University of Miami Business Law Review

Volume 31 | Issue 1 Article 6

January 2023

In Support of UREAA: The Case for Timely, Uniform, and Comprehensive Action Against Restrictive Employment Agreements

Ryan Greenberg

In Support of UREAA: The Case for Timely, Uniform, and Comprehensive Action Against Restrictive Employment Agreements

Ryan Greenberg

Tens of millions of American workers across a range of occupations are bound by restrictive employment agreements. The COVID-19 pandemic has caused people to leave their jobs in search of more money, flexibility, and happiness—deemed the Great Resignation—shining a new light on the volatility of labor markets. But restrictive employment agreements limit workers' exit options and stymie competition, in tension with our nation's antitrust laws. The effects of these agreements are particularly damaging to low-wage workers. Rightfully so, policymakers across jurisdictions and political ideologies are increasingly introducing measures to curtail the abuse of these agreements. This area of the law would benefit from timely, uniform, and comprehensive reform. The Uniform Restrictive Employment Agreement Act ("UREAA") has emerged as a forward-thinking piece of legislation that seeks to unify the current patchwork of state laws targeting various renditions of restrictive employment agreements. Every state should adopt UREAA, and the federal government should join their surging fight against restrictive employment agreements.

This Note expresses the state of the law as it exists on August 1, 2022. Part I ushers in the concept of labor mobility and its particular importance to low-wage workers. Part II explains how current events are influencing workers' changing attitudes towards their jobs, spotlighting the need for labor mobility. Part III introduces a widespread barrier to labor mobility—restrictive employment agreements, which function as restraints of trade. Part IV presents the role of antitrust as a safeguard against

unreasonable restraints of trade. Part V synthesizes common arguments for and against restrictive employment agreements as unreasonable restraints of trade, exploring the changing landscape of restrictive employment agreement laws, as jurisdictions re-examine their usefulness and fairness. Part VI presents this author's view that action against restrictive employment agreements should be timely, uniform, and comprehensive. Part VII encourages states to adopt UREAA in consideration of these metrics, while also acknowledging the Act's limitations and highlighting areas in which the federal government can contribute. Part VIII concludes by providing a model for multilevel enforcement of restrictive employment agreement laws.

I. A PRIMER ON LABOR MOBILITY

Labor mobility refers to the degree to which workers are able and willing to move from one job to another, or from one area to another, to work.[1] Labor mobility is important for workers and employers alike.[2] Labor mobility allows workers whose aspirations or skills are a poor match for their job or location to improve their economic circumstances and quality of life, empowering them to find the best possible employment fit and providing employers with a large pool from which to recruit the best possible employees.[3] Unremarkably, employees who improve their financial and personal situations are more likely to be happy and productive at work.[4]

Movement that occurs across occupations is known as occupational mobility.[5] Ease of occupational mobility allows workers to leverage their existing skills to move into higher-paying roles with more growth opportunities.[6] Occupational mobility can be restricted through regulations, licensing, training, or education requirements that prevent the free flow of labor from one industry to another.[7] Movement that occurs across physical space is known as geographic mobility.[8] Ease of geographic mobility allows workers to seek out opportunities in new

---

1 *See Labour Mobility*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/labour-mobility.

2 *See* Brent Radcliffe, *The Economics of Labor Mobility*, INVESTOPEDIA (Mar. 30, 2022), https://www.investopedia.com/articles/economics/09/labor-mobility.asp.

3 Jason Long & Joseph Ferrie, "*Labour Mobility*", OXFORD ENCYC. OF ECON. HISTORY 1, 1 (2006), https://faculty.wcas.northwestern.edu/~fe2r/papers/Labour%20Mobility.pdf; Jacqueline A. Carosa, *Employee Mobility and the Low Wage Worker: The Illegitimate Use of Non-Compete Agreements*, 67 DOCKET D1, D7 (2019).

4 *See generally* Radcliffe, *supra* note 2.

5 Long & Ferrie, *supra* note 3, at 1.

6 Helen Thompson, *Workers Gain New Tool to Locate More-Lucrative Jobs*, ESRI (Mar. 2, 2021), https://www.esri.com/about/newsroom/publications/wherenext/workers-gain-new-tool-to-locate-more-lucrative-jobs/.

7 Adam Hayes, *Occupational Labor Mobility*, INVESTOPEDIA (Aug. 16, 2021), https://www.investopedia.com/terms/o/occupational-labor-mobility.asp.

8 *Id.*

markets.[9] Geographic mobility can be restricted through physical, geographic, and political barriers to movement.[10]

Labor mobility is of heightened importance for low-wage workers.[11] A low-wage worker might be eager to change jobs for a more favorable work schedule or a small increase in compensation or benefits, as compared to a high-wage worker who is less apt to start over with a new employer.[12] Many low-wage workers, such as those with substantial debt, value the ability to move from one job to another without restraint.[13]

II. INTERRELATED ECONOMIC CHALLENGES HIGHLIGHT THE NEED FOR LABOR MOBILITY

In April 2021, 3.8 million American workers quit their jobs, a record-high for a single month.[14] By July 2021, the U.S. economy reached just over four million quits.[15] Monthly quit numbers have not dipped below the four-million mark since, reaching a new record-high of 4.53 million in March 2022, followed by 4.4 million in April and 4.3 million in May.[16] Over a year into the phenomena, the "Great Resignation" shows little sign of slowing and may persist.[17]

---

9 Clay Halton, *Geographical Labor Mobility*, INVESTOPEDIA (Aug. 15, 2022), https://www.investopedia.com/terms/g/geographical-mobility-of-labor.asp; *see* Thompson, *supra* note 6.

10 Halton, *supra* note 9.

11 Carosa, *supra* note 3, at D34.

12 *Id.*; Todd Gabe et al., *Can Low-Wage Workers Find Better Jobs?*, FED. RSRV. BANK OF N.Y. 1, 18 (Apr. 2018), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr846.pdf.

13 *See* Carosa, *supra* note 3, at D34.

14 Stephanie Horan, *A Record 3.8 Million Workers Quit Their Jobs in April 2021: Who Are They?*, YAHOO! (Jul. 22, 2021), https://www.yahoo.com/now/record-3-8-million-workers-110039995.html.

15 Rebecca Klapper, *Nearly 4 Million Americans Quit Jobs in July, Second Highest Record*, NEWSWEEK (Sept. 8, 2021), https://www.newsweek.com/nearly-4-million-americans-quit-jobs-july-second-highest-record-1627160.

16 *Id.*; Thomas Ahearn, *"Great Resignation" Sees Record 4.5 Million Workers Quit in March 2022*, ESRCHECK (May 3, 2022), https://www.esrcheck.com/2022/05/03/great-resignation-4-5-million-workers-quit-march-2022/.

17 Cagan Koc, *Great Resignation Isn't Slowing and May Persist, Randstad Says*, BLOOMBERG (Apr. 3, 2022), https://www.bloomberg.com/news/articles/2022-04-03/great-resignation-isn-t-slowing-and-may-persist-randstad-says; *see* Diana Zoga, *What Do Workers Want as The 'Great Resignation' Continues?*, NBCDFW (June 13, 2022), https://www.nbcdfw.com/news/nbc-5-responds/what-do-workers-want-as-the-great-resignation-continues/2991181/. *But see* Pablo Fernandez Cras & Cagan Koc, *Great Resignation is Slowing Amid High Inflation, Randstad Says*, BLOOMBERG (July 26, 2022), https://www.bloomberg.com/news/articles/2022-07-26/great-resignation-is-slowing-amid-high-inflation-randstad-says.

Though employee turnover has steadily risen for the past decade, individuals often point to the novel COVID-19 pandemic as a dominant force in their decision to resign.[18] Americans, stuck at home due to local shut-downs or remote work policies, are rethinking what work means to them, how they are valued, and how they spend their time.[19] They are leaving their current work arrangements in search of more money, more flexibility, and more happiness.[20] Robert Reich, former U.S. Secretary of Labor, put it bluntly: "[Employees] don't want to return to backbreaking or boring, low wage, sh-t jobs. Workers are burned out. They're fed up. They're fried. In the wake of so much hardship, and illness and death during the past year, they're not going to take it anymore."[21]

Workers are seeking out companies with better company culture, including flexible work arrangements and a healthy work-life balance.[22] The pandemic has amplified Americans' existing concerns about their lack of career progression and skills development.[23] Furthermore, laborers now place a higher value on employer-provided benefits such as retirement plans; health, disability, and life insurance; paid family medical leave; and emergency savings programs.[24]

Many of us, not just those in the workforce, remain wary about the next variant, undoubtedly affecting our productivity and attitudes about our work situations.[25] In May 2022, the U.S. death toll from the pandemic reached one million individuals.[26] However, COVID-19 is far from the only factor driving workforce behavior.[27] The Great Resignation has in turn led to a labor shortage, and these interrelated challenges are wreaking

---

18 *See* Ian O. Williamson, *The "Great Resignation" Is a Trend That Began Before the Pandemic – and Bosses Need to Get Used to it*, BIG THINK (Nov. 16, 2021), https://bigthink.com/the-present/the-great-resignation/; Phillip Kane, *The Great Resignation is Here, and It's Real*, INC. (Aug. 26, 2021), https://www.inc.com/phillip-kane/the-great-resignation-is-here-its-real.html.

19 *See* Andrea Hsu, *As the Pandemic Recedes, Millions of Workers Are Saying 'I Quit'*, NPR (June 24, 2021), https://www.npr.org/2021/06/24/1007914455/as-the-pandemic-recedes-millions-of-workers-are-saying-i-quit; Kane, *supra* note 18.

20 Hsu, *supra* note 19.

21 Abby Vesoulis, *Why Literally Millions of Americans Are Quitting Their Jobs*, TIME (Oct. 13, 2021), https://time.com/6106322/the-great-resignation-jobs/.

22 Caroline Castrillon*, Why Millions of Employees Plan to Switch Jobs Post-Pandemic*, FORBES (May 16, 2021), https://www.forbes.com/sites/carolinecastrillon/2021/05/16/why-millions-of-employees-plan-to-switch-jobs-post-covid/?sh=1b42bc6d11e7.

23 *See id.*

24 *See id.*

25 *See* Vesoulis*, supra* note 21.

26 Carla K. Johnson, *US Deaths from COVID Hit 1 Million, Less Than 2 1/2 Years in*, AP NEWS (May 16, 2022), https://apnews.com/article/us-covid-death-toll-one-million-7cefbd8c3185fd970fd073386e442317.

27 Vesoulis*, supra* note 21.

havoc on the U.S. job market, to the detriment of both employers and employees.[28]

The labor shortage, a natural consequence of the Great Resignation, is itself an expression of widespread worker dissatisfaction.[29] Americans that stayed put in jobs are grappling with increasing responsibility, creating a greater risk of burnout and resignation.[30] Half of U.S. workers describe their workplace as understaffed, and those workers are more likely to report thoughts of quitting.[31] Workers perceive understaffed companies as struggling enterprises, accelerating this desire.[32] This vicious job market feedback loop has made it harder for employers to hire and retain employees.[33] There's also the issue of increasing prices that outpace wage growth, on top of rising childcare costs that make work simply unaffordable for some Americans.[34] Andrew Garin, an economics professor at the University of Illinois, pointed to the construction industry as one example of an industry whose labor shortage issue isn't due to a shortage of workers as much as its due to a shortage of workers at the going rate.[35] Even though the labor shortage has forced companies to raise wages at the fastest rate in decades, record inflation has swallowed up workers' gains, leaving most with less buying power than when the pandemic started.[36]

These economic challenges have accentuated the need for labor mobility, especially among low-wage workers.[37] Front-line workers, tired of customer mistreatment and concerned about exposure to COVID-19,

---

[28] Eric Rosenbaum, *A Vicious Job Market Feedback Loop is Making the Great Resignation Even Worse — for Employers*, CNBC (Nov. 5, 2021, 6:30 AM), https://www.cnbc.com/2021/11/05/the-vicious-job-market-feedback-loop-making-great-resignation-worse.html.

[29] *See* Abigail Susik, *Could the Great Resignation Help Workers? Take a Look at History.*, N.Y. TIMES (Dec. 11, 2021), https://www.nytimes.com/2021/12/11/opinion/great-resignation-labor-shortage.html.

[30] *See* Vesoulis*, supra* note 21.

[31] *See* Rosenbaum, *supra* note 28.

[32] *See id.*

[33] *Id.*

[34] *See id.*; Vesoulis*, supra* note 21.

[35] *See* Patrick Sisson, *One Solution to a Shortage of Skilled Workers? Diversify the Construction Industry.*, N.Y. TIMES (Sept. 25, 2021), https://www.nytimes.com/2021/09/25/business/dealbook/labor-shortage-diversity.html.

