luck and if consumers perceive that there is a possibility that the odds are not fair, because they do not trust the service provider, they will choose to spend their gambling dollars on other leisure activities instead.").

[131] David G. Schwartz, *How Casinos Use Math to Make Money When You Play the Slots*, FORBES (Jun. 4, 2018, 9:33 AM), https://www.forbes.com/sites/davidschwartz/2018/06/04/how-casinos-use-math-to-make-money-when-you-play-the-slots/?sh=1ee0919994d0 [https://perma.cc/H77X-MET5].

[132] *See* Unikel, *supra* note 82, at 847.

[133] William N. Thompson & Catherine Prentice, *Should Casinos Exist as Monopolies or Should Casinos Be in Open Markets?*, 4 UNLV GAMING L. J. 39, 67 (2013).

[134] Lawrence Chiu Hill, *The Host: A Casino's Best Friend or Worst Enemy?*, 12 GAMING L. REV. & ECON. 563, 563 (2008); Jahd Khalil, *Richmond Grand's Average Wages Close to State's Planned Minimum, Data Suggests*, VPM (Oct. 24, 2023), https://www.vpm.org/news/2023-10-24/richmond-grand-casino-average-wages-virginia-data-analysis ("According to BLS statistics, Gambling Service Workers make a median hourly wage of $16.28.").

$29,000-$56,000,[135] but are exposed to proprietary information including high-roller client data.[136] Client data is necessary in establishing "finely tuned marketing and service-delivery strategies," leading to increased profits.[137] In *Golden Rd. Motor Inn, Inc. v. Islam*, a casino host copied client data before leaving her employer for a competitor.[138] She later inputted the newly acquired data in her new employer's computer system.[139] Her former employer sought to enforce their noncompete agreement in Nevada state court.[140] Though the Nevada Supreme Court ultimately invalidated the noncompete agreement in a split majority decision on grounds that it was too geographically broad,[141] the court recognized that the former employer's client information was a trade secret.[142] The three-panel dissent stated that instead of invalidating the entire agreement, the majority should have followed "most Unites States jurisdictions" in altering the agreement to accommodate for both the employee's and employer's interests.[143] Ultimately, eliminating noncompetes across the board will permit similar instances of unfair competition, likely disincentivizing employers from investing in intellectual property, human capital, and business relationships, and potentially having a negative effect on economic growth and innovation..[144] The negative effects of

[135] *What is a Casino Host?*, ZIPPIA, https://www.zippia.com/casino-host-jobs/ [https://perma.cc/AW2P-S3JD]. Outside of gambling service workers generally, no specific casino host salary information is available with the U.S. Bureau of Labor Statistics.

[136] Brandon Presser, *Ten Things I Never Knew About Las Vegas Until I Ran a High-Roller Suite*, BLOOMBERG (Sept. 3, 2018, 10:00 PM), https://www.bloomberg.com/news/features/2018-09-04/secrets-of-las-vegas-s-exclusive-high-roller-cosmopolitan-sweet [https://perma.cc/5VTS-8Z53].

[137] Gary W. Loveman, *Diamonds in the Data Mine*, HARV. BUS. REV. (May 2003), https://hbr.org/2003/05/diamonds-in-the-data-mine [https://perma.cc/3QXS-98SN].

[138] Golden Rd. Motor Inn, Inc. v. Islam, 376 P.3d 151 (Nev. 2016).

[139] *Id.* at 153.

[140] *Id.* at 154.

[141] *Id.* at 155.

[142] *Id.* at 161.

[143] *Id.* at 162–163.

[144] *See* Samila & Sorenson, *supra* note 89, at 426–27 ("[I]f incumbent firms, or even start-ups, invest less intensely in human, intellectual, and relational capital in response to the higher probability of losing employees, then increases in the supply of venture capital might have no—or even a negative—effect on innovation and economic growth in employee-friendly regimes . . . . [Noncompetes] encourage firms to allocate resources to the development of certain sorts of assets, such as intellectual property, human capital, and interfirm relations. These incentives stem from two common features: (1) the control of

unfair competition in the casino industry are likely to disproportionately impact minority rural communities.[145]

In addition to the beauty, oil and gas, and casino industries, there are several other industries comprising low-wage workers with access to proprietary information.[146] The relationship between noncompete agreements and low-wage workers is not as black and white as some critics might assert. As a result, a noncompete ban will likely have unintended consequences for both the employer and employee in high and low-wage occupations.

