Report to the Study Committee on Covenants Not to Compete
Uniform Law Commission
From

Stewart J. Schwab, Study Committee Reporter

Draft of September 4, 2019 (as edited 9/24/2019 and 12/13/2019)

Table of Contents

IV. BALANCING THE POLICY FACTORS

V. UNIFORM NONCOMPETE STATUTE—KEY DRAFTING ISSUES

a. *Codify or Reform*
b. *Scope Issues*
    i. *Including Non-solicitation and other Restrictive Covenants*
    ii. *Including No-Poach Agreements*
    iii. *Covering Independent Contractors as well as Employees*
c. Exempting Categories of Workers
    i. *Exempting Low-Income Workers*
    ii. *Exempting Physicians (and other Professionals)*
d. *Notice and Transparency Requirements*
    i. *Written and Signed*
    ii. *Pre-Hire Notice*
    iii. *Consideration*
    iv. *Garden Leave*
e. *Drafting Issues Within the Common-Law Codification*
    i. *Codifying the Basic Two-Part Test*
    ii. *Inclusion or Exclusion Language*
    iii. *Listing of Protectable Interests*
    iv. *Blue or Red Pencil*
    v. *Choice of Law*

VI. CONCLUSION: WOULD A UNIFORM STATUTE BE HELPFUL (AND ADOPTED)?

I. INTRODUCTION and COMMON-LAW BACKGROUND

A noncompete or noncompetition agreement (also called a covenant not to compete (CNC), Do-Not-Compete Clause (DNC), or Non-Compete Agreement (NCA)) is an agreement between an employer and employee or independent contractor that, upon termination of the employment, prohibits the worker from creating, joining, or working as a consultant or independent contractor for ~~or creating~~ a competing firm. A typical modern covenant specifies the length of time, geographic area, and scope of business that the worker may not engage in.

While *noncompetition agreements* get the most attention, they are part of a family of restrictive covenants: others include *non-solicitation agreements* prohibiting the recruitment of former customers or workers; *non-business agreements* prohibiting doing business with former customers or workers whether solicited or not; *confidentiality clauses* or *nondisclosure agreements* not to reveal trade secrets or other confidential information; *repayment promises* to pay the employer if the employee competes, solicits, or does business; and *training-repayment promises* to pay back training expenses if the employee leaves early. *No-poach agreements* are cousins to restrictive covenants: while ~~a~~ restrictive covenants are~~is an~~ agreements between an employer and its employees, ~~in~~ a no-poach is an agreement between two employers (perhaps joint venturers or franchisees of the same brand) ~~agree~~ not to hire each other's workers.

Noncompete agreements and other restrictive covenants arise in several typical scenarios. Officers and top managers are one focus. Researchers and high-tech workers privy to trade secrets are another. Physicians, dentists, and other professionals are a third, and sales persons who develop customer relationships are a fourth. Recently, however, noncompetes are increasingly being used to restrain lesser skilled, low-wage employees, and this has been a focus of recent policy debate and legislation.

Noncompetition agreements have a long legal history tracing back to medieval guilds. One polar position, articulated most prominently by Judge Posner,[1] is that DNCs should be treated like any other contract, meaning they should be enforceable if there was an offer, acceptance, and consideration, subject to standard contract defenses such as fraud, duress, unconscionability, or mutual mistake. No American jurisdiction takes this view. The opposite polar position is that DNCs should never be enforceable because they are always against public policy. California, North Dakota, and Oklahoma ~~and a few other states~~ come close to this latter position, holding that a DNC is only enforceable in connection with the sale of a business.[2]

The common law tradition takes an intermediate position. For a noncompete agreement to be enforceable, courts require (1) a protectable interest of the employer; and (2) that the noncompete be reasonably tailored in time, geography and scope to further that interest.[3] Common-

[1] See Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 669-71 (7th Cir. 1999) (Posner, J., dissenting).