[36] Ben Winck & Andy Kiersz, *Inflation Has Been Historically High for Most of 2021. But the Stars Are Aligning for Strong Wage Growth That Could Offset It.*, BUS. INSIDER (Dec. 10, 2021, 1:05 PM), https://www.businessinsider.com/labor-shortage-inflation-high-wage-growth-outlook-cpi-november-prices-2021-12.

[37] *See* Susan Lund et al., *The Future of Work After COVID-19*, MCKINSEY & CO. (Feb. 18, 2021), https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19.

have resigned at staggering rates.[38] Perhaps unsurprisingly, the greatest increases in quit rates are occurring in sectors such as leisure and hospitality, where office workers are few, working remotely is seldom an option, and wages are low.[39] Much of the Great Resignation is, in effect, a product of low-paid workers seeking higher-paying jobs.[40]

Most workers view job-hopping as a strategic and beneficial career strategy.[41] But what happens when an earlier employer seeks to limit a former employee's move? If the employee signed a restrictive employment agreement, he or she may be legally obligated to comply with the employer's demand, to the detriment of the employee and the public at large.

III. PERVASIVE BARRIERS TO LABOR MOBILITY: RESTRICTIVE EMPLOYMENT AGREEMENTS AS RESTRAINTS OF TRADE

Restrictive employee agreements prohibit or limit a worker from working elsewhere after a work relationship ends.[42] Non-compete agreements are the best-recognized flavor of restrictive employee agreements, often considered the most restrictive.[43] Broadly, the term non-compete agreement refers to an agreement between an employer and an employee that prohibits the employee from accepting employment in a similar line of work or establishing a competing business following the parties' separation.[44] About one in every five American workers—nearly

---

38 *See* Áine Cain & Allana Akhtar, *Burned Out Frontline Workers Are Seeking Out the Lesser Evil in Their Job Searches*, BUS. INSIDER (Oct. 10, 2021, 8:05 AM), https://www.businessinsider.com/burned-out-frontline-workers-lesser-evil-jobs-customers-harassment-2021-10; Megan Leonhardt, *The Great Resignation is Hitting These Industries Hardest*, FORTUNE (Nov. 16, 2021, 2:39 PM), https://fortune.com/2021/11/16/great-resignation-hitting-these-industries-hardest/.

39 Justin Fox, *The Great Resignation is Great for Low-Paid Workers*, BLOOMBERG (Nov. 18, 2021, 6:00 AM), https://www.bloomberg.com/opinion/articles/2021-11-18/the-great-resignation-is-great-for-low-paid-workers.

40 *Id.*

41 *Id.*

42 UNIF. RESTR. EMP. AGR. ACT 1 (prefatory note) (UNIF. L. COMM'N 2021).

43 *See id.* 1 (prefatory note), § 2 cmt.; Stephen L. Brodsky, *Restrictive Covenants in Employment and Related Contracts: Key Considerations You Should Know*, A.B.A. (Feb. 8, 2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/restrictive-covenants-employment-related-contracts/.

44 Sandeep Vaheesan & Matthew Jinoo Buck, *Non-Competes and Other Contracts of Dispossession*, 2022 MICH. ST. L. REV. 113, 119 (Sandeep Vaheesan is the Legal Director of Open Markets Institute and former counsel in the Consumer Financial Protection Bureau's Office of Regulations. Matthew Jinoo Buck is a J.D. Candidate at Yale law school and Senior Fellow at the American Economic Liberties Project, as well as a former policy analyst at Economic Liberties and Open Markets Institute).

thirty million people, across a wide range of occupations—are contractually bound by non-compete agreements.[45]

Other common varieties of *employer-employee* restrictive employment agreements include non-solicitation agreements prohibiting the solicitation of former customers; no-business agreements prohibiting doing business with former customers; confidentiality or nondisclosure agreements prohibiting the use or disclosure of trade secrets or other confidential information; training-repayment agreements to pay back training expenses if the employee leaves early; no-business agreements prohibiting doing business with former customers; no-recruit agreements prohibiting the recruitment or hiring of former co-workers; and payment-for-competition agreements to pay the employer if the employee competes, solicits, recruits, or does business.[46] On the other hand, no-poach agreements are *employer-employer* restrictive employment agreements—deals made between competing employers not to hire or pursue each other's employees.[47]

Restrictive employment agreements usually arise in the context of employment or separation agreements.[48] Thus, these agreements may appear as restrictive covenants within a larger contract.[49] Regardless of the name given to it by the contracting parties or the context in which they arise, restrictive employee agreements are typically reviewed under state statutory or common law.[50] States vary widely in their treatment of restrictive employee agreements.[51] Some states impose few restrictions on

---

45 *See id.* at 120.

46 UNIF. RESTR. EMP. AGR. ACT 1 (prefatory note).

47 Kelly Anderson, *DOJ Focus on No-Poach Cases Could Have Wide-Ranging Consequences for Managers*, SHRM (Aug. 11, 2021), https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/no-poach-cases-.aspx.

48 Teresa Lewi et al., *Recent Federal and State Laws Restrict Use of Employee Non-Competition Agreements by Government Contractors and Other Employers*, INSIDE GOV'T CONTS. (Aug. 19, 2021), https://www.insidegovernmentcontracts.com/2021/08/recent-federal-and-state-laws-restrict-use-of-employee-non-competition-agreements-by-government-contractors-and-other-employers/.

49 *See Restrictive Covenants in Employment Contracts - Employer Liability*, DORSEY & WHITNEY LLP (Apr. 28, 2020), https://www.dorsey.com/newsresources/publications/client-alerts/2020/04/restrictive-covenants-in-employment-contracts ("While restrictive covenants are most commonly found in employment contracts, they may be included in several other types of agreements.").

50 *See Antitrust Considerations in Employment Agreement Non-Compete Clauses*, PRACTICAL L. ANTITRUST, https://1.next.westlaw.com/Document/If28fc8b60fbe11e698dc8b09b4f043e0/View/FullText.html?originationContext=knowHw&transitionType=KnowHowItem&contextData=(sc.DocLink)&isplcus=true&firstPage=true&bhcp=1 (last visited Aug. 1, 2022).

51 *See id.*

their use, while others ban certain agreements in most circumstances or impose criminal penalties for employers who use them.[52]

Fittingly, restrictive employment agreements are also known as restraint of trade agreements, which prohibit the contracting party from conducting his or her trade or business as he or she otherwise would in the absence of the agreement.[53] For hundreds of years, restraints of trade were considered unequivocally illegal.[54] Over time, exceptions to the general rule developed, and courts began distinguishing between *general* and *limited* restraints of trade.[55] General restraints of trade, such as agreements that limited a party's ability to accept employment or establish a competing business indefinitely and without bounds, were still considered unreasonable (illegal) and, thus, unenforceable.[56] In contrast, limited restraints of trade, such as agreements that constrained a party's ability to accept employment or establish a competing business within a sensible geographic area or within a sensible period of time, came to be considered reasonable (legal) and thus enforceable.[57]

The distinction between unreasonable and reasonable restraints of trade persists today, though, as mentioned, the standard that restrictive employment agreements are judged against differs across jurisdictions.[58] For example, in enforceable states, non-compete agreements must generally be narrowly tailored to protect an employer's legitimate business interests, and this protection must be reasonable with respect to duration, geographical scope, and the line of business restricted.[59] An agreement is reasonable only if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.[60]

---

52 *See id.*

53 *See id.*

54 *See* Alger v. Thacher, 36 Mass. 51, 52-53 (1837) ("Among the most ancient rules of the common law, we find it laid down, that bonds in restraint of trade are void. As early as the second year of Henry V. (A. D. 1415) we find by the Year Books, that this was considered to be old and settled law."); Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 539 (Wyo. 1993) ("The common law policy against contracts in restraint of trade is one of the oldest and most firmly established." (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 185–188, intro. note (AM. L. INST. 1981))), *overruled by* Hassler v. Circle C Res., 505 P.3d 169 (Wyo. 2022).

55 *Alger*, 36 Mass. at 53.

56 *See id.*

57 *Id.*

58 *See* Brodsky, *supra* note 43.

59 *Non-Competition Agreements: Overview*, FINDLAW (Dec. 17, 2021), https://www.findlaw.com/employment/hiring-process/non-competition-agreements-overview.html.

60 Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 648–49 (1960).

IV. THE ROLE OF ANTITRUST: PREVENTING UNREASONABLE RESTRAINTS OF TRADE

As restraints of trade, restrictive employee agreements may implicate our nation's antitrust laws.[61] Antitrust laws prohibit business practices that unreasonably deprive Americans of the benefits of competition.[62] A competitive marketplace facilitates high-quality job creation and empowers workers to switch jobs or negotiate a higher wage.[63] Aggressive competition in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation.[64] Competition also gives businesses the opportunity to compete on legitimate merits such as price and quality.[65] Plainly, antitrust laws protect the welfare of all Americans, including American workers.[66]

The Sherman Antitrust Act of 1890 remains the principal federal law expressing our nation's commitment to a free market economy unencumbered by anticompetitive restraints.[67] Section one of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[68] Courts do not read the Sherman Act literally; the statute has been interpreted to outlaw only *unreasonable* restraints of trade.[69] A literal reading of the Sherman Act would smother our economy, since any contract can be said to somewhat restrain trade.[70]

However, certain acts are considered so anticompetitive that they are, in every instance, deemed illegal.[71] Some agreements, such as plain agreements among competitors to fix prices, rig bids, or divide markets, are so repugnant to American antitrust ideals that they are considered *per se* violations of the Sherman Act.[72] These types of agreements are so likely

---

61 PRACTICAL L. ANTITRUST, *supra* note 50.

62 *Antitrust Enforcement and the Consumer*, U.S. DEP'T OF JUST. 1, 1, https://www.justice.gov/atr/file/800691/download (last visited Aug. 1, 2022).

63 Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

64 *Guide to Antitrust Laws*, F.T.C., https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws (last visited Aug. 1, 2022).

65 *Mission*, U.S. DEP'T OF JUST. (July 20, 2015), https://www.justice.gov/atr/mission.

66 *Joint Antitrust Statement Regarding COVID-19 and Competition in Labor Markets*, U.S DEP'T OF JUST. & F.T.C. 1, 2 (Apr. 2020), https://www.justice.gov/opa/press-release/file/1268506/download.

67 U.S. DEP'T OF JUST., *supra* note 62, at 2.

68 15 U.S.C. § 1.

69 *The Antitrust Laws*, F.T.C., https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Aug. 1, 2022).

70 *See* U.S. DEP'T OF JUST., *supra* note 62, at 2.

71 F.T.C., *supra* note 69.

72 *Id.*

to be harmful to competition and to have no significant benefits that they do not warrant the time and expense required for particularized inquiry into their effects.[73]

Agreements that have not been deemed *per se* illegal are analyzed under the rule of reason.[74] Restrictive employee agreements are typically reviewed under this standard.[75] The rule of reason focuses on the state of competition in the relevant market before and after an agreement was undertaken.[76] Courts assess whether the agreement likely harms (or harmed) competition by (1) increasing the ability or incentive of a firm to profitably raise prices *above*; or (2) reducing output, quality, service, or innovation *below* what would likely prevail in the absence of the agreement.[77] If the rule of reason analysis is sufficient to raise a presumption of anticompetitive harm, defendants have an opportunity to rebut the presumption by showing that the agreement is reasonably necessary to achieve procompetitive benefits that likely offset the harm.[78]

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) are the main entities tasked with enforcing federal antitrust law.[79] The FTC may bring civil enforcement actions, while the DOJ may bring both civil and criminal actions.[80] Additionally, private parties—a phrase that includes individuals corporations, and states—are incentivized bring antitrust claims by the prospects of recovering treble damages, including costs and attorney's fees.[81]

Most states themselves have antitrust laws that mirror the federal antitrust laws.[82] These laws generally apply to violations that occur wholly in one state and are typically enforced through the offices of state attorneys

---

73 *Antitrust Guidelines for Collaborations Among Competitors*, F.T.C. & U.S. DEP'T OF JUST. 1, 3 (Apr. 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdoj guidelines-2.pdf.

74 *Id.*

75 J. Mark Gidley et al., *Analysis: FTC Encouraged to Ban or Limit Non-Compete Agreements in July 9, 2021 Executive Order*, WHITE & CASE (July 19, 2021), https://www.whitecase.com/publications/alert/analysis-ftc-encouraged-ban-or-limit-non-compete-agreements-july-9-2021.

76 F.T.C. & U.S. DEP'T OF JUST., *supra* note 73, at 4.

77 *Id.*

78 *Id.*

79 U.S. DEP'T OF JUST., *supra* note 62, at 3.

80 *Id.*; *see The Enforcers*, F.T.C. (last visited Aug. 1, 2022) https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers ("The FTC . . . may refer evidence of criminal antitrust violations to the DOJ. Only the DOJ can obtain criminal sanctions.").