III. ADDRESSING POTENTIAL ALTERNATIVES TO NONCOMPETE AGREEMENTS

Noncompete critics claim employers can seek other avenues to protecting their business interests without restricting worker mobility.[147] Without

these assets, to a large extent, resides in individuals within the firm; and (2) firms have few alternative mechanisms for protecting these assets.").

[145] James I. Schaap, *The Growth of the Native American Gaming Industry: What Has the Past Provided, and What Does the Future Hold?*, 34 AM. INDIAN Q. 365, 368 (2010) ("[T]ribal gaming has been hailed as the 'new buffalo' for Indians and has been credited with wresting once-destitute reservations from the grip of poverty, unemployment, and welfare dependency.").

[146] *See, e.g.*, Viking Grp., Inc. v. Old, No. 1:22-CV-930, 2023 WL 2730203 (W.D. Mich. Jan. 18, 2023) (upholding noncompete agreement against customer service representative for fire protection services with access to customer, pricing, and product information); Mid-States Paint & Chem. Co. v. Herr, 746 S.W.2d 613, 614 (Mo. Ct. App. 1988) (upholding noncompete against customer service representative in coatings industry who had access to proprietary information in a "highly competitive and technical field"); Alltype Fire Prot. Co. v. Mayfield, 88 S.W.3d 120 (Mo. Ct. App. 2002) (upholding noncompete against fire safety product salesperson with access to trade secret and client information); Safety-Kleen Sys., Inc. v. Hennkens, 301 F.3d 931 (8th Cir. 2002) (upholding noncompete agreement against waste management employee with access to confidential business information).

[147] *E.g.*, Jerrick Robbins, *A Solution to Utah's Non-Compete Dilemma: Soliciting the Use of Non-Solicitation Agreements*, 2017 BYU L. REV. 1227 (2017); Christopher Mack, *Postemployment Noncompete Agreements: Why Utah Should Depart from the Majority*, 2015 UTAH L. REV. 1201, 1211 (2015); Emily Halliday, *Analysis: 5 Things to Consider Before Suing Over a Noncompete*, BLOOMBERG L. (Aug. 19, 2021, 4:00 AM), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/XCGTKJT8000000?bna_news_filter=bloomberg-law-analysis#jcite [https://perma.cc/H3EX-7U8E]; Ryan Golden, *As Regulators Target Noncompete Agreements, Employers Could Seek Alternatives*, HR DIVE (June 15, 2022),

noncompetes, employers can still implement nondisclosure agreements, as well as nonsolicitation agreements with other employers.[148] Employers can also rely on trade secret protections under the Defend Trade Secrets Act (DTSA).[149] However, when compared to noncompete agreements, these alternative protective measures fall short in protecting against unauthorized disclosure of proprietary information.[150] This section will address the drawbacks each proposed alternative has in preventing unfair competition.

A. Nondisclosure Agreements

Instead of restricting employee mobility, nondisclosure agreements restrict disclosure of confidential information.[151] Nondisclosure agreements can cover a variety of information such as product specifications, client lists, business plans, and research. Common law limits these agreements "if the provision is unconscionable or contrary to public policy."[152] Unconscionable nondisclosures include provisions that are overly broad or situations where the employee was coerced into agreeing to it.[153] Public policy reasons against enforcement include instances of sexual misconduct, workplace harassment, or other unlawful

https://www.hrdive.com/news/as-regulators-target-noncompete-agreements-employers-could-seek-alternatives/625483/ [https://perma.cc/C4PB-HWN3].

[148] Mack, *supra* note 147, at 1211.

[149] Steve Carey, Sarah Hutchins & Tory Summey, *FTC's Noncompete Ban Leaves Room to Prevent Trade Secret Theft*, BLOOMBERG L. (Jan. 24, 2023), https://news.bloomberglaw.com/us-law-week/ftcs-noncompete-ban-leaves-room-to-prevent-trade-secret-theft [https://perma.cc/UT3H-SA64].

[150] *See* Sandeen & Rowe, *supra* note 8, at 441 ("NCAs can be a valuable and complementary tool for protecting trade secrets because they can be the *most* effective remedy in some circumstances of trade secret misappropriation.") (emphasis added).

[151] Erin Brendel Mathews, *Forbidden Friending: A Framework for Assessing the Reasonableness of Nonsolicitation Agreements and Determining What Constitutes a Breach on Social Media*, 87 FORDHAM L. REV. 1217, 1226 (2018).