[2] Cal. Bus. & Prof. Code § 16600, initially enacted in 1872 as part of the Field Code, declares that "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

[3] The blackletter of Am. Law. Inst., Restatement of Employment Law § 8.06 (2015) states: "Except as otherwise provided by other law or applicable professional rules, a covenant in an agreement between an employer and a former

law states differ on details of this two-part test, and on other aspects of noncompete law such as consideration requirements and the blue-pencil rule. The Restatement explains that, for DNCs agreed to after the start of the employment relationship, the "majority rule is that continuing employment of an at-will employee is sufficient consideration," but that a "significant minority of jurisdictions require 'new' or 'additional' consideration."[4] The Restatement declares that a court may modify and enforce an overbroad DNC,[5] but some common-law jurisdictions reject this "blue-pencil" rule.

A l~~L~~egitimate ~~or~~ protectable employer interest~~s~~ is the key requirement for DNC enforceability ~~inquiry~~ under the common law. Trade secrets are the most frequently discussed legitimate interest. Importantly, almost all states have now enacted the Uniform Trade Secrets Act to define and directly protect trade secrets, which means that ~~so the~~ states have common principles and language about this core protectable interest. Other standard legitimate employer interests in addition to protecting trade secrets include the purchase of a business, goodwill with customer relationships, and investment in an employee's market reputation.[6] Some states add other legitimate employer interests such as protecting key employees and training and education of

---

employee restricting the former employee's working activities is enforceable only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer, as defined in § 8.07, unless: (a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable; (b) the employer acted in bad faith in requiring or invoking the covenant; (c) the employer materially breached the underlying employment agreement; or (d) in the geographic region covered by the restriction, a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant."

Some states refer to the three-part test of the first Restatement of Contracts §§ 513-15 (1932): a restraint 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. Harlan Blake, in his seminal article, declared that courts seldom gave separate consideration of parts (2) and (3): "having completed the analysis of the extent of a protectable interest, courts usually find the relevant considerations exhausted; the other branches of the *Restatement* formulation are seldom as separate considerations, given much attention. This does not mean that the interests of the employee and the public are necessarily slighted, but only that 'undue hardship' to the employee and 'injury' to the public are measured against the urgency of the employer's claim to protection, rather than against some extrinsic standard." Harlan M. Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 648-49 (1960).

[4] Am. Law Inst., Restatement of Employment Law § 8.06 cmt. e ("The majority rule is that continuing employment of an at-will employee is sufficient consideration to support the enforcement of an otherwise valid restrictive covenant. However, a significant minority of jurisdictions require 'new' or 'additional' consideration. Under either approach, the parties may enter into enforceable restrictive covenants after the start of an employment relationship.").

[5] See Am. Law Inst., Restatement of Employment Law § 8.07 cmt. a ("Although unreasonable restrictive covenants should never be enforced as written, a court may modify an overly broad restrictive covenant into one that is reasonably tailored to the employer's protectable interest under § 8.07, and may thereafter enforce the modified covenant. Such modification, sometimes called 'blue penciling,' lies within the sound discretion of the court but that discretion should be exercised with care so as not to create an incentive for employers to draft overbroad restrictive covenants that in some instances will be taken by employees at face value as enforceable. On the other hand, a rules that forbids judicial modification and leaves courts with only a binary 'enforce or reject' choice can also lead over time to a legal regime that provides employers with an incentive to draft overly broad covenants that employees will similarly regard as enforceable, due to judicial unwillingness to completely reject a covenant that is partially valid. . . . The best approach, reflected in this section, is for courts to refuse to modify an overly broad restrictive covenant when the employer lacked a reasonable good-faith belief that the covenant was enforceable.")

[6] Protectable interests for restrictive covenants are defined in Am. Law. Inst. Restatement of Employment Law (2015) § 8.07(b): "An employer has a legitimate interest in protecting, by means of a reasonably tailored restrictive covenant with its employee, the employer's: (1) trade secrets, as defined in § 8.02, and other protectable confidential information that does not meet the definition of trade secret; (2) customer relationships; (3) investment in the employee's reputation in the market; or (4) purchase of a business owned by the employee."

employees. –Critically, however, the employer's understandable desire to prevent a former employee from competing is not a protectable interest, even if the employee uses their general skills, experience, and on-the-job training learned on the first job to compete.

II. MAPPING STATE NONCOMPETE LAW

States take one of three basic approaches to regulating non-competes. (The states are listed in Table A-1. Our counts include the District of Columbia, Puerto Rico, the Virgin Islands, and Guam, and so the totals will be 54.)