81 Kenneth Ewing, *Private Anti-Trust Remedies Under US Law*, PRACTICAL L. CO. (2006/07), https://www.steptoe.com/images/content/1/7/v1/1731/2804.pdf.

82 U.S. DEP'T OF JUST., *supra* note 62, at 3.

general.[83] State attorneys general may also bring federal antitrust suits on behalf of individuals residing within their states ("*parens patriae*" suits), or on behalf of the state as a purchaser.[84]

V. ARE RESTRICTIVE EMPLOYMENTS AGREEMENTS UNREASONABLE RESTRAINTS OF TRADE?

Those in favor of restrictive employee agreements argue that they are necessary to protect an employer's intangible property such as trade secrets, customer lists, and employee training.[85] These agreements protect employers from employees who might otherwise misuse confidential information or exercise special influence over customers.[86] Without restrictive employment agreements, an employee or subsequent employer can "free ride" on a prior employer's investments in intangible property.[87] A employee bound by a restrictive employment agreement benefits by his or her greater importance to the organization as a result of exposure to trade secrets, customer lists, or special training.[88] In this way, a well-drafted restrictive employment agreement "preserves a careful and necessary economic balance."[89] Another argument is that restrictive employee agreements reduce employee turnover by matching companies and employees who both seek out long-term working relationships.[90] Others maintain that the parties' freedom to contract is an overriding consideration.[91]

Critics of restrictive employee agreements posit that they are ineffective tools for protecting trade secrets and other employer investments.[92] Other bodies of law, such as trade secret law and intellectual property law, serve the same function more effectively.[93] And

---

83 *Id.*

84 F.T.C., *supra* note 80.

85 *See* Vaheesan & Buck, *supra* note 44, at 117; Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531, 546 (Wyo. 1993) ("Both the employer and the employee invest in success by expressing a commitment to one another in the form of a reasonable covenant not to compete. For the employer, this commitment may mean providing the employee with access to trade secrets, customer contacts or special training. These assets of the business are entitled to protection.").

86 *See Hopper*, 861 P.2d at 546.

87 *See* Vaheesan & Buck, *supra* note 44, at 158.

88 *Hopper*, 861 P.2d at 546.

89 *Id.*

90 *What is a Non-Competition Agreement?*, CONTS. COUNS., https://www.contractscounsel.com/t/us/non-competition-agreement (last visited Aug. 1, 2022).

91 *See* Brodsky, *supra* note 43.

92 *See* Vaheesan & Buck, *supra* note 44, at 159.

93 *Id.* at 46-49.

the use of nonlegal measures—such as offering stock options, better terms of employment, and higher wages and benefits—are superior to the use of restrictive employee agreements.[94] With long-term stable employment no longer the dominant model, employees should be able to take their services to a an employer who offers greater opportunities.[95]

Workers bound by restrictive employee agreements are restricted from utilizing their full set of experiences, knowledge, and skills, reducing labor mobility.[96] Most dissatisfied workers bound by a restrictive covenant are limited to three socially undesirable outcomes: (1) staying with their current employer; (2) finding employment in a line of work or an area that is outside the scope of the covenant; or (3) accepting unemployment until the covenant expires.[97] Restrictive employment agreements may compel workers to stay in a job where they are subject to gender or racial discrimination, sexual harassment, or other forms of mistreatment and health threats.[98]

Restrictive employment agreements unfairly affect labor market competition.[99] By limiting competition for workers among employers, restrictive employment agreements negatively affect wages and employee welfare.[100] Because bound workers are unable to leverage any increase in marketability into a better position elsewhere, restrictive employee agreements discourage them from seeking out self-training and other forms of self-improvement in their current roles.[101] Workers who switch jobs are more likely to leave their industry if they are covered by a non-compete.[102] These workers may be faced with reduced compensation, atrophy of their skills, and estrangement from their professional networks.[103] In states where non-compete agreements are enforceable, there are both reduced labor movement and wages for *all* workers, not just

---

94 *See id.* at 50-51.

95 MARION G. CRAIN ET AL., WORK LAW: CASES AND MATERIALS 303-04 (4th ed. 2020).

96 *See* Vaheesan & Buck, *supra* note 44, at 158-59.

97 *Id.* at 26.

98 *Id.*

99 *See* Evan Starr, *The Ties that Bind Workers to Firms: No-Poach Agreements, Noncompetes, and Other Ways Firms Create and Exercise Labor Market Power*, PROMARKET (Jan. 3, 2022), https://promarket.org/2022/01/03/workers-poaching-noncompete-employers-labor-antitrust/ (Evan Starr is an author and an Associate Professor of Management & Organization at the Robert H. Smith School of Business, University of Maryland).

100 *See* Vaheesan & Buck, *supra* note 44, at 141; Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 55 (2021).

101 *See* Vaheesan & Buck, *supra* note 44, at 162.

102 *Non-Compete Contracts: Economic Effects and Policy Implications*, U.S. DEP'T OF TREAS. 1, 18 (Mar. 2016), https://home.treasury.gov/system/files/226/Non_Compete_Contracts_Econimic_Effects_and_Policy_Implications_MAR2016.pdf.

103 *Id.*

those bound by non-competes.[104] These negative effects spill over to entire industries and neighboring states.[105]

Moreover, restrictive employment agreements unfairly affect product market competition.[106] They constrict information flow between competitors and preempt future competition from departing employees.[107] If a substantial portion of an industry's workforce is covered by a non-compete, it discourages new firms from entering the market, lessening product market competition, increasing prices, and reducing consumer welfare.[108]

Employers increasingly use restrictive employment agreements to restrain lesser skilled, low-wage employees, limiting their mobility and access to higher-paying jobs.[109] Those who push restrictive employment agreements on low-wage workers cannot plausibly have a legitimate business reason for doing so, as these employees are unlikely to possess confidential information or special skills.[110]

Thankfully, large companies' use of broad and abusive restrictive employee agreements has received considerable attention in recent years.[111] In 2014, former employees of Jimmy John's sued the company for using overbroad non-compete agreements that tremendously restricted its sandwich shop employees' post-employment options.[112] U.S. Congress members called for a federal investigation into the company.[113] Amazon noticed all of the heat Jimmy John's was taking and wisely stopped

---

104 Starr, *supra* note 99.

105 *Id.*; Orly Lobel, *Should Noncompete Clauses for Executives Be Legal? No: They Reduce Wages and Job Mobility*, WALL ST. J. (Sept. 22, 2021, 3:00 PM), https://www.wsj.com/articles/non-compete-clause-legal-11632244492.

106 Starr, *supra* note 99.

107 Starr et al., *supra* note 100, at 55.

108 *See id.*; Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 909 (2021).

109 UNIF. RESTR. EMP. AGR. ACT 2 (prefatory note); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, MGMT. SCI. 1, 6 (Oct. 19, 2020) ("[W]hen workers do not fully understand their employment contract or have a limited ability to negotiate for higher pay to compensate them for lost (future) mobility, NCAs [non-compete agreements] may reduce worker earnings while also limiting mobility.").

110 *See* Carosa, *supra* note 3, at D6; *see* Lobel, *supra* note 108, at 913.

111 UNIF. RESTR. EMP. AGR. ACT 3-4 (prefatory note); Lipsitz & Starr, *supra* note 109, at 1.

112 Alissa Wickham, *Reps. Seek Probe of Jimmy John's Over Noncompetes*, LAW360 (Oct. 23, 2014, 1:54 PM), https://www.law360.com/articles/589575/reps-seek-probe-of-jimmy-john-s-over-noncompetes ("The agreements . . . bar employees from working at any sandwich-serving restaurant within three miles of a Jimmy John's location while employed by the company, or for two years after they've left their Jimmy John's position.").

113 *Id.*

requiring its U.S. employees to sign broad non-competes in 2015.[114] A year later, Jimmy John's finally agreed to stop using the non-compete agreements after the Attorneys General of New York and Illinois brought *parens patriae* suits.[115] New York Attorney General Eric Schneiderman said the agreements had "no legitimate business interest" and "limit[ed] mobility and opportunity for vulnerable workers and bull[ied] them into staying with the threat of being sued."[116] Media attention has prompted a public backlash so severe that at least fifteen other franchises voluntarily eliminated non-compete and no-poach agreements from their employment contracts.[117]

This is significant because, generally, employees are unlikely to challenge the validity of restrictive employment agreements.[118] Workers in need of employment will consent to almost any restrictive employment agreement.[119] They will assume the agreement is valid and comply with its restrictions.[120] This is likely to be particularly true of low-wage workers who do not have the resources to consult an attorney, nor the incentive to risk legal action.[121] Those brave enough to engage are likely sufficiently chilled when served with a cease and desist letter or pressured into negotiating a settlement with their employer, even if the agreement is not legally enforceable.[122] Should a challenge be brought in a blue-pencil

---

114 *See* Jana Kasperkevic, *Amazon Removes Crazy Non-Compete Clause from Hourly Workers' Contracts*, BUS. INSIDER (Mar. 29, 2015, 10:42 AM), https://www.businessinsider.com/amazon-removes-non-compete-clause-for-hourly-workers-2015-3 ("Amazon has required its US employees, including seasonal workers, to sign non-compete contracts which cover a period of more than 18 months after the employee has separated with the company.").

115 *See* Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit Over Non-Compete Agreements*, REUTERS (Dec. 7, 2016), https://www.reuters.com/article/us-jimmyjohns-settlement-idUSKBN13W2JA.

116 Aruna Viswanatha, *Sandwich Chain Jimmy John's to Drop Noncompete Clauses from Hiring Packets*, WALL ST. J. (June 21, 2016, 9:00 PM), https://www.wsj.com/articles/sandwich-chain-jimmy-johns-to-drop-noncompete-clauses-from-hiring-packets-1466557202.

117 *See* Evan Starr, *The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements*, ECON. INNOV. GRP. 1, 3 (Feb. 2019), https://eig.org/wp-content/uploads/2019/02/Non-Competes-2.20.19.pdf; Rachel Abrams, *8 Fast-Food Chains Will End 'No-Poach' Policies*, N.Y. TIMES (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/business/fast-food-wages-no-poach-franchisees.html; Rachel Abrams, *7 Fast-Food Chains to End 'No Poach' Deals That Lock Down Low-Wage Workers*, N.Y. TIMES (July 12, 2018), https://www.nytimes.com/2018/07/12/business/fast-food-wages-no-poach-deal.html.

118 *See* CRAIN ET AL., *supra* note 95, at 101; Carosa, *supra* note 3, at D26.

119 Star Direct, Inc. v. Dal Pra, 767 N.W.2d 898, 924 n.10 (Wis. 2009) (Abrahamson C.J., dissenting).

120 CRAIN ET AL., *supra* note 95, at 301.

121 *Id.* at 101; Carosa, *supra* note 3, at D26; *see* Lipsitz & Starr, *supra* note 109, at 2.

122 Carosa, *supra* note 3, at D26.

jurisdiction (whereby judges strike out the offensive provisions of the contract) or a purple-pencil or reformation jurisdiction (whereby judges revise an unenforceable agreement), employers can rest easy knowing that the court will uphold the restrictions to the fullest extent possible.[123] In red-pencil jurisdictions, the court will simply throw out the unenforceable agreement.[124]

Many workers are asked to sign a non-compete agreement only after accepting their job offer.[125] These workers tend to be less satisfied, compensated, and likely to receive training benefits.[126] "Employers generally present [non-competes] to workers as standard form documents on a take it-or-leave it basis, not subject to negotiation."[127] Thus, the timing of restrictive employment agreements can detrimentally affect an employee's bargain position and wellbeing.[128] Sandeep Vaheesan and Matthew Jinoo Buck refer to restrictive employment agreements and alternative arrangements (such as mandatory arbitration clauses, confessions of judgment, and unilateral modification clauses) as contracts of adhesion and dispossession, established in an environment of "radical inequality" between a corporation and a worker, consumer, or small business.[129] The lacking case law involving challenges to the legitimacy of non-competes brought by low-wage workers led Jacqueline A. Carosa to categorize such agreements as nothing more than a "scare tactic" used to control turnover and limit fair competition, rather than protect legitimate business interests.[130]

---

123 *See* Carosa, *supra* note 3, at D18; Streiff v. Am. Family Mut. Ins. Co., 348 N.W.2d 505, 509 (Wis. 1984) ("The objection to [reformation] . . . is that it tends to encourage employers possessing bargaining power superior to that of the employees to insist upon unreasonable and excessive restrictions, secure in the knowledge that the promise will be upheld in part, if not in full.") (internal citations omitted).