[152] Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 644 (1999).

[153] JASON SOCKIN, AARON SOJOURNER, & EVAN STARR, HOW DO BROAD NON-DISCLOSURE AGREEMENTS AFFECT LABOR MARKETS? 5 (2022), https://research.upjohn.org/cgi/viewcontent.cgi?article=1054&context=up_policybriefs [https://perma.cc/YPJ6-BV9B]; Maureen A. Weston, *Buying Secrecy: Non-Disclosure Agreements, Arbitration, and Professional Ethics in the #MeToo Era*, 2021 U. ILL. L. REV. 507, 512–514 (2021).

activity.[154] Barring these restrictions, nondisclosure agreements intend to prevent leaks of proprietary business information to the public or industry competitors.[155]

Nondisclosure enforcement has three major flaws. First, it is difficult to determine what specific information constitutes a breach.[156] Second, it is also difficult to ascertain whether a former employee has revealed proprietary information.[157] For non-patented information such as customer lists, geographic coordinates, business processes, or future business plans, it can be difficult to prove whether an employee intentionally revealed the information, or whether a competing company made a disconnected decision.[158] Additionally, it is burdensome for employers to monitor all former employee activities.[159] Finally, in

[154] Taishi Duchicela, *Rethinking Nondisclosure Agreements in Sexual Misconduct Cases*, 20 LOYOLA J. PUB. INT. L. 53, 66–69 (2018).

[155] Bast, *supra* note 152, at 627–628.

[156] Craig P. Ehrlich & Leslie Garbarino, *Do Secrets Stop Progress? Optimizing the Law of Non-Disclosure Agreements to Promote Innovation*, 16 N.Y.U. J. L & BUS. 279, 280 (2020); Marwa Elzankaly, *The Not-So-Powerful Non-Disclosure Agreement (NDA)*, MCMANIS FAULKNER (May 17, 2018), https://www.mcmanislaw.com/blog/2018/the-not-so-powerful-non-disclosure-agreement-nda [https://perma.cc/Z8XX-UJD7].

[157] *See* David L. Hoffman & Robert J. Lauson, *Tailoring Nondisclosure Agreements to Client Needs*, L.A. LAW., Oct. 2000, at 57 ("Typically, it is difficult to prove that a former employee made a wrongful disclosure after starting a new job with a competitor."); *Loose Lips: What to Do if a NDA Has Been Broken*, ROCKET LAWYER, https://www.rocketlawyer.com/business-and-contracts/intellectual-property/confidentiality-agreements/legal-guide/loose-lips-what-to-do-if-a-nda-has-been-broken [https://perma.cc/8TS4-HZAZ] ("Investigate the theft or breach. Sometimes, this can be the most difficult step in pursuing a breach of NDA contract case. You know the information is out, but you'll need concrete evidence explaining how the information got out.").

[158] Hoffman & Lauson, *supra* note 157, at 57.

[159] *See* David R. Hannah & Kirsten Robertson, *Why and How Do Employees Break and Bend Confidential Information Protection Rules?*, 52 J. MGMT. STUD. 381, 399–400 (2015) (discussing employee willingness to disclose confidential information when "they believed they were unlikely to be caught and punished because [the employer] did not monitor the use of USB drives. Further, given the small size of USB drives, it was easy for employees to use them surreptitiously."); Christina H. Bost Seaton & D. Eugene Webb Jr., *Caution Advised: Employers Must Be Careful Not to Commit an Invasion of Privacy During Investigations*, TROUTMAN PEPPER (Dec. 13, 2012), https://www.troutman.com/insights/caution-advised-employers-must-be-careful-not-to-commit-an-invasion-of-privacy-during-investigations.html#:~:text=Employers%20that%20conduct%20an%20investigation,claim%20by%20their%20former%20employees [https://perma.cc/6ELS-P67Z].

many circumstances, remedies can only be enforced after the damage has already occurred.[160] Once a former employee releases proprietary information, it is difficult to reverse the impact, and no amount of monetary relief can truly compensate for exposed technology, customer lists, or missed business opportunities.[161]