(1) *Category 1: Common-law Regulation*. Most states (29 by our count) continue to rely on the common law to regulate noncompete agreements. Statutes are important in almost all states, however, for two reasons. First, every state[7] but New York has adopted the Uniform Trade Secrets Act, which is the primary legitimate interest for employers justifying a noncompete. Second, many states have statutes that exempt certain categories of workers—most commonly, physicians-- from this common-law regulation.

(2) *Category 2: Common-Law Codification*. Eleven states have enacted a statute that essentially codifies the common law approach of requiring a DNC to be reasonably tailored to a legitimate employer interest. For example, a 1987 Michigan statute allows a DNC "which protects an employer's reasonable competitive business interests" and "is reasonable as to its duration, geographical area, and the type of employment or line of business," and endorses the blue-pencil rule.[8] Michigan courts have recognized that the statute essentially endorses common-law principles.

(3) *Category 3: Comprehensive Statutory Scheme Significantly Altering Common Law*. At least nine states by statute have altered the common law framework in a significant way, and perhaps more depending on how one counts (we count twelve in all).

Some statutes clearly alter the common law by declaring DNCs to be unenforceable in almost all circumstances except when related to the sale of a business. These states are ~~include~~ California and North Dakota, whose statutes trace back to the 19th Century Field Codes, and Oklahoma.

[7] Massachusetts was the most recent state to adopt the UTSA, in 2018. North Carolina and Alabama have trade secrets statutes, but there is some debate whether they are close enough to the UTSA to be considered adoptions.

[8] Mich. Comp. Laws § 445.774a. This statute amended the Michigan Antitrust Reform Act of 1984, which perhaps inadvertently repealed a 1905 Michigan statute that had declared most noncompetes to be void. For an explanation of the statutory history and empirical study of the natural experiment that occurred when the ban on noncompetes was inadvertently repealed, see Matt Marx, Deborah Strumsky & Lee Fleming, Mobility, Skills, and the Michigan Non-Compete Experiment, 55 Management Science 875 (2009).

In the last couple of years, several states have also enacted statutes significantly changing the common law. These include Maine and Washington in 2019, Massachusetts in 2018, and Oregon significantly amending its 2008 statute in 2016 and 2019. These statutes allow some DNCs but impose a range of procedural as well as substantive requirements, such as requiring employers to give notice of a DNC before the employee accepts the job, requiring DNCs to be signed and in writing, and requiring "garden leave" pay during periods the DNC prevents the employee from working, as well as voiding DNCs of low-income workers variously defined.

While these statutes clearly deviate from the common law and thus are Category 3, other states are closer to common-law rules and thus perhaps could be called codification statutes. We classify them as comprehensive if the statute specifies a large number of protectable interests, gives presumptive minimum or maximum time limits for a reasonable DNC, and gives explicit rules on blue-penciling, consideration, and burden-of-proof. Alabama, Arkansas, Colorado, Louisiana, and Nevada are such states. They don't differ too much from common-law codification statutes. On the other hand, we classify Florida and Georgia as common-law codification statutes, even though they set maximum and minimum time limits, among many other details. Maybe we should classify Florida and Georgia as comprehensive.

Professional/Occupational Exceptions. Regardless of whether a state generally relies on or codifies the common law or has a comprehensive statute on noncompetes, most states have by statute singled out particular professions or occupations for different treatment.

Attorney is the profession most widely exempted from noncompete statutes. While usually not done directly by statute, the ethical rules of every state bar association prohibit noncompetition agreements among lawyers, largely on the rationale that clients should have an unfettered right to the lawyer of their choice.[9]

Another common exception is for physicians, enacted by about a dozen states and under consideration by several others. (Table A-2 lists the states and shows the variety of physician-exemption statutes.) Several statutes void all DNCs against a physician, except, in some states, in relation to the sale of a medical practice. Other statutes specify that a DNC cannot limit a physician, for example, for more than a year or more than 30 miles. Some states broaden the physician exception to cover other medical professionals as well, generally on the rationale of providing greater patient choice of health-care providers.