124 *See* UNIF. RESTR. EMP. AGR. ACT § 16 cmt.; *see also* Lobel, *supra* note 108, at 931 ("If reformation is the norm, . . . 'Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation.'") (quoting Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 260 (Cal. Ct. App. 1998)).

125 *See* U.S. DEP'T OF TREAS., *supra* note 102, at 4; Hayes, *supra* note 7; Starr et al., *supra* note 100, at 55.

126 *See* Carosa, *supra* note 3, at D31.

127 Vaheesan & Buck, *supra* note 44, at 116.

128 Carosa, *supra* note 3, at D31.

129 Vaheesan & Buck, *supra* note 44, at 114, 116, 118, 173.

130 Carosa, *supra* note 3, at D26, D37; *see* Starr et al., *supra* note 100, at 55 ("Employers might even deploy noncompetes when they are entirely unenforceable . . . hoping . . . that the *in terrorem* effects of the contract will hold employees to their (unenforceable) promises."); Eric A. Posner, *Antitrust and Labor Markets: A Reply to Richard Epstein*, 15 N.Y.U. J.L. & LIBERTY 389, 400 (2022) ("Employers are clearly not intimidated by the law . . . .[N]oncompetes operate through an in terrorem effect. Only highly compensated employees can afford lawyers to contest noncompetes in court, and so everyone else doesn't.").

A. States Take the Lead in the Fight Against Restrictive Employment Agreements

Many states have limited the enforceability of restrictive employment agreements, usually targeting non-compete agreements for low-wage workers.[131] Since 2011, at least thirty-seven states have reviewed at their noncompete laws, with twenty-eight states and the District of Columbia making changes.[132] Three states—California, North Dakota, Oklahoma—have enacted legislation deeming the use of employer-employee non-compete agreements *per se* illegal, unless they are connected to the sale of a business.[133]

Prior to 2021, seven states—Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, and Washington state—had enacted legislation deeming the use of employer/employee non-compete agreements *per se* illegal for low-wage workers.[134] In 2021, three more states—Oregon, Nevada, and Illinois—joined this group.[135] Colorado is set to be the eleventh state on August 10, 2022 and the District of Columbia's wage threshold is slated to take effect on October 1, 2022.[136] Legislators in other states, such as Florida, Arkansas, Vermont, Pennsylvania, and New Jersey have proposed bills banning non-compete

---

131 *See* Lewi et al., *supra* note 48; UNIF. RESTR. EMP. AGR. ACT 2, 5 (prefatory note).

132 *See* Russell Beck, *What2Watch4: Two More Upcoming Noncompete Law Changes — Colorado and D.C.*, FAIR COMP'N L. (Feb. 2, 2022), https://faircompetitionlaw.com/2022/02/04/what2watch4-two-more-upcoming-noncompete-law-changes-colorado-and-d-c/; Russell Beck, *Curious Which States Have Changed Their Noncompete Laws in the Last Decade? (More than Half)*, FAIR COMP'N L. (July 12, 2022), https://faircompetitionlaw.com/2022/07/12/curious-which-states-have-changed-their-noncompete-laws-in-the-last-decade-more-than-half/ (Russell Beck is a business, trade secrets, and employee mobility litigator, nationally recognized for his trade secrets and noncompete experience).

133 *See* Lewi et al., *supra* note 48; UNIF. RESTR. EMP. AGR. ACT 3 (prefatory note).

134 Chris Marr, *Employee Noncompete Clause Limits Adopted by Three More States*, BLOOMBERG L. (June 29, 2021, 5:30 AM), https://news.bloomberglaw.com/daily-labor-report/employee-noncompete-clause-limits-adopted-by-three-more-states.

135 *Id.*; Russell Beck, *Ours Goes to 11: Eleven States Now Have "Low-Wage" Worker Thresholds*, FAIR COMP'N L. (July 7, 2022), https://faircompetitionlaw.com/2022/07/07/ours-goes-to-11-eleven-states-now-have-low-wage-worker-thresholds/ ("On August 10, 2022, Colorado will join the ranks of states prohibiting noncompetes for workers who do not meet certain wage thresholds or related criteria . . . .Because of legislative cycles and developments over the year, most of the 24 state bills involving low-wage workers this year have died. However, as of [July 7, 2022], four more states are still considering low-wage thresholds. They are Michigan, New Jersey, New York, and Pennsylvania.").

136 Beck, *supra* note 135; Russell Beck, *A Second Paradigm Shift in D.C.'s Noncompete Law – No Longer a Ban, Now a Wage Threshold*, FAIR COMP'N L. (July 15, 2022), https://faircompetitionlaw.com/2022/07/15/a-second-paradigm-shift-in-d-c-s-noncompete-law-no-longer-a-ban-now-a-wage-threshold/.

agreements for most or all employees.[137] Montana law strongly disfavors covenants not to compete, construing them in a light most favorable to the employee and voiding agreements that completely restrain an employee's ability to work.[138]

States also are enacting legislation allowing for civil penalties against companies that use illegal or abusive non-compete agreements.[139] For example, Illinois' newly expanded Freedom to Work Act allows the Illinois Attorney General to pursue enforcement action against employers related to non-compete agreements and win civil penalties.[140] On March 1, 2022, Colorado added criminal penalties to its existing non-compete laws.[141] In some cases, states are making it easier for workers to win attorney's fees following disputes against employers who sought to enforce illegal non-compete agreements.[142] Though states vary in their approach, the legislative trend has been to allow for greater employee mobility.[143]

B. The Federal Government Encourages the Fight, But Remains Somewhat Sidelined

Federal regulation of restrictive employment agreements has been stipulated for years, but tangible legislation and/or agency rulemaking has

---

137 *Tightening Restrictions on Noncompetes*, MORRISON FOERSTER, https://elc.mofo.com/topics/Tightening-Restrictions-on-Noncompetes.html (last visited Aug. 1, 2022).

138 Russell Beck, *Montana Allows Noncompetes! (Only California, Oklahoma, and North Dakota Don't.)*, FAIR COMP'N L. (Jan. 30, 2021), https://faircompetitionlaw.com/2021/01/30/montana-allows-noncompetes-only-california-oklahoma-and-north-dakota-dont/ (discussing Montana non-compete law and Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C., 265 P.3d 646 (Mont. 2011)).

139 *Id.*

140 Julie L. Gottshall, *Illinois Enacts Restrictions on the Use of Non-Compete Agreements: What Employers Need to Know*, KATTEN (Aug. 30, 2021), https://katten.com/Illinois-Enacts-Restrictions-on-the-Use-of-Non-Compete-Agreements-What-Employers-Need-to-Know.

141 *Colorado Adds Criminal Penalties to Unenforceable Non-Compete Agreements*, BAKER DONELSON (Mar. 3, 2022), https://www.bakerdonelson.com/colorado-adds-criminal-penalties-to-unenforceable-non-compete-agreements; *see* Russell Beck, *Eight States with 39 Pending Noncompete Bills: Colorado is Changing its Noncompete Law – Again*, FAIR COMP'N L. (July 6, 2022), https://faircompetitionlaw.com/2022/07/06/8-states-with-39-pending-noncompete-bills-colorado-is-changing-its-noncompete-law-again/.

142 Marr, *supra* note 134 (citing Evan Starr); Janet A. Hendrick & Angela M. Buchanan, *Is This the End of Non-Compete Clauses in America?*, PHILLIPS MURRAH, https://phillipsmurrah.com/2021/08/is-this-the-end-of-non-compete-clauses-in-america/ (last visited Aug. 1, 2022).

143 Amit Bindra, *Recent Trends in Noncompete Laws Across the U.S.*, A.B.A. (May 29, 2019), https://www.americanbar.org/groups/litigation/committees/employment-labor-relations/articles/2019/spring2019-recent-trends-in-noncompete-laws-across-the-us/.

yet to materialize.[144] In March 2016, the U.S. Treasury Department issued a report titled "Non-Compete Contracts: Economic Effects and Policy Implications," asserting pervasive misuse of non-compete agreements.[145] On April 15, 2016, President Obama issued Executive Order 13725: Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, directing federal agencies to promote competition and arm consumers and workers with information.[146] The Order was followed by a May 2016 White House report titled "Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses," decrying the use of employer/employee non-compete agreements and promising to identify avenues for reform.[147]

In October 2016, President Obama issued a "State Call to Action on Non-Compete Agreements," echoing the sentiments of the Treasury Department and White House reports.[148] "Best-practice policy objectives" included banning noncompete agreements for certain categories of workers, including low-income workers; improving transparency and fairness by requiring that employers propose the agreement before acceptance of a job offer or promotion; and incentivizing employers to write enforceable contracts by eliminating the blue-pencil rule in favor of the red-pencil rule.[149]

The Call to Action influenced more than twenty states and the District of Columbia to enact changes to their laws governing non-compete agreements.[150] Later that month, the DOJ and FTC issued "Antitrust Guidance for Human Resources Professionals," ushering in a new era of increased scrutiny by government regulators of non-compete clauses and other labor market restrictions.[151] The Guidance outlined an aggressive

---

144 *See* Clifford Atlas et al., *Takeaways from President Biden's Executive Order on Non-Competes*, JDSUPRA (July 16, 2021), https://www.jdsupra.com/legalnews/takeaways-from-president-biden-s-5602664/.

145 *Id.*; U.S. DEP'T OF TREAS., *supra* note 102.

146 Clifford Atlas et al., *White House Continues Attack on Non-Compete Agreements*, JACKSONLEWIS (Nov. 2, 2016), https://www.jacksonlewis.com/publication/white-house-continues-attack-non-compete-agreements.

147 *Id.*

148 *Id.*

149 *See State Call to Action on Non-Compete Agreements*, THE WHITE HOUSE (Oct. 25, 2016) https://obamawhitehouse.archives.gov/sites/default/files/competition/noncompetes-calltoaction-final.pdf.

150 Atlas et al., *supra* note 144; *see* Beck, *A Second Paradigm Shift in D.C.'s Noncompete Law – No Longer a Ban, Now a Wage Threshold*, *supra* note 136.

151 David J. Clark, *Antitrust Action Against No-Poaching Agreements: Obama Policy to Be Continued by the Trump Administration*, EPSTEIN BECKER GREEN (Jan. 26, 2018), https://www.tradesecretsandemployeemobility.com/2018/01/articles/non-compete-agreements/antitrust-action-against-no-poaching-agreements-obama-policy-to-be-continued-by-the-trump-administration/; Michael E. Martinez et al., *Competition in U.S.*

policy promising to investigate and punish employers, including Human Resources employees, who enter into unlawful agreements concerning recruitment or retention of employees.[152]

Back in 2010, the FTC proposed settlements against Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm Ltd., and Pixar for their use of anticompetitive no-poach agreements.[153] After a drawn-out fight, Adobe, Apple, Google, and Intel eventually settled for $415 million in 2015.[154] In the Call to Action, the DOJ announced its intention to begin proceed criminally against "naked" no-poach agreements because these "types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers" and are "*per se* illegal under the antitrust laws."[155] The Trump Administration voiced support for the Obama-era policy.[156] In 2018, the FTC had a handful of such criminal antitrust cases pending and issued a "Spring Update" reiterating its position.[157]

In September 2019, the DOJ held a public workshop to discuss the role of antitrust enforcement in labor markets.[158] In November 2019, nineteen State Attorneys General wrote a joint letter requesting that the FTC use its "rulemaking authority to bring an end to the abusive use of

---

Labor Markets: Non-Compete Clauses Increasingly Under Fire, THE NAT'L L. REV. (Jan. 27, 2020), https://www.natlawreview.com/article/competition-us-labor-markets-non-compete-clauses-increasingly-under-fire.

152 Clark, *supra* note 151.

153 *Justice Department Requires Lucasfilm to Stop Entering into Anticompetitive Employee Solicitation Agreements*, U.S. DEP'T OF JUST. (Dec. 21, 2010), https://www.justice.gov/opa/pr/justice-department-requires-lucasfilm-stop-entering-anticompetitive-employee-solicitation; *Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements*, U.S. DEP'T OF JUST. (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

154 Jeff John Roberts, *Tech Workers Will Get Average of $5,770 Under Final Anti-Poaching Settlement*, FORTUNE (Sept. 3, 2015), https://fortune.com/2015/09/03/koh-anti-poach-order/.

155 *Antitrust Guidance for Human Resource Professionals*, U.S. DEP'T OF JUST. & F.T.C. (Oct. 16), https://www.justice.gov/atr/file/903511/download (emphasis added).

156 Clark, *supra* note 151.

157 Gidley et al., *supra* note 75; *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute "No-Poach" and Wage-Fixing Agreements*, U.S. DEP'T OF JUST. (Apr. 10, 2018), https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements.