Conversely, under a noncompete agreement, an employer can preemptively prevent disclosure of proprietary information before the damage has occurred.[162] Once the employee joins a competing employer—assuming the noncompete contains reasonable restrictive terms—the employee has breached the agreement, and the former employer may pursue injunctive relief.[163] The former employer does not need to wait for disclosure to occur.[164] Moreover, a noncompete breach is more easily discoverable than a nondisclosure breach.[165] In some instances, it may take years to discover a nondisclosure breach.[166] As a result, nondisclosure agreements fall short in preventing unfair trade practices that negatively affect employers and employees.[167]

B. Non-solicitation Agreements

Non-solicitation agreements prevent employees or industry competitors from soliciting a company's clients or employees.[168] Like noncompetes, these agreements are typically limited by geographic area, time, and type of work

[160] Neda Dadpey, *Issues Enforcing Nondisclosure Agreements (United States)*, ASS'N CORP. COUNS. (Apr. 7, 2017), https://www.acc.com/resource-library/issues-enforcing-nondisclosure-agreements-united-states [https://perma.cc/N5Z6-72HZ].

[161] Scott M. McDonald, *Noncompete Contracts: Understanding the Cost of Unpredictability*, 10 TEX. WESLEYAN L. REV. 137, 149 (2003).

[162] Pivateau, *supra* note 43, at 496.

[163] *Id.*

[164] *Id.*

[165] McDonald, *supra* note 161, at 151 ("A [noncompete] breach is often easy to spot and prove. Either the ex-employee is working for a competitor in a certain geography or not.").

[166] *E.g.*, Synthes, Inc. v. Emerge Med., Inc., 25 F. Supp. 3d 617, 654, 657 (E.D. Pa. 2014) (employee's non-disclosure breach of proprietary business information was not discovered until over two years later).

[167] *See generally* Hannesson Murphy, *Confidentiality & Nondisclosure Agreements are No Substitute for Noncompetes*, BARNES & THORNBURG (Oct. 27, 2014), https://btlaw.com/insights/blogs/currents/2014/confidentiality-nondisclosure-agreements-are-no-substitute-for-noncompetes [https://perma.cc/X8XJ-45VB].

[168] Mathews, *supra* note 151, at 1226.

performed.[169] Non-solicitation agreements purportedly allow an employer to prevent unfair competition and retain and invest in talent more easily.[170]

However, under a non-solicitation agreement, it is difficult to prove whether an employer has truly solicited an employee's services. Though a non-solicitation agreement prevents direct engagement with a competitor's employees or clients, it fails to protect against indirect communication.[171] A competitor can still generally advertise positions to the public.[172] Additionally, with the advent of social media, it is increasingly difficult to distinguish direct from indirect communication.[173] For example, in *Invidia, LLC v. DiFonzo*, a salon was accused of breaching its non-solicitation agreement by becoming "friends" with eight of its competitor's clients.[174] The Superior Court of Massachusetts held that Facebook-friending a competitor's customers was not solicitation.[175] Accordingly, with the rise of technology, non-solicitation agreements have become increasingly obsolete.

On the other hand, as previously mentioned, there is less difficulty in showing a noncompete breach.[176] Notably, there is evidence that social media activity may make it *easier* to pursue noncompete enforcement.[177] In *KNF&T Inc. v. Muller*, an employer pursued a noncompete breach after its former employee updated her job status on LinkedIn.[178] The update was visible to hundreds of

[169] Elizabeth E. Nicholas, *Drafting Enforceable Non-Solicitation Agreements in Kentucky*, 95 KY. L.J. 505, 524–25 (2006).

[170] *Id.* at 505–06.

[171] Evan Belosa, *I Can't Call Who? Employee Nonsolicitation of Clients Covenants Under New York Law*, 66 LAB. L. J. 215, 221 (2015) ("[G]eneral advertisement, without more, and factual statements as to former association are permissible, and will not suffice to establish a violation of a nonsolicitation provision.").

[172] *Id.*

[173] James Patton Jr. & Tae Phillips, *Nonsolicitation Agreements in the Social Media Age*, LAW360 (May 16, 2017), https://www.law360.com/articles/921169/nonsolicitation-agreements-in-the-social-media-age [https://perma.cc/7ETK-LXGH].

[174] Invidia, LLC v. DiFonzo, No. 2012-3798-H, 2012 WL 5576406 at *9 (Mass. Super. Oct. 22, 2012).

[175] *Id.*

[176] Pivateau, *supra* note 43, at 496.

[177] *See* article cited *infra* note 178.