Broadcasters are singled out for special regulation in ten states, some states voiding all broadcaster DNCs while others specially limiting their scope. (Table A3 lists the variety of

[9] ABA Model Rules of Professional Responsibility 5.6 ("A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement"). A few states enforce lawyer restrictions that are less than full noncompetition agreements, such as forfeiture-for-competition and compensation-for-competition clauses among lawyers. See Am. Law. Inst., Restatement of Employment Law § 8.06 cmt. h reporters' notes (2015).

broadcaster exemptions by state.) Other state noncompete statutes single out a variety of miscellaneous occupational exemptions, such as security guards, mediators, auto salesperson, beauticians, and locksmiths. A recent Hawaii statute bans DNCs for employees in the technology industry.

Idaho takes the opposite tack by singling out one occupation where DNCs may be allowed. While most of these occupation-exception statutes make it harder to enforce a DNC against a particular job category, Idaho (which generally is stringent against enforcement), singles out insurance agents as being subject to a reasonable DNC.

Exceptions for Low-Income Workers. Seven states have recently passed statutes prohibiting enforcement of noncompetes against low-wage workers, and other states are contemplating such statutes. Table A-4 lists the states. Such statutes arise regardless of whether the state generally regulates noncompetes through the common law, a codification of the common law, or comprehensive statute. A couple of states (Oregon and Massachusetts) focus on FLSA "non-exempt" workers rather than directly on "low-wage workers." These statutes prohibit noncompetes from being enforced against workers not exempt from the federal Fair Labor Standards Act's minimum wage and overtime requirements, the largest category being bona fide administrative, executive, or professional employees, or outside sales representatives.

Procedural Regulations. In addition to the exceptions noted above, several states have passed statutory provisions that seek to regulate the *process* by which DNCs are implemented. Of particular note are provisions that require DNCs to be implemented before an employee begins work or receives a promotion. Oregon, for example, voids noncompetes unless they are presented at least two weeks before work begins, or with a "bona fide advancement" if the employer requests a DNC after employment has commenced. Massachusetts requires a period of ten days before employment begins or~~and~~ the DNC must include "fair and reasonable consideration independent from the continuation of employment". In New Hampshire, workers are entitled to a three-day consideration period before signing a DNC, and any DNC cannot take effect until the longer of one year working at the job or six months after signing the DNC. The ~~supposed~~ goal of these "notice" provisions is to prevent workers from agreeing to most of the contractual terms of the job at one point in time, only to be unexpectedly presented with a DNC at some subsequent point in time when they have limited bargaining power.

III. THE IRON IS HOT—DNCs IN THE NEWS AND LEGISLATURES

While reliable data are sparse, many believe that noncompetition agreements are becoming more common and expanding beyond their traditional areas of use. Perhaps the most comprehensive survey was conducted by Professor Evan Starr and colleagues in 2014.[10] Among his findings are that some 20 percent of all workers say they are currently subject to a DNC, and almost 40 percent say they have been subject to a DNC sometime in their career. While highly paid workers are more likely to have a DNC (including 85 percent of executives), some 14 percent of those making under $40,000 a year had a DNC.

[10]See J.J. Prescott, Norman Bishara & Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project," 2016 Michigan St. L. Rev. 369.

Media attention. Some notorious cases have received considerable media attention in recent years. Among the many illustrations are these:

- Jimmy John's sandwich shops restricted its "sandwich artists" after leaving Jimmy John's from working for another company that made more than 10 percent of its revenue by selling sandwiches working for 2 years within 3 miles of any Jimmy John's.[11]
- Amazon required temporary warehouse workers to sign broad non-compete clauses, prohibiting them for 18 months from working for a business that sells a competing good or service, which greatly limited some workers from finding employment after termination.[12]
- Camp Bow Wow, a doggy day care and boarding company, requires its employees to sign non-compete agreements to prevent their former employees from utilizing "trade secret" dog walking and sitting techniques.[13]
- Don Cue, who needed treatment from his urologist, felt abandoned when he could not contact his doctor in Iowa due to a non-compete clause.[14]
- Duke University entered into no-poach agreement with the University of North Carolina-Chapel Hill to not hire each other's medical faculty. Both UNC and Duke settled the suit with Duke paying a historic $54 million.[15]

In response to this recent media attention, there has been some response at the federal level and considerable action and debate at the state level.[16]