158 *US: DOJ to Hold Workshop on Competition in Labor Markets*, COMP'N POL'Y INT'L (Aug. 8, 2019), https://www.competitionpolicyinternational.com/us-doj-to-hold-workshop-on-competition-in-labor-markets/; *Public Workshop on Competition in Labor Markets*, U.S. DEP'T OF JUST. (Nov. 5, 2020), https://www.justice.gov/atr/events/public-workshop-competition-labor-markets.

non-compete clauses in employment contracts."[159] On January 9, 2020, the FTC held a follow-up workshop focusing on the legal, economic, and consumer protection issues associated with the use of employer/employee non-compete agreements.[160]

On July 9, 2021, President Biden issued Executive Order 14036: Promoting Competition in the American Economy.[161] The Order began by articulating the overarching policy consideration that a "fair, open, and competitive marketplace has long been a cornerstone of the American economy."[162] The Order affirmed the Biden Administration's commitment to the principles behind the Sherman Act, promising to enforce antitrust laws and address issues in labor markets.[163] The FTC, DOJ, Attorney General, and other agencies were encouraged to enforce the Clayton Act and the other antitrust laws "fairly and vigorously."[164] The FTC in particular was encouraged to curtail the unfair use of restrictive employment agreements that may unfairly limit worker mobility through its rulemaking authority under the Federal Trade Commission Act (FTCA).[165]

President Biden has expressed disdain for restrictive employment agreements in the past.[166] While serving as Vice President to President Obama in 2015, he bashed non-competes for depriving workers of the freedom to find new jobs and negotiate higher wages.[167] In 2019, he tweeted, "[w]e should get rid of non-compete clauses and no-poaching

---

159 Gidley et al., *supra* note 75.

160 U.S. DEP'T OF JUST., *supra* note 158; *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, F.T.C. (Jan. 19, 2020), https://www.ftc.gov/news-events/events-calendar/non-competes-workplace-examining-antitrust-consumer-protection-issues.

161 Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

162 *Id.*

163 *Id.*

164 *Id.*; *see* U.S. DEP'T OF JUST., *supra* note 62, at 2 (The Clayton Act, passed in 1914 and significantly amended in 1950, prohibits mergers and acquisitions that are likely to harm competition.)

165 Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021); *see* F.T.C., *supra* note 69; *see F.T.C. Act of 1914*, BALLOTPEDIA, https://ballotpedia.org/Federal_Trade_Commission_Act_of_1914 (last visited Aug. 1, 2022) (The FTCA passed in 1914, establishes the FTC. The five-member body was created to protect consumers by preventing unfair methods of competition and unfair or deceptive acts or practices. All violations of the Sherman Act also violate the FTCA; thus, the FTC can bring case under the FTCA against the same kinds of activities that violate the Sherman Act. The FTCA also prohibits other practices that harm competition but do not fit neatly into categories of conduct formally prohibited by the Sherman Act).

166 Sandeep Vaheesan, *Biden Can Free Millions from Coercive Employment Contracts*, BLOOMBERG L. (Feb. 5, 2021), https://news.bloomberglaw.com/daily-labor-report/biden-can-free-millions-from-coercive-employment-contracts.

167 *Id.*

agreements that do nothing but suppress wages."[168] He affirmed this commitment as part of his 2020 presidential campaign, calling for the elimination of "all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets."[169] President Biden is the first ever president-elect to have campaigned on a promise to limit restrictive employment agreements.[170]

In March 2021, President Biden named Tim Wu a special assistant to the president for technology and competition policy.[171] In June 2021, President Biden appointed Lina Khan as the chair of the FTC.[172] In November 2021, the Senate confirmed "Big-Tech Critic" Jonathan Kanter to head the DOJ's Antitrust Division.[173] The appointments of Khan, Kanter, and Wu marked victories for the New Brandeis (a/k/a Neo-Brandeis) movement.[174] The movement seeks to aggressively curb the dominance of companies with "more muscular forms of antitrust policy" and a "broad view of the harms caused by giant corporations, not just to consumers but to rival companies, customers, suppliers and the larger economy."[175] In 2020, Khan criticized the FTC for failing to "play an administrative, norm-creating role, instead opting to pursue antitrust enforcement exclusively through adjudication."[176] She has lamented the fact that restrictive employment agreements are often not litigated to begin with, due to contracts of dispossession such as mandatory arbitration provisions or class action waivers.[177]

---

168 *Id.*

169 *Id.*; *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, https://joebiden.com/empowerworkers/ (last visited Aug. 1, 2022).

170 Chris Marr, *As States Limit Noncompetes, D.C. on Verge of Outlawing Them*, BLOOMBERG L. (Dec. 14, 2020), https://news.bloomberglaw.com/daily-labor-report/as-states-limit-noncompetes-d-c-on-verge-of-outlawing-them.

171 Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html.

172 David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html.

173 *U.S. Senate Confirms Google Critic Kanter to Head Justice Dept Antitrust Division*, REUTERS (Nov. 16, 2021), https://www.reuters.com/world/us/us-senate-confirms-google-critic-kanter-head-justice-dept-antitrust-division-2021-11-16/.

174 David Dayden & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, THE AM. PROSPECT (July 21, 2021), https://prospect.org/justice/new-brandeis-movement-has-its-moment-justice-department-antitrust-jonathan-kanter/.

175 Shannon Bond, *New FTC Chair Lina Khan Wants to Redefine Monopoly Power for the Age of Big Tech*, NPR (July 1, 2021), https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-redefine-monopoly-power-for-the-age-of-big-tech.

176 Lina M. Khan, *The End of Antitrust History Revisited*, COLUM. L. SCH. (2020), https://scholarship.law.columbia.edu/faculty_scholarship/2788/.

177 *See* Gidley et al., *supra* note 75.

On October 27, 2021, the FTC and DOJ announced a two-day virtual workshop titled "Making Competition Work: Promoting Competition in Labor Markets," to discuss efforts to promote competitive labor markets and worker mobility.[178] The workshop took place on December 6 and 7, 2021, and Khan's opening remarks outlined FTC-specific goals, including scrutinizing non-compete agreements through rulemaking, enforcement, and notice.[179] Panelists urged the agencies to follow the states' leads and limit the use of agreements, particularly among low-wage workers.[180] However, speakers from the Biden Administration focused on other measures, such as regulating worker misclassification.[181] The keynote address given by Wu did not mention non-compete agreements and the workshop ended without any firm guidance on the President's or the agencies' plans.[182]

On January 18, 2022, the FTC and DOJ launched a joint public inquiry focused on strengthening enforcement against illegal mergers.[183] The agencies are devoting substantial resources into investigating and battling Big-Tech giants such as Amazon, Apple Google, Microsoft, and Facebook.[184] On March 7, 2022, the Treasury Department released "The State of Labor Market Competition", a sixty-eight-page report which, among other things, discussed the heterogeneity in enforcement and legality of restrictive employment agreements; the adverse effects of mandatory pre-dispute arbitration and class action waivers; and the barriers to mobility imposed by occupational licensing requirements.[185]

---

178 *FTC and DOJ to Hold Virtual Public Workshop Exploring Competition in Labor Markets*, F.T.C. (Oct. 27, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-doj-hold-virtual-public-workshop-exploring-competition-labor.

179 Guy Brenner et al., *FTC and DOJ Hold Workshop on Non-Compete Agreements*, PROSKAUER (Dec. 13, 2021), https://www.lawandtheworkplace.com/2021/12/ftc-and-doj-hold-workshop-on-non-compete-agreements/.

180 *Id.*

181 *Id.*

182 *Id.*

183 *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, F.T.C. (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

184 Will Oremus, *The Battle to Break up Big Tech Has Just Begun*, WASH. POST (June 30, 2021), https://www.washingtonpost.com/technology/2021/06/29/big-tech-breakup-battle/; Clare Duffy, *Microsoft's Blockbuster Activision Blizzard Deal Could Raise Uncomfortable Challenges for US Antitrust Enforcers*, CNN (Feb. 18, 2022), https://www.cnn.com/2022/02/18/tech/microsoft-activision-blizzard-ftc-antitrust/index.html.

185 *The State of Labor Market Competition* 1, 14-21, U.S. DEP'T OF TREAS. (Mar. 7, 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf.

Kanter's keynote address at the University of Chicago Stigler Center in April 2022 "declare[d] that the era of lax enforcement is over, and the new era of vigorous and effective antitrust law enforcement ha[d] begun."[186] In June, Khan said that "[the FTC] fe[lt] an enormous amount of urgency given how much harm [was] happening against . . . workers."[187] In July, Khan, on behalf of the FTC, signed a Memorandum of Understanding (MOU) with the National Labor Relations Board (NLRB) regarding information sharing, cross-agency training, and outreach in areas of common regulatory interest including "the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions."[188] The DOJ entered into similar MOUs with the NLRB and Department of Labor in 2022.[189] Still, it has been over a year since President Biden issued Executive Order 14036 and the agencies have not taken any action on restrictive employment agreements.[190] Some attribute a delay in agency rulemaking to a vacancy on the FTC's five-member body, as President Biden's nomination of Alvaro Bedoya to the empty seat remained pending for months.[191] He was eventually confirmed as an FTC Commissioner on May 11, 2022.[192]

---

[186] Jonathan Kanter, Asst. Att'y Gen., *Antitrust Enforcement: The Road to Recovery*, U.S. DEP'T OF JUST. (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago-stigler.

[187] Dave Michaels & Ryan Tracy, *FTC Considers Restricting the Use of Noncompete Clauses by Companies*, WALL ST. J. (June 9, 2022), https://www.wsj.com/articles/ftc-considers-restricting-the-use-of-noncompete-clauses-by-companies-11654747203.

[188] *Memorandum of Understanding Between the F.T.C. and the NLRB Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest*, F.T.C. & NLRB (July 19, 2022), https://www.nlrb.gov/sites/default/files/attachments/pages/node-7857/ftcnlrb-mou-71922.pdf.

[189] *Memorandum of Understanding Between the U.S. Department of Justice and the National Labor Relations Board*, U.S. DEP'T OF JUST. & NLRB (July 26, 2022), https://www.justice.gov/opa/press-release/file/1522096/download; *Departments of Justice and Labor Strengthen Partnership to Protect Workers*, U.S. DEP'T OF JUST. & U.S. DEPARTMENT OF LABOR (Mar. 10, 2022), https://www.justice.gov/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers.

[190] Kate E. Gehl et al., *One Year of Action Since President Biden's Executive Order on Competition*, FOLEY & LARDNER LLP (July 27, 2022), https://www.foley.com/en/insights/publications/2022/07/1-year-president-biden-executive-order-competition.

[191] *See* Erik W. Weibust, *FTC Signals New Action on Noncompetes*, NAT'L L. REV. (June 13, 2022), https://www.natlawreview.com/article/ftc-signals-new-action-noncompetes-will-people; *FCC and FTC Nominations Delayed*, ACA INT'L (Feb. 1, 2022), https://www.acainternational.org/news/take-two-on-fcc-and-ftc-nominations/.

[192] Arianna Evers et al., *US Senate Confirms Alvaro Bedoya as FTC Commissioner*, JDSUPRA (May 24, 2022), https://www.jdsupra.com/legalnews/us-senate-confirms-alvaro-bedoya-as-ftc-4066224/.

Federal legislative efforts have continually fallen flat.[193] Three Senate bills seeking to limit the use of non-compete agreements were introduced in 2015, but none passed.[194] In 2018 and 2019, various other bills were introduced, but none passed.[195] Still, federal legislative efforts have not ceased.[196] Senator Murphy introduced another version of the Workforce Mobility Act in February 2021.[197] An analogue bill, H.R. 1367, was introduced in the House.[198] Finally, in July 2021, Senators Rubio and Maggie Hassan reintroduced the Freedom to Compete Act.[199] These bills and others remain pending as of August 1, 2022.[200]

VI. THE NEED FOR TIMELY, UNIFORM, AND COMPREHENSIVE ACTION AGAINST RESTRICTIVE EMPLOYMENT AGREEMENTS

The conventional employer justifications for restrictive employment agreements ignore the availability of more effective, less restrictive alternatives.[201] Employers can use intellectual and trade secret law to protect their investments.[202] They can attract and retain talent through

---

193 *See* Russell Beck, *Déjà Vu All Over Again: The Workforce Mobility Act Redux*, FAIR COMP'N. L. (Feb. 26, 2021), https://faircompetitionlaw.com/2021/02/26/deja-vu-all-over-again-the-workforce-mobility-act-redux/.

194 *Id.*

195 *Id.* (In 2018, Democratic Senators introduced the Workforce Mobility Act to impose a federal ban on the use of employer/employee non-competes. House Representatives introduced a companion bill, but that legislative session ended without action on either bill. In 2019, Republican Senator Marco Rubio introduced the Freedom to Compete Act to amend the Fair Labor Standards Act of 1938 and ban non-competes for most non-exempt workers. Later that year, Democrat and Republican Senators together introduced an amended Workforce Mobility Act to ban the use of virtually all employee non-compete agreements. Neither of these bills passed.)