[178] KNF & T Staffing, Inc. v. Muller, No. SUCV201303676BLS1, 2013 WL 7018645 (Mass. Super. Oct. 24, 2013); *Could Your Social Media Status Violate a Noncompete Agreement?*, TENAGLIA & HUNT (Jan. 8, 2014), https://www.tenagliahunt.com/could-your-social-media-status-violate-a-non-compete-agreement [https://perma.cc/LK74-7BE7].

contacts, including members of her former company.[179] The social media announcement was enough to commence a non-frivolous suit, although the Massachusetts Superior Court dismissed the case, stating the new employer provided substantially distinct services.[180]

C. Trade Secret Protections

The DTSA authorizes a plaintiff to initiate a civil action for alleged trade secret theft and misappropriation.[181] Under § 1839 of the Act, Congress defines a trade secret as "all forms and types of financial, business, scientific, technical, economic, or engineering information."[182] The DTSA includes a broad range of materials such as "patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing."[183] Remedies can include compensatory damages, punitive damages, and injunctive relief.[184] At first glance, trade secret protections under the DTSA may seem sufficient to fully protect business interests in place of noncompetes. However, there are notable limitations to its implementation.[185]

Like non-solicitation agreements, it can be difficult to determine a trade secret breach. There is no designated government agency monitoring trade secret violations.[186] As a result, the employer is responsible for tracking unauthorized use

[179] TENAGLIA & HUNT, *supra* note 178.

[180] *See id.*; KNF & T Staffing, Inc. v. Muller, No. SUCV201303676BLS1, 2013 WL 7018645 at *7 n.6.

[181] 18 U.S.C. § 1836.

[182] § 1839(3).

[183] *Id.*

[184] § 1836(b)(3).

[185] *See infra* notes 186–93.

[186] Unless a trade secret misappropriation also violates the Economic Espionage Act (EEA), federal agencies do not pursue, let alone investigate, trade secret claims. *See* BRIAN T. YEH, CONG. RSCH. SERV., R43714, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION at summary (2016) ("In contrast to other types of intellectual property (trademarks, patents, and copyrights) that are governed primarily by federal law, trade secret protection is primarily a matter of state law. Thus, trade secret owners have more limited legal recourse when their rights are violated.").

and disclosure of trade secret information.[187] Even if a defendant is shown to have unlawfully acquired the trade secret, courts will not grant relief unless actual misappropriation occurred.[188] For example, in *First Western Cap. Mgmt. Co.*, an employer brought a trade secret claim against an employee who copied thousands of client names, contact information, and investment information before leaving the company.[189] The lower court granted injunctive relief, stating the employee "is or will soon be engaged in acts or practices prohibited by [the DTSA]."[190] However, the Tenth Circuit reversed, holding that additional evidence of irreparable harm was needed for injunctive relief.[191] Moreover, even when an employer proves misappropriation, valuable business information often becomes public.[192] Lastly, succeeding in an initial trade secret misappropriation suit does not prevent further unauthorized use once the trade secret is revealed, as the DTSA no longer protects the secret against other unauthorized users.[193]

Yet again, employers can recognize noncompete breaches much more easily than trade secret breaches. Tracking an employee's next employer is presumptively less burdensome than tracking an employee's specific actions.[194] Furthermore, some employers may ask if an employee is under an existing noncompete before hiring, insinuating inter-industry regulation.[195] Also, unlike trade secret

[187] David R. Hannah, *Should I Keep a Secret? The Effects of Trade Secret Protection Procedures on Employees' Obligations to Protect Trade Secrets*, 16 ORG. SCI. 71, 73 (2005).

[188] CONG. RSCH. SERV., PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION at 3–4.

[189] First W. Cap. Mgmt. Co. v. Malamed, 874 F.3d 1136, 1139 (10th Cir. 2017).

[190] *Id.* at 1140.

[191] *Id.*

[192] Elizabeth A. Rowe, *Saving Trade Secret Disclosures on the Internet Through Sequential Preservation*, 42 WAKE FOREST L. REV. 1, 72 (2007).

[193] *Id.* at 22 ("[T]he current status of trade secret law would suggest that the third party is entitled to use information she obtained from the public domain.").

[194] *See* David J. Balan, *Labor Noncompete Agreements: Tool for Economic Efficiency or Means to Extract Value from Workers?*, 66 ANTITRUST BULL. 593, 607 (2021) ("[N]oncompetes do have one important advantage over other [Postemployment Restrictive Covenants], namely, that violations of noncompetes are much more easily detected. It is much easier to know and to prove that a worker has accepted a job that violates their noncompete than it is to prove that they have not shared information in violation of a nondisclosure agreement or subtly recruited customers or workers in violation of a nonsolicitation or nonrecruitment agreement.").