Recent Federal Action. In 2016, the U.S. Treasury[17] issued a report declaring that the overuse of restrictive covenants was harming the American economy. Later that year, the White House[18] issued a state call to action, calling on state policymakers to join in "best-practice policy objectives" including: (1) banning DNCs for certain categories of workers, including low-income workers, those unlikely to possess trade secrets, and workers laid off or terminated without cause; (2) improving transparency and fairness of DNCs by requiring that employers propose them before a job offer or promotion has been accepted and provide additional consideration beyond continued employment; and (3) incentivizing employers to write enforceable contracts by eliminating the blue-pencil rule whereby judges could revise a DNC in favor of the red-pencil rule that renders a DNC with unenforceable provisions entirely unenforceable.

---

[11] https://www.forbes.com/sites/clareoconnor/2014/10/15/does-jimmy-johns-non-compete-clause-for-sandwich-makers-have-legal-legs/#77e5c2bf4107

[12] https://www.theverge.com/2015/3/26/8280309/amazon-warehouse-jobs-exclusive-noncompete-contracts

[13] https://www.washingtonpost.com/news/wonk/wp/2014/12/02/capitalism-is-officially-broken-even-doggy-day-care-workers-have-non-competes-now/?utm_term=.ac6e388e242a

[14] https://www.nytimes.com/2019/03/15/business/physician-non-compete-clause.html

[15] https://www.wfae.org/post/duke-university-officials-settle-no-poaching-lawsuit#stream/0

[16] For an excellent survey of recent developments, see Russell Beck, Fair Competition Law (April 22, 2019), available at https://www.faircompetitionlaw.com/2019/04/22/new-trade-secret-and-noncompete-legislation-whats-already-happened-and-what-you-can-expect-for-the-rest-of-the-year-in-every-state/.

[17] U.S. Dep't of Treasury, Office of Econ. Policy, Non-compete Contracts: Economic Effects and Policy Implications (March 2016) available at https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf;

[18] https://obamawhitehouse.archives.gov/sites/default/files/non-comptes_report_final2.pdf.

In 2015, Democrat Senators Murphy and Franken introduced the Mobility and Opportunity for Vulnerable Employees (MOVE) Act, which would ban DNCs for employees making less than $15 an hour or $31,200 per year. In 2018, several House and Senate Democrats introduced the Workforce Mobility Act that would ban all DNCs. In January 2019, Republican Senator Mario Rubio proposed a bill that would void all noncompetes for non-exempt workers under the Fair Labor Standards Act, similar to the non-exempt exemptions in the Oregon and Massachusetts statutes. It does not appear that Congress is actively considering any of these bills.

The Federal Trade Commission is studying these issues, particularly focusing on the antitrust implications of non-poach agreements between franchise employers not to hire each other's workers. The FTC and Department of Justice in 2016 issued an Antitrust Guidance for Human Resource Professionals[19] warning that no-poach agreements may violate antitrust laws, and DoJ has begun to press charges against companies with no-poach agreements. In November 2019 a group of 19 state attorneys general wrote an open letter urging the FTC to "initiate a rulemaking to classify abusive worker non-compete clauses as an 'unfair method of competition' and per se illegal under the FTC Act for low wage workers or where the clause is not explicitly negotiated.

State Legislation since 2015. Since 2015, at least twelve states have enacted or amended noncompete statutes, and many other states are considering noncompete legislation. These twelve recent statutes are summarized in Table A-5.

A few of the recent statutes made minor amendments, such as limiting DNCs to a specific occupation (e.g., Utah on broadcasters, Colorado on physicians of patients with rare disorders, Utah removing presumption of irreparable harm upon breach), but many significantly changed prior law.

Considerable momentum surrounds statutory protection of low-wage workers against non-competes, as mentioned above and listed in Table A-4. There is a wide range in the statutory definition of low-income, ranging from $13/hour in Illinois, to four times the poverty level (approximately $50,000/year) in Maine, to $100,000/year in Washington.

At least four or five states have enacted relatively comprehensive statutes since 2015. These include the significant statutory restrictions on noncompetes of Massachusetts, Maine, and Washington (and perhaps Oregon's amendments should be included here), as well as the more noncompete-friendly statutes enacted recently in Arkansas and Nevada.