196 *See* Beck, *supra* note 141.

197 Beck, *supra* note 193; Workforce Mobility Act of 2021, S.483, 117th Cong. (2021) (available at https://www.congress.gov/bill/117th-congress/senate-bill/483?q=%7B%22search%22%3A%5B%22noncompete%22%5D%7D&s=2&r=2).

198 Beck, *supra* note 141; Workforce Mobility Act of 2021, H.R. 1367, 117th Cong. (2021) (available at https://www.congress.gov/bill/117th-congress/house-bill/1367/all-info).

199 Russell Beck, *A Brief History of Noncompete Regulation*, FAIR COMP'N L. (Oct. 11, 2021), https://faircompetitionlaw.com/2021/10/11/a-brief-history-of-noncompete-regulation/; *Noncompete Laws: 2021 Year in Review*, AKIN GUMP STRAUSS HAUER & FELD LLP (Jan. 13, 2022), https://www.akingump.com/a/web/q8oZeB1EXhFh1u9KDDN81C/3yxJjf/labor-and-employment-alert.pdf.

200 *See* Beck, *supra* note 141.

201 *See* Sandeep Vaheesan, *Testimony of Sandeep Vaheesan*, *Open Markets Institute, Applauding SB 906 – An Act Concerning Non-Compete Agreements*, OPEN MKTS. INST. (Mar. 3, 2021), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/603fb3f994021b58c3cea6fe/1614787578764/Vaheesan+testimony+re+SB+906.pdf.

202 Vaheesan & Buck, *supra* note 44, at 162.

higher wages, bonuses, regular raises, promotions, skill development programs, and flexible work arrangements.[203] These incentives and opportunities should be tailored to individual employees' preferences and values.[204] Employers can also promote a culture of respect and loyalty by improving work environments and addressing workplace hostility and health threats.[205]

Restrictive employment agreements are too often used as a weapon to restrain trade and labor mobility, unreasonably depriving Americans of the benefits of competition and hindering economic growth.[206] For a restrictive employment agreement to be enforceable, the agreement must reasonably protect a legitimate employer interest.[207] An employer's desire to prevent a former employee from competing is not a legitimate interest, especially when the worker is low-wage and unlikely to possess valuable proprietary information.[208]

Unions—collective bodies of workers who negotiate for higher wages and benefits, improved workplace conditions, and opportunities for career mobility,[209]—could theoretically serve as a check on overbroad restrictive employment agreements.[210] Collective bargaining for assurances such as formal pay scales and firm job ladders raises wages and mobility for unionized and non-unionized workers alike.[211] But there has been a massive decline in union participation since the 1950s, coinciding with slowed GDP growth, increased economic inequality, and a decline in workers' share of income.[212] And while 2021 was marked with many strikes and efforts to organize, the trends of declining unionization and worker power have persisted.[213]

---

203 *See supra* Part II; Vaheesan, *supra* note 201.

204 Williamson, *supra* note 18; *see supra* Part II.

205 *See* Carosa, *supra* note 3, at D61.

206 *Id.*

207 *See* Vaheesan & Buck, *supra* note 44, at 120, 125-26; UNIF. RESTR. EMP. AGR. ACT 3 (prefatory note).

208 *Id.* at 4; *See* Carosa, *supra* note 3, at D5.

209 *What Unions Do*, AFL-CIO, https://aflcio.org/what-unions-do (last visited Aug. 1, 2022).

210 *See* Mark Theodore, *Non-Compete Agreement a Mandatory Subject of Bargaining, NLRB Rules*, PROSKAUER (Aug. 17, 2016), https://www.laborrelationsupdate.com/uncategorized/non-compete-agreement-a-mandatory-subject-of-bargaining-nlrb-rules/.

211 *See* Michael A. Schultz, *The Wage Mobility of Low-Wage Workers in a Changing Economy, 1968 to 2014*, 5 RUSSEL SAGE FOUND. J. SOC. SCIS. 159, 162 (2019).

212 Posner, *supra* note 130, at 402.

213 Josh Eidelson, *U.S. Labor's Watershed Year Failed to Boost Union Memberships*, BLOOMBERG L. (Jan. 20, 2022), https://news.bloomberglaw.com/daily-labor-report/u-s-labors-watershed-year-failed-to-boost-union-memberships; *see The Power of Workers*, NPR (July 24, 2020), https://www.npr.org/transcripts/895222963; *see also* Teddy Ostrow, *Labor Notes 2022: US Workers Are Pushing Unions into the Mainstream*, DEUTSCHE

Legislators and regulators must use the tools at their disposal to confront the mismatch of power that currently exists between companies and their employees.[214] Action against restrictive employment agreements should be timely, uniform, and comprehensive.

A. Action Against Restrictive Employment Agreements Should Be Timely

Action against restrictive employment agreements should be timely, because these agreements stifle labor mobility at a time when it is greatly needed. The pandemic and Great Resignation have completely restructured the job market by disrupting jobs that are needed most, and creating a skills mismatch between available workers and open jobs.[215] Existing trends in remote work and e-commerce are accelerating and unspecialized, lower-paying jobs are most at risk for post-pandemic obsolescence due to automation.[216] Altogether, up to twenty-five percent more workers than previously estimated may need to switch occupations and more than half of unemployed lower-wage workers may need to find higher paying occupations to regain employment.[217] In other words, strong economic recovery from COVID-19 hinges on occupational mobility.[218]

Geographic mobility may also play an increasingly greater role in labor markets.[219] If people continue to reject big-city life for more spacious suburbs or smaller cities, employers in metropolitan areas might be forced to open satellite work sites.[220] Most companies are expected to continue allowing remote work post-pandemic, and those that don't could find themselves at risk of losing valued employees.[221] In 2021, ten percent of jobs on LinkedIn and ZipRecruiter allowed workers to at least do some work remotely, up from two percent in 2020 and those jobs got four times

---

WELLE (June 6, 2022), https://www.dw.com/en/labor-notes-2022-us-workers-are-pushing-unions-into-the-mainstream/a-62216491 (noting increasing organized worker activity through the first half of 2022, including those employed by Starbucks, Amazon, and Apple—workplaces "previously considered unorganizable.").

214 *See* NPR, *supra* note 213.

215 Winck & Kiersz, *supra* note 36.

216 *See* Thompson, *supra* note 6; Lund et al., *supra* note 37.

217 Lund et al., *supra* note 37.

218 Thompson, *supra* note 6.

219 *Id.*

220 *Id.*

221 Rani Molla, *Remote Workers Are Moving Out of Big Cities — But Not to the Midwest*, VOX (July 5, 2021), https://www.vox.com/recode/22559081/remote-workers-moving-cities-suburbs-middle-america-midwest; Laurel Wamsley, *Workers Are Moving First, Asking Questions Later. What Happens When Offices Reopen?*, NPR (Mar. 9, 2021), https://www.npr.org/2021/03/09/974862254/workers-are-moving-first-asking-questions-later-what-happens-when-offices-reopen.

as many applications.[222] Remote workers should be free to move when they desire a change of scenery, lower cost of living, or a more family friendly environment.[223]

Decisionmakers on both sides of the aisle increasingly turn to antitrust mechanisms to combat corporate power and address a variety of economic problems, from supply chain issues to inflation.[224] The heightened focus on restrictive employment agreements reflects a growing recognition that such agreements "prevent workers from earning what a competitive market would dictate" and "stymie the natural labor market churn that keeps the economy healthy."[225] "Many courts have refused to uphold non-competes against former employees who face a more difficult re-employment landscape than previously anticipated prior to COVID-19, including employees in industries where the pandemic had . . . a devastating impact."[226] Public sentiment stands behind action against unfair restraints of worker mobility and policymakers should strike while the iron is hot.[227] Employees have become *less* happy, *less* productive, and *less* engaged, accentuating the need for policies to promote labor mobility.[228]

B. Action Against Restrictive Employment Agreements Should Be Uniform

Action against restrictive employment agreements should uniformly address the current patchwork of state laws.[229] Homogenous restrictive employment agreement laws benefits both employers and workers—both of whom typically operate or will operate across state lines—by enhancing clarity and predictability.[230] The assortment of state laws makes

---

222 Molla, *supra* note 221.

223 Wamsley, *supra* note 221.

224 *See, e.g.*, Starr, *supra* note 117, at 14; Joe Weisenthal, *Transcript: How Using Antitrust Can Fight Inflation*, BLOOMBERG L. (Jan. 13, 2022), https://news.bloomberglaw.com/antitrust/transcript-how-using-antitrust-can-fight-inflation.

225 *See* Starr, *supra* note 117, at 14; *see also* Lobel, *supra* note 108, at 915 ("The argument . . . for antitrust reform comes at a ripe time in which antitrust law is grappling with changing markets and new ways in which companies gain dominance.").

226 Ruofei Xiang, *Enforcing Non-Compete Clauses in the Post-COVID Era*, LAW. MONTHLY (Mar. 2022), https://www.lawyer-monthly.com/2022/03/enforcing-non-compete-clauses-post-covid/.

227 *See supra* Part V.

228 *See supra* Part II.

229 *See* Starr, *supra* note 117, at 6, 14.

230 *See* Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIF. L. COMM'N (July 23, 2021), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867; *Why Your State Should Adopt the Uniform Restrictive Employment Agreement Act (2021)* 1, 1, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/Download

compliance expensive for companies that operate in multiple states and creates economic inefficiencies.[231] Interstate variations also make it difficult for workers and potential entrepreneurs to know their rights and obligations under a restrictive employment agreement.[232] Uniform action against restrictive employment agreements is a logical approach to reform that delivers strong benefits to employers, workers, entrepreneurs, and the broader economy.[233]

C. Action Against Restrictive Employment Agreements Should Be Comprehensive

Action against restrictive employment agreements should be comprehensive to prevent common abuses that restrain workers and would-be entrepreneurs.[234] Many of the proposals put forth and state laws passed thus far have focused largely on limiting enforcement of non-compete agreements.[235] These measures inadequately protect workers.[236] Evan Starr explains that lawmakers who wish to ban non-competes must be ready to counter the potential anticompetitive effects of alternative restrictive employment agreements, which can effectively bind workers to firms.[237] In fact, recent policy movements focused on non-competes have already influenced attorneys to advise firms to consider adopting alternative arrangements.[238] Sandeep Vaheesan and Matthew Jinoo Buck advocate for a comprehensive, "all-inclusive" solution which bans a range of contracts of dispossession.[239]

States' use of the common law to regulate restrictive employment agreements is not conducive for crafting strict notice requirements.[240] And state legislation in this area has yet to include truly comprehensive notice requirements.[241] Notice is critical for an effective and fair restrictive employment agreement because advanced notice improves the workers' bargaining position, allowing them to evaluate the agreement and improving the likelihood that they will be happy, well compensated, and

---

DocumentFile.ashx?DocumentFileKey=7e370da2-2a5b-2d35-f7a5-599d66d87734&forceDialog=0 (last visited Aug. 1, 2022).

231 *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557, 2561 (2020).

232 UNIF. RESTR. EMP. AGR. ACT 2 (prefatory note).

233 *Id.*

234 *See* Marr, *supra* note 170; *see also* Starr, *supra* note 99.

235 Marr, *supra* note 170.

236 *See* Starr, *supra* note 99.

237 *Id.*

238 *Id.*

239 Vaheesan & Buck, *supra* note 44, at 180.

240 UNIF. L. COMM'N, *supra* note 230, at 1.

241 *Id.*

adequately trained.[242] John Lettieri, CEO of The Economic Innovation Group, advocates for policies that require advance notice to job candidates if they'll be asked to sign a non-compete and employer payments of a former employee's partial or full salary while they're subject to a non-compete ("garden leave").[243]

Finally, any law or rule curtailing restrictive employment agreements must effectively deter their misuse and protect workers' freedom to switch jobs or to start their own businesses.[244] In blue-pencil jurisdictions, employers can "free ride" on the chilling effects an overly broad restrictive employment agreement with the knowledge that the court will simply rewrite the agreement.[245] In red-pencil jurisdictions, an agreement found to violate state law is often merely unenforceable, with no consequence to the employer.[246]

VII. EVERY STATE SHOULD ADOPT THE UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT

The Uniform Law Commission ("ULC" or "Commission") is a nonprofit that was formed in 1892 to create non-partisan state legislation.[247] The ULC consists of volunteer commissioners (practitioners, judges, law professors, legislative staff, etc.)—all of whom are lawyers qualified to practice law.[248] The commissioners are appointed by state governments, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to "research, draft, and promote enactment of uniform state laws in areas where uniformity is desirable and practical."[249] The Commission has drafted more than three hundred laws designed to decrease unnecessary conflicts.[250]

In response to the recent flurry in legislative activity surrounding restrictive employment agreements, the ULC was inspired to propose the Uniform Restrictive Employment Agreement Act ("UREAA" or the

---

242 *See* UNIF. RESTR. EMP. AGR. ACT § 4 cmt.; *supra* Part V.