[195] *See* Pivateau, *supra* note 26, at 692 ("Companies who want to hire an applicant subject to a noncompete agreement must weigh the potential benefits of the agreement

misappropriation claims, injunctive relief is a common judicial remedy granted for noncompete breaches regardless of whether the employee or subsequent employer revealed or misappropriated the proprietary information.[196] As a result, an employer can not only sue for damages once they occur and can also more easily prevent an employee from causing any additional future harm.[197] Overall, in addition to nondisclosure and non-solicitation agreements, trade secret protections are an inadequate replacement for noncompetes in preventing unfair competition.[198]

IV. ADDRESSING THE ARGUMENTS FOR A NONCOMPETE BAN

Even if noncompete agreements are used to legitimately protect confidential business information, opponents claim these agreements still unjustly suppress income mobility for low-wage workers.[199] Critics point to various studies that

against the burden of possibly having to enforce the agreement. Often, the hiring employer must perform its own legal analysis to discover whether the noncompete agreement can or will be enforced."); *see also Should You Hire That Great Applicant with the Non-Compete?*, ARCHER (Nov. 2016), http://www.archerlaw.com/wp-content/uploads/2016/11/Client-Advisory-Should-You-Hire-That-Great-Applicant-with-the-Non-Compete.pdf?utm_source=Advisory+-+Should+you+Hire+that+great+applicant+with+the+non-compete&utm_campaign=Advisory%3A+Should+I+Hire+the+great+candidate+with+the+noncompete&utm_medium=email [https://perma.cc/2K8L-VV6E] (explaining the risks and additional steps employers take when hiring an applicant under a preexisting noncompete agreement).

[196] *See* Charles Tait Graves, *Analyzing the Non-Competition Covenant as a Category of Intellectual Property Regulation*, 3 HASTINGS SCI. & TECH. L.J. 69, 88–89 (2010) (Unlike "trade secret law, which requires that an individual misuse (or threaten to misuse) a specific trade secret in order to be restrained[,] [s]ome courts make explicit that there need not be an actual threat to misuse trade secrets in order for a non-compete to be enforceable.").

[197] *Id.*

[198] *See* Camilla Alexandra Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes*, 133 YALE L. J. (forthcoming 2023) (manuscript at 15–16) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4384661#) ("[Noncompetes] go beyond what trade secret law, on its own, can do. So noncompetes are a natural way to 'bolster [trade secret] protection.'").

[199] *See generally* Lawrence Mishel & Josh Bivens, *The Productivity-Median Compensation Gap in the United States: The Contribution of Increased Wage Inequality and the Role of Policy Choices*, 41 INT'L PRODUCTIVITY MONITOR 61 (2021).

show reduced enforcement of noncompete agreements leads to higher wages for hourly employees.[200] Thus, a noncompete ban is purportedly necessary to close the national wage gap. However, focusing solely on pay fails to take into consideration other workplace drawbacks that may occur from a nationwide ban. Decreases in human capital investment will likely offset increases in pay.[201] Employers are less likely to invest in employee training and development if employees can subsequently take those developed skills elsewhere.[202] In the long term, limited employment opportunities may also offset short term increases in pay..[203] With less protection of proprietary information, entrepreneurs are less willing to risk entering the market.[204] As a result, less market competition leads to decreased employment opportunities over time.

Alternatively, critics claim these agreements actually *hinder* innovation, making them unnecessary.[205] For example, researchers frequently cite California for its innovation in the tech industry despite its ban on noncompete agreements.[206] Critics attribute this phenomenon to California's noncompete ban and claim it "prevents a company from establishing a monopoly, and thus, increases

[200] *See generally, e.g.*, Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Noncompete Agreements*, 68 MGMT. SCI. 143 (2022); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L. J. 165 (2020).

[201] Norman D. Bishara, *Covenants Not to Compete in a Knowledge Economy: Balancing Innovation from Employee Mobility Against Legal Protection for Human Capital Investment*, 27 BERKELEY J. EMP. & LAB. L. 287, 295–97 (2006).

[202] *Id.* at 301–03.

[203] *See* Jonathan M. Barnet & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 971 (2020) ("[I]t is important not to overlook the possibility that the *absence* of noncompetes can block certain *other* employment opportunities.").

[204] *See* Tobias Kollmann & Julia Christofor, *International Entrepreneurship in the Network Economy: Internationalization Propensity and the Role of Entrepreneurial Orientation*, 12 J. INT. ENTREP. 43, 50 (2014) ("Another factor affecting market entry strategy and the make-up of internationalization propensity is the protection of proprietary rights . . . Especially in the network economy where knowledge-based business models and the foundation of firms are prevalent and where information plays a central role, both as a production factor and source of competitive advantage, the protection of proprietary rights is relevant.").

[205] *See generally, e.g.*, Mark Lemley & Orly Lobel, *Banning Noncompetes is Good for Innovation*, HARV. BUS. REV. (Feb. 6, 2023), https://hbr.org/2023/02/banning-noncompetes-is-good-for-innovation [https://perma.cc/KP5H-LHJ6]; Charles Tait Graves & James A. DiBoise, *Do Strict Trade Secret and Non-Competition Laws Obstruct Innovation?*, 1 ENTREPRENEURIAL BUS. L. J. 323 (2006).

[206] Mack, *supra* note 147, at 1210.

competition."[207] However, this depiction is an incomplete picture. Three of the nation's four biggest tech monopolies, Apple, Facebook, and Google, are all located in California.[208] Moreover, California falls outside the top 20 states in the number of new small business startups *per capita* nationwide.[209] North Dakota and Oklahoma, two states with comparable noncompete bans[210], also fall outside the top 20.[211] On the other hand, at least 16 of the top 20 states have relatively loose noncompete regulations.[212] Overall, though innovation can still occur without noncompete enforcement, noncompete agreements are likely necessary to adequately protect small businesses from information theft, encourage entrepreneurship, and challenge monopolistic behavior. Correspondingly, increased competition leads to more available jobs overall.

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[207] *Id.*

[208] *Big Tech Monopolies*, AM. ECON. LIBERTIES PROJECT, https://www.economicliberties.us/big-tech-monopolies-2/#:~:text=The%20harms%20Amazon%2C%20Apple%2C%20Facebook,list%20of%20their%20recent%20abuses [https://perma.cc/RN6Y-NQG2]; Anna Edgerton & Emily Birnbaum, *Big Tech's $95 Million Spending Spree Leaves Antitrust Bill on Brink of Defeat*, BLOOMBERG (Sept. 6, 2022, 9:00 AM), https://www.bloomberg.com/news/articles/2022-09-06/tech-giants-spree-leaves-antitrust-bill-on-brink-of-defeat#xj4y7vzkg [https://perma.cc/A4AQ-FUC5].

[209] Eliza Siegel, *States with the Most New Small Business Per Capita*, SIMPLY BUS. (Sept. 17, 2021), https://www.simplybusiness.com/simply-u/articles/2021/09/states-most-new-small-businesses-capita/ [https://perma.cc/SW2K-LT5D] (analyzing Business Formation Statistics from the U.S. Census Bureau); *see also* Jon Jones, *U.S. Cities with the Most New Businesses Per Capita [2022 Edition]*, SMARTEST DOLLAR (Oct. 28, 2022), https://smartestdollar.com/research/cities-with-the-most-new-businesses-per-capita [https://perma.cc/K4M5-6P5P].

[210] Leah Shepherd, *More States Block Noncompete Agreements*, SHRM (Sept. 15, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/states-restrict-noncompete-agreements-colorado.aspx [https://perma.cc/R98W-FRHW].

[211] Siegel, *supra* note 209.

[212] *Compare* Siegel, *supra* note 209, *with* SEYFARTH, 50 STATE DESKTOP REFERENCE: WHAT BUSINESSES NEED TO KNOW ABOUT NON-COMPETES AND TRADE SECRETS LAW 2–13 (2021), https://www.seyfarth.com/a/web/70844/2020-2021%2050%20State%20Non-Compete%20Guide.pdf. [https://perma.cc/WK7A-UWF8]. Strict noncompete regulations include states where noncompetes are banned, are only applied to highly compensated employees, or are only applied to buyers and sellers of businesses. As a result, "loose" noncompete regulations exclude Illinois, Montana, Colorado, and Washington, D.C.