243 Marr, *supra* note 170 (The Economic Innovation Group promotes policies that benefit entrepreneurs, investors, and economic growth).

244 Vaheesan, *supra* note 201.

245 *See supra* Part V.

246 *See* UNIF. L. COMM'N, *supra* note 230, at 1; *see also* Lobel, *supra* note 108, at 931 ("If reformation is the norm, 'Employers would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation'") (quoting Kolani v. Gluska, 75 Cal. Rptr. 2d 257, 260 (Cal. Ct. App. 1998)).

247 UNIF. L. COMM'N, *supra* note 230, at 1.

248 *Id.*

249 *Id.*

250 KENT C. OLSON, LEGAL RESEARCH IN A NUTSHELL 1, 110 (14th ed. 2021).

"Act").[251] Legislators in four states have introduced UREAA, but the Act has yet to be adopted.[252] Every state should adopt UREAA because it is timely, uniform, and comprehensive.

A. The Act is Timely

Critics broadly concur that the laws governing restrictive employment agreements must be reformed.[253] Business-community and employee-advocate groups are frustrated with the current patchwork of state laws and employers are revising their agreements to better align with public sentiment.[254] "[T]he rising tide of reform means this is one area of policy that is almost certain to become friendlier to workers, more embracing of competition, and more conducive to economic dynamism in the years ahead."[255] UREAA can introduce uniformity and comprehensiveness to the current patchwork of state laws, without the need for time-consuming federal legislative or regulatory approval.[256]

B. The Act is Uniform

Surprise! The Uniform Restrictive Employment Agreement Act provides a framework for uniform regulation of restrictive employment agreements.[257] The Act was approved and recommended for enactment in all fifty states.[258]

C. The Act is Comprehensive

Currently, no state or federal law addresses restrictive employment agreements *en masse*.[259] UREAA regulates all *employer-employee* restrictive employment agreements, including non-competes, confidentiality/non-disclosure agreements, non-solicitation agreements,

---

251 UNIF. L. COMM'N, *supra* note 230, at 1.

252 Russell Beck, *Lots Going on: Noncompete Legislation, Regulation, and Case Law Developments*, FAIR COMP'N L. (June 27, 2022), https://faircompetitionlaw.com/2022/06/27/lots-going-on-with-noncompete-legislation-regulation-and-case-law/ (Colorado, Oklahoma, Vermont, and West Virginia); Beck, *supra* note 141 (Though Colorado's legislature indefinitely postponed consideration of UREAA, the legislature did pass HB.22-1317, which makes sweeping changes to existing Colorado law, including the establishment of low-wage thresholds, notice requirements, and a $5,000 penalty per violation, effective August 10, 2022).

253 *See* UNIF. RESTR. EMP. AGR. ACT 2 (prefatory note).

254 *See id.*; *supra* Part V.

255 *See* UNIF. RESTR. EMP. AGR. ACT 2 (prefatory note).

256 *See id.*

257 UNIF. RESTR. EMP. AGR. ACT 1-2 (prefatory note).

258 UNIF. RESTR. EMP. AGR. ACT (title page).

259 *See* Starr, *supra* note 99.

no-business agreements, no-recruit agreements, payment-for-competition agreements, and training-repayment agreements.[260] The Act uses the term "worker" to include employees, independent contractors, externs, interns, volunteers, apprentices, and any other individuals providing services.[261] In short, UREAA offers a comprehensive approach to reform that benefits market participants and promotes competition.[262]

The Act sets maximum durations for restrictive agreements ranging from six months to five years and establishes other substantive requirements for valid agreements.[263] UREAA's requirements are mandatory and cannot be waived, except under limited circumstances, to protect the public interest in competition and mobility in labor markets.[264] The Act adopts commentators' suggestions and the State Call to Action on Non-Compete Agreements' best-practice objectives by banning non-compete agreements for low-wage workers; providing for detailed notice requirements that ensure workers understand what their restrictive employment agreement prohibits; and eliminating the blue-pencil rule in favor of two alternatives.[265]

UREAA prohibits all restrictive employment agreements, except confidentiality and training-reimbursement agreements for low-wage workers, defined as those making less than the state's annual mean wage.[266] The Act also prohibits the enforcement of restrictive agreements for workers that (1) resign for good cause attributable to their employer or (2) are fired for a reason other than substantial misconduct or the completion of the agreed work or employment term.[267]

As explained above, state common law is a disfavored mechanism for crafting strict notice requirements and has failed to do so.[268] UREAA provides for detailed mechanisms to ensure that workers are aware of the agreements in which they sign, and thus increases their bargaining power.[269] The Act requires an employer to provide a prospective worker

---

260 *See* Robinson, *supra* note 230.

261 UNIF. RESTR. EMP. AGR. ACT § 2.

262 *See id.* 1-2 (prefatory note).

263 *The Uniform Restrictive Employment Agreement Act* (2021) -*A Summary-,* 1, 1, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b88a7f4c-00ee-4cc7-d586-83ba57220ded&forceDialog=0 (last visited Aug. 1, 2022).

264 *Id.*

265 *See supra* Part V; UNIF. RESTR. EMP. AGR. ACT 1, 4 (prefatory note).

266 UNIF. RESTR. EMP. AGR. ACT 1 (prefatory note), § 5, § 5 cmt. (or some multiplier thereof).

267 *Id.* § 6 ("A state should insert the term the state uses for determining major disqualification for unemployment insurance benefits." For example, instead of substantial misconduct, a state may use the term gross misconduct or willful misconduct).

268 *See supra* Part V.

269 UNIF. L. COMM'N, *supra* note 230, at 1.

with a copy of the proposed restrictive employment agreement at least fourteen days before the worker accepts or commences work, whichever is earlier.[270]

The Act replaces the blue-pencil rule in favor of two alternatives.[271] Under Alternative A, a restrictive employment agreement that does not comply with the Act is prohibited and unenforceable—essentially a red-pencil rule.[272] Alternative B permits greater judicial discretion by allowing a court to reform the agreement in certain circumstances if the employer entered the agreement reasonably and in good faith thinking it was enforceable.[273] The Act creates penalties to be enforced by private actors in addition to state departments of labor, Attorneys General, or other state officials.[274] Specifically, UREAA allows courts to award damages of up to $5,000 per worker per illegal agreement for each violation.[275] This hefty fine will deter the misuse of restrictive employment agreements and promote worker mobility.[276]

D. Lingering Issues: Truly Comprehensive & Uniform? Too Employer-Friendly? Not Strict Enough? Redundant?

Of course, no piece of legislation is perfect, and the Act is not without its flaws. Though the array of covered agreements is broader than non-competes, the definition of restrictive employment agreement is inherently limiting, covering only *post-work activity*.[277] For example, the Act does not cover an agreement between an employer and worker about *current* working conditions.[278] UREAA does not cover *employer-employer* no-poach agreements, which restrain trade and depress wages.[279] The Act also does not cover certain alternative arrangements, or institutional barriers to worker mobility, such as occupational licensing and educational requirements.[280] Furthermore, UREAA defers regulation of confidentiality agreements to state whistleblower and sexual harassment statutes.[281] The Commission believes that confidentiality is a "major requirement for any

---

270 UNIF. RESTR. EMP. AGR. ACT § 4.
271 *See id.* § 16, § 16 cmt.
272 *See id.*
273 *See id.*
274 *See id.*
275 *See id.* § 16, § 16 cmt.
276 *See* Vaheesan, *supra* note 201.
277 UNIF. RESTR. EMP. AGR. ACT § 2 cmt.
278 *Id.*
279 *Id.*; *see* Starr, *supra* note 99.
280 Adam A. Millsap, *Occupational Licensing Linked to Less Economic Mobility*, FORBES (Apr. 11, 2018), https://www.forbes.com/sites/adammillsap/2018/04/11/occupational-licensing-linked-to-less-economic-mobility/?sh=470ddab67732; Hayes, *supra* note 7.
281 UNIF. RESTR. EMP. AGR. ACT § 2 cmt.

worker," and that "an appropriate confidentiality agreement does not greatly restrict mobility."[282] Because each state has different annual mean wages, the threshold at which a worker is considered low-wage will vary among jurisdictions, marginally preserving the patchwork of state laws.[283]

Declining to condemn training-reimbursement agreements as *per se* illegal, the Commission strikes a balance that some may find too employer-friendly: an employer can require repayment up to the actual cost of "special training," as long as the worker worked for the employee for two years or less after receiving the training.[284] Additionally, UREAA's Saving Provision delays the full applicability of the Act, exempting agreements entered into before an effective date.[285] The Commission acknowledges that the Savings Provision might incentivize employers to lock employees into a soon-to-be prohibited agreement, but counteracts these concerns with a Transitional Provision that allows state legislatures to enforce certain provisions immediately.[286]

UREAA doesn't go as far as some states have gone in classifying non-competes *per se* illegal for all employees, which is problematic because restrictive employment agreements are anti-competitive at any income level.[287] Critics have claimed that legislation or regulatory action against restrictive employment agreements is unnecessary, as courts satisfactorily judge the reasonableness of restrictive covenants on a case-by-case basis.[288]

In reality, restrictive employment agreements are rarely challenged by low-wage workers, and a pro-employee ruling is, at most, a minimal

---

[282] *Id.* § 5 cmt.

[283] *Id.*; Dawn Mertineit, *More States Eye Low-Wage Non-Compete Bans* n.1, JDSUPRA (Mar. 8, 2022), https://www.jdsupra.com/legalnews/more-states-eye-low-wage-non-compete-8055571/; *see generally* Weibust, *supra* note 191 (arguing that regulation of non-competes should be left to the states but recognizing the practical disadvantages of a state-by-state approach).

[284] UNIF. RESTR. EMP. AGR. ACT § 14 cmt.

[285] *Id.* § 19, § 19 cmt.

[286] *See id.* § 19, § 19 cmt., § 20.

[287] *See supra* Part V; Marr, *supra* note 170; Lobel, *supra* note 105 ("While some proposals on prohibiting noncompete policies have focused on the lower-skilled labor market, these efforts miss the bigger picture. The reason to ban noncompetes isn't simply to protect the ability of low-income workers to make a living in low-skill jobs. Rather, a ban on noncompetes is designed to enrich the talent pool at all levels of the labor market and to fuel healthy competition for skilled, as well as unskilled, talent.").

[288] Mark S. Goldstein & Noah S. Oberlander, *What Does the Future Hold for Restrictive Covenant Agreements in the U.S.?*, REUTERS (Oct. 1, 2021, 10:53 AM), https://www.reuters.com/legal/legalindustry/what-does-future-hold-restrictive-covenant-agreements-us-2021-10-01/; Posner, *supra* note 130, at 398 ("Epstein . . . argues that . . . antitrust litigation aimed at covenants not to compete is unnecessary because common law regulation is sufficient.").

inconvenience for the employer.[289] In the antitrust context, once the rule of reason has been adopted, antitrust claims are very difficult to prove, requiring "an individualized factual inquiry into [a restraint's] nature, purpose, circumstances, and history."[290] The rule of reason analysis determines the effect of a particular restraint's effect on the relevant geographic and product market, rather than the effect on the parties themselves.[291] One study found that ninety-seven percent of cases analyzed under the rule of reason framework were dismissed due to the plaintiff's inability to show an anticompetitive effect.[292]

Existing common law and antitrust approaches have been insufficient, as evidenced by the proliferation of restrictive covenants and their adverse effects on employees.[293] The abuse of restrictive employment agreements to restrain low-wage workers is especially egregious and unjustified—worthy of special protection, lest the abuse go unpunished—and the Act is consistent with state trends in addressing this issue.[294] Ten states have introduced or amended their low-wage worker thresholds since 2016, with Colorado and the District of Columbia coming down the pipeline.[295] Of the first one-hundred non-compete laws introduced across twenty-nine states and the District of Columbia in 2022, five involved proposed bans, twenty-four involved low-wage worker thresholds, twenty-one involved notice provisions, and sixteen included fines for violations.[296] While the

---

289 *See supra* Part V; Posner, *supra* note 130, at 399 ("[C]ommon law regulation varies across states, and in some states it is quite light . . . .[C]ommon law sanction is exceedingly weak—nonenforcement, while in some states courts will merely whittle down an overbroad noncompete to an acceptable size.").

290 Lobel, *supra* note 108, at 911.

291 PRACTICAL L. ANTITRUST, *supra* note 50.

292 *Id.*; Lobel, *supra* note 108, at 911-13 ("In practice, when an individual challenges a noncompete absent a class action, it is difficult to prove market impact of the single noncompete[,] . . . [which] allows employers to increase their market power over the labor force and further suppress wages.").

293 *See* Posner, *supra* note 130, at 399 ("[C]ommon law regulation does not address market-wide impacts as antitrust law does, and so will tolerate noncompete agreements that cartelize labor markets but that do not cause significant harm to the worker in question."); Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L. J. 165, 200 (2020) ("[N]ew evidence, including the new research about labor market concentration, the evidence of wage stagnation, and the legacy of failed antitrust enforcement against labor monopsonists suggest that courts have failed to give noncompetes sufficient scrutiny."); UNIF. RESTR. EMP. AGR. ACT § 3 cmt.

294 *See supra* Part V.

295 *See supra* Part IV.

296 Beck, *supra* note 141; Russell Beck, *Noncompete Notice Requirements — Updated for D.C.'s Anticipated Amendment,* FAIR COMP'N L. (Aug. 17, 2022), https://fair competitionlaw.com/2022/07/18/noncompete-notice-requirements-updated-for-d-c-s-

Act does not enact a blanket ban, it protects a substantial fraction of the labor force from restrictive employment agreements and is a step in the right direction.[297]

E. The Act Leaves Room for Congress and Federal Agencies to Guide Enforcement

If President Biden wants to make good on his promise to limit restrictive employment agreements, federal rulemaking or legislation are two paths to real change. [298] To his credit, he has made a host of agency appointments that have been well-received by advocates for reform.[299] His willingness to unleash non-legislative power to tangle with the largest forces in our economy may prove to be one of the defining achievements of his presidential tenure.[300]

An FTC rule curtailing restrictive employment agreements would be consistent with the agency's goal of preventing unfair methods of competition, as well as recent state action.[301] FTC rulemaking would also be consistent with the ideals of the Neo-Brandeis movement, which seeks to use antitrust mechanisms to address a wide range of anticompetitive practices.[302] Executive Order 14036 gives the FTC a green light to do what Lina Khan has been advocating for in academic publications.[303] The agency can play an administrative, norm-creating role to broadly shape the law of restrictive employment agreements, rather than pursuing challenges exclusively through adjudication.[304] Rulemaking would also give notice to a much larger set of employers and employees than ad hoc adjudication.[305] Of course, any federal action would be uniform in its application and scope.[306]

Federal action against restrictive employment agreements has not exactly been timely, though that could change. Traditionally, federal

---

anticipated-amendment/ (By the end of 2022, at least eight states will have advance notice requirements in effect).

297 *See* Vaheesan, *supra* note 201.

298 *See* Marr, *supra* note 170.

299 *See supra* Part V. B.

300 Dayden & Sammon, *supra* note 174.

301 *See* Ballotpedia, *supra* note 165; *supra* Part IV.

302 Gidley et al., *supra* note 75.

303 *Id.*

304 *Id.*

305 *Id.*

306 *See id. But see* Jessica Mach, *Labor of Law: Federal Noncompete Ban Would Be Far from Last Word on Issue*, LAW.COM (July 28, 2022, 10:44 AM), https://www.law.com/2022/07/28/labor-of-law-federal-noncompete-ban-would-be-far-from-last-word-on-issue/ ("Even if the rule passes muster, the extent to which the FTC will try—or have the resources—to enforce it nationwide also will determine how effective it is.").

agencies take months or years to complete the rulemaking process and resolve any legal challenges.[307] However, in July 2021, the FTC approved changes to its Rules of Practice, eliminating internal hurdles to rulemaking and strengthening the agency's ability to challenge unfair and deceptive practices under the FTCA.[308] And FTC Commissioners have recognized that rulemaking can effectuate changes in the legal landscape faster than legislation, even if federal regulations do not necessarily carry the same force of law as Congressional legislation.[309]

Still, the FTC and DOJ remain preoccupied grappling with Big-Tech giants, illegal mergers, and other issues, such as worker misclassification.[310] Commissioner Noah Phillips has suggested that the FTC lacks authority to promulgate a rule restricting the use of employer/employee non-compete agreements, a view that may find support in the Supreme Court's ruling in *West Virginia v. EPA,* 142 S. Ct. 2587 (2022).[311]

Congress has been unable to agree on the details of reform, notwithstanding years of bipartisan proposals in both the House and Senate, though bills continue to be introduced.[312] Despite all the posturing, neither tangible federal legislation nor agency rulemaking against restrictive employment agreements has come to fruition.

With or without new regulation, the FTC and DOJ should devote more resources to scrutinizing restrictive employment agreements and alternative arrangements and/or expand the circumstances under which these arrangements are considered to unreasonably restrain trade.[313] The agencies should also revise the Joint Antitrust Guidelines for Human Resources Professionals to reflect any change in enforcement policies and laws.[314]

Again, the importance of comprehensive action cannot be overstated. If the agencies or Congress ban non-compete agreements for some or all

---

307 Mark S. Goldstein et al., *What's All this Talk About Federal Regulation of Non-Compete Agreements?*, REED SMITH (July 19, 2021), https://www.employmentlawwatch.com/2021/07/articles/employment-us/whats-all-this-talk-about-federal-regulation-of-non-compete-agreements/.

308 Gidley et al., *supra* note 75.

309 *Id.*

310 *See supra* Part IV.

311 *See* Erik Weibust & Stuart Gerson, *FTC Authority to Ban Noncompetes Shaky After EPA Ruling*, LAW360 (July 14, 2022, 6:29 PM), https://www.law360.com/articles/1511340/ftc-authority-to-ban-noncompetes-shaky-after-epa-ruling; Mach, *supra* note 306.

312 *See supra* Part IV.

313 Goldstein et al., *supra* note 307.

314 *See id.*; Goldstein & Oberlander, *supra* note 288 ("The guidelines currently state that they do 'not address the legality of specific terms contained in contracts between an employer and an employee, including non-compete clauses.'").

workers, but leave other restrictive employment agreements untouched, firms will resort towards these substitutes, and the negative effects on labor and product market competition will persist.[315] Workers must be made aware that their restrictive employment agreements are unenforceable to avoid the chilling effect on employee mobility.[316] Moreover, employers must be held accountable through aggressive enforcement and penalties.[317]

UREAA falls short of regulating no-poach agreements, which is an area where the federal government can step in.[318] In January 2021, the DOJ Antitrust Division filed its first criminal antitrust prosecution against a healthcare provider for its use of no-poach agreements.[319] Six months later, the DOJ achieved two more indictments against two alleged co-conspirators in the same investigation.[320] On January 28, 2022, a federal district court endorsed for the first time the DOJ's view that no-poach agreements can constitute criminal antitrust violations.[321] State Attorneys Generals and private actors have been active in the fight against no-poach agreements, but it would be nice to see the agencies answer the Attorneys Generals' call for additional federal support.[322]

VIII. CONCLUSION: FEDERALISM "AT WORK"

"While many lawyers and judges describe contract law as 'private law,' it is dependent on state power for its force and legitimacy and so unavoidably implicates public policy."[323] Public policy considerations weigh in favor of an individual's right to pursue a new job without hindrance.[324] There are signs of growing public and bipartisan support for limiting the use of restrictive employment agreements, both at the state and federal level.[325] Oversight and enforcement of restrictive employee agreements has traditionally been left to the states.[326] Many states have

---

315 *See* Starr, *supra* note 99.
316 *See id.*
317 *Id.*
318 UNIF. RESTR. EMP. AGR. ACT 1 (prefatory note), §2 cmt.; *see* Gidley et al., *supra* note 75.
319 Gidley et al., *supra* note 75.
320 *Id.*
321 *District Court Holds that No-Poach Agreements Can Constitute Criminal Antitrust Violations*, *O'MELVENY & MYERS LLP* (Feb. 16, 2022), https://www.omm.com/resources/alerts-and-publications/alerts/district-court-no-poach-agreement/.
322 *See* Gidley et al., *supra* note 75.
323 Vaheesan & Buck, supra note 44, at 179-80.
324 Brodsky, *supra* note 43.
325 *See* Marr, *supra* note 170; *supra* Part V.
326 Gidley et al., *supra* note 75.

limited the enforceability of such agreements and ramped up penalties for noncompliance, and many more seem poised to do so in the near future.[327] But legislation has been neither timely, nor uniform, nor comprehensive, and fails to provide adequate notice to market participants.[328]

UREAA addresses all restrictive employment agreements, including topics such as the extent to which such agreements are enforceable; notice and other procedural requirements; enforceability standards; choice of law issues; and remedies.[329] It is consistent with state enforcement trends and protects particularly vulnerable low-wage workers from unreasonable restraints on their mobility.[330] Every state should adopt UREAA because the Act is timely, uniform, and comprehensive.

Although Executive Order 14036 breaks with historical tradition by encouraging federal involvement, this approach aligns with the Neo-Brandeis antitrust school of thought that is quickly gaining momentum (and representation) in the Biden Administration.[331] The Order provides a clear message from the Biden Administration to the federal government: join the states' fight against restrictive employment agreements.[332] Neither Congress nor the agencies have taken up the task quite yet.[333]

Will states be permitted to continue adopting laws regulating restrictive employment agreements on an ad hoc basis? [334] Will the federal government finally step into the fray and force a one-size-fits-all approach?[335] The options are not mutually exclusive. Federal and state efforts to curtail the use of restrictive employment agreements can coexist. Take trade secret law as an example. Forty-eight states, the District of Columbia, Puerto Rico, and the US Virgin Islands have adopted the ULC's Uniform Trade Secrets Act ("UTSA") since it was first promulgated in 1979.[336] By enacting UTSA, states codified the basic principles of

---

327 *See supra* Part IV.

328 *Id.*

329 Robinson, *supra* note 230.

330 *See supra* Part V.

331 Gidley et al., *supra* note 75; *see* REUTERS, *supra* note 173.

332 Goldstein et al., *supra* note 307; Gidley et al., *supra* note 75.

333 *See supra* Part V. B.

334 *See* Russell Beck & Erika Hahn, *Noncompete Misconceptions May Be Inhibiting Reform*, LAW360 (Dec. 17, 2019, 3:29 PM), https://www.law360.com/articles/1228569.

335 *Id.*

336 *See Trade Secrets Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=3a2538fb-e030-4e2d-a9e2-90373dc05792 (last visited Aug. 1, 2022); UNIF. TRADE SECRETS ACT 3 (prefatory note) (UNIF. L. COMM'N 1979) (amended 1985). *But see* Russell Beck, *Trade Secrets Laws and the UTSA*, FAIR COMP'N L. (Aug. 10, 2018), https://faircompetitionlaw.com/2018/08/10/trade-secrets-laws-and-the-utsa-a-50-state-and-federal-law-survey-chart-updated-for-massachusetts/ ("[S]ome may quibble with whether Alabama or North Carolina actually adopted it. The

common law trade secret protection to clarify and standardize the law.[337] UTSA did not lead to an *entirely* "uniform" set of laws, as many states adopted their own variations which courts have uniquely interpreted.[338] So, in 2016, Congress supplemented state trade secret laws by enacting the Defend Trade Secrets Act ("DTSA") to address the patchwork of state trade secret laws and enhance uniformity.[339] DTSA provides a single, national standard for trade secret misappropriation, but doesn't preempt state laws (such as UTSA), providing overlapping causes of action.[340] In similar fashion, states should adopt UREAA to address often-abused restrictive employment agreements in the short term, while the federal government should address any gaps in uniformity or efficacy in the long term.

Uniform Law Commissioners contend that Alabama has adopted it, while North Carolina has not; I view the results as largely the opposite.") (internal parentheses omitted).

337 *See* UNIF. TRADE SECRETS ACT 1 (prefatory note) ("[T]rade secret law . . . has not developed satisfactorily. In the first place, its development is uneven . . . .Secondly, even in states in which there has been significant litigation, there is undue uncertainty concerning the parameters of trade secret protection, and the appropriate remedies for misappropriation of a trade secret.")

338 *See* Danielle A. Duszczyszyn & Daniel F. Roland, *Three Years Later: How the Defend Trade Secrets Act Complicated the Law Instead of Making it More Uniform*, FINNEGAN (July/Aug. 2019), https://www.finnegan.com/en/insights/articles/three-years-later-how-the-defend-trade-secrets-act-complicated-the-law-instead-of-making-it-more-uniform.html.

339 *See Explaining the Defend Trade Secrets Act*, A.B.A. (Sept. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/09/03_cohen/.

340 *See id.*; Mark Klapow et al., *How 5-Year-Old Defend Trade Secrets Act Has Met Its Goals*, LAW360 (May 11, 2021), https://www.law360.com/articles/1381556/how-5-year-old-defend-trade-secrets-act-has-met-its-goals.