V. RECOMMENDATION: MAINTAINING THE STATUS QUO

Instead of a nationwide noncompete ban, this article proposes maintaining state-by-state noncompete regulation. Maintaining state autonomy over noncompetes better accounts for the complexity of employment relationships; and the complexity of the American economy.

First, employment relationships are highly complex and the circumstances surrounding a noncompete's reasonableness can vary significantly. The validity of a noncompete depends on a variety of factors including term, geographic area, type of competitor, type of work performed, consideration tendered, and access to proprietary information.[213] Depending on the employment circumstances, these factors can favor the employer or employee. A nationwide ban would ignore these factors and rule in favor of the employee every time. This approach fails to consider the employer's interests and dismisses situations where noncompetes legitimately apply. This overly expansive measure will likely perpetuate information theft and industry monopolization, leading to higher levels of unemployment over time. On the other hand, state legislatures frequently tailor noncompete legislation to meet the complexities of the employment relationship such as imposing notice requirements, geographic restrictions, or industry-specific exemptions.[214] As a result, maintaining state autonomy over noncompetes more adequately addresses the complexities of the employment relationship, and better balances the interests of both the employer and employee.

Second, the American economy is highly complex, and each state comprises a unique combination of industries, workers, and consumers. For example, Nevada, Pennsylvania, and New Jersey have the largest casino industries in the United States.[215] Texas is the nation's largest producer of total crude oil.[216] Texas, Pennsylvania, Florida, and New York are four of the top five states containing the highest number of hairdressers, cosmetologists, and

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[213] Kenneth R. Swift, *Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements*, 24 HOFSTRA LAB. & EMP. L. J. 223, 226-31 (2007).

[214] *Supra* notes 32–39.

[215] *Gross Gaming Revenue of Casinos in the United States in 2021, By State*, STATISTA, https://www.statista.com/statistics/187926/gross-gaming-revenue-by-state-us/ [https://perma.cc/L2LN-VXZC].

[216] Ward Williams, *Top 6 Oil-Producing States*, INVESTOPEDIA (Aug. 1, 2022), https://www.investopedia.com/financial-edge/0511/top-6-oil-producing-states.aspx [https://perma.cc/9MLU-N2EP].

hairstylists.[217] It is likely no coincidence that all the states previously mentioned have relatively loose noncompete restrictions. Meanwhile, California has the highest number of Amazon warehouse workers[218], while Illinois has the highest number of Jimmy John's employees[219]. With each employer's history of imposing exploitive noncompete agreements[220], it is likely necessary for California and Illinois to enact more stringent regulations. There is a multitude of other economic factors that vary from state to state. Some industries may warrant more stringent noncompete regulation while others may require an expansion of noncompete enforcement. A nationwide ban—even if just for low-wage employees—fails to consider these local economic realities. Alternatively, state legislatures are better equipped to recognize economic discrepancies and administer applicable legislation.

CONCLUSION

Altogether, a nationwide blanket ban on noncompetes will likely lead to unintended consequences for both employers and employees, including for some low-wage workers. Contrary to the FTC's belief, though many noncompetes have been used to unnecessarily restrict low-wage workers' mobility, some noncompetes are legitimately used to protect proprietary information. Protecting proprietary information is necessary for innovation, entrepreneurship, and healthy competition. Alternative measures including nondisclosure agreements, nonsolicitation agreements, and trade secret law, fall short in protecting this information. Moreover, failure to protect proprietary information may lead to decreases in human capital investment and employment opportunities over time. As a result, instead of an FTC-imposed nationwide ban, states should maintain their autonomy in regulating noncompetes. State-by-state regulation better accounts for the complexities of the employment relationship, as well as the complexities of the American economy. Overall, abolishing noncompete

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[217] *Occupational Employment and Wages, May 2021: 39-5012 Hairdressers, Hairstylists, and Cosmetologists*, U.S. BUREAU LAB. STAT., https://www.bls.gov/oes/current/oes395012.htm [https://perma.cc/7A2H-TKRK].

[218] *Amazon Employees by State 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/amazon-employees-by-state [https://perma.cc/4UND-MKH5].

[219] *Number of Jimmy John's Locations in the United States*, SMARTSCRAPERS (Apr. 23, 2021), https://rentechdigital.com/smartscraper/location-reports/jimmyjohns-locations-in-united-states [https://perma.cc/U38D-G6AN].

[220] Fraser, *supra* note 58, at 88.

agreements entirely fails to account for any of the above considerations and will likely lead to long-term negative consequences for the labor market.