Legislative Committee Process. In assessing the likelihood of adoption of a Uniform Noncompete Statute, it is useful to understand the legislative process. General or low-wage noncompete statutes usually come from the state's labor committee, while noncompete statutes focusing on particular occupations usually come from other committees. Table A-7 catalogues states with pending noncompete legislation by which legislative committee is considering the bill. Of the 18 states considering general or low-wage statutes, 13 are being handled by the labor

[19] See Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), available at https://www.justice.gov/atr/file/903511/download.

committee. Of the ten states considering specific-occupation noncompete statutes, only three are being handled by the labor committee.

IV. BALANCING THE POLICY FACTORS AND RECENT EVIDENCE

Any policy discussion of noncompetes must balance several factors. Importantly, noncompete law differs from much other employment law, which politically pits employers against workers. The policy debate for other employment law is whether the purported benefit (for example a $15 minimum wage) imposes too high costs on employers which in turn may hurt workers (to continue the example, a high minimum wage may induce employers to hire fewer workers, creating unemployment among low-skilled workers). While noncompetes have some of this general employment-law employer-versus-employee flavor, the debate differs in that employers are on both sides of the issue—employers want to keep current employees, but also want to hire experienced employees from other firms. Recognizing that employers want to both retain and hire, there is room for an intermediate position on DNCs among employers.

The positive argument for noncompetes is that they allow employers to give their employees greater access to trade secrets and to customers, and thereby encourage employers to invest both in employee training and in developing commercially valuable information.

The danger of noncompetes is that they restrict workers from moving to more productive opportunities, potentially harming not only the worker but also social productivity. The productivity argument has been forcefully put in the high-tech industry, where the positive spillover effects have been lauded. It has also been made forcefully in the context of low-wage workers, since those DNCs are often used simply to constrain workers without serving a countervailing legitimate business.

Empirical evidence testing these contrasting theories is newquite recent but growing rapidly. Professor Evan Starr has published a recent review of the empirical literature,[20] which I will briefly sketch here.

As a baseline, survey evidence from several sources suggests that approximately one in five U.S. workers are subject to DNCs.[21] Higher-skilled and higher-paid workers are more likely

[20] Evan Starr, The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts, Econ. Innovation Group Issue Brief (Feb. 2019), available at https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf.

[21] Evan Starr, J.J. Prescott & Norman Bishara, Noncompetes in the U.S. Labor Force, U. of Mich. Law & Econ. Research Paper No. 18-013 (2019); Alan Krueger & Eric Posner, A Proposal for Protecting Low-Income Workers from Monopsony and Collusion, Hamilton Project Policy Proposal 2018-05; Cicero Group, Utah Non-Compete Agreement Research (Feb. 24, 2017), available at https://issuu.com/saltlakechamber/docs/utah_non-compete_agreement_research.

to sign DNCs, but even low-paid workers sign them. Indeed, according to 2014 data from Starr and colleagues, hourly-paid workers actually comprise the majority of DNC signers. DNCs are also found regularly in states such as California that do not enforce them.[22]

The contracting process of DNCs has also been empirically studied. Two studies find that DNCs are rarely negotiated over or rejected outright.[23] They also find that DNCs are frequently offered—between 33 percent and 46 percent of the time—after the individual has accepted the job offer (but not with any sort of promotion or change in responsibilities). The Starr study finds that these workers with a delayed ~~delays in~~ DNC have ~~timing are associated with~~ no additional earnings or training than workers without a DNC, ~~for the worker,~~ but do have lower job satisfaction and longer job tenure. Starr finds that DNCs presented at the outset of the job offer, by contrast, are associated with higher wages and more training relative to unbound workers.

Another study by Starr and colleagues shows that DNCs used in states that will not enforce them (e.g., California) have similar effects on employee mobility. Follow up work by Prescott and Starr[24] shows that workers are generally unaware of the laws that regulate these provisions, and that workers tend to believe that such contracts are generally enforceable, even when they are not. These papers substantiate the longstanding hypothesis about the potential *in terrorem* effects of DNCs.[25]

The bulk of the empirical literature attempts to examine the overall effects of laws regulating DNCs on wages, firm investment, entrepreneurship, and other outcomes. Two recent studies develop high quality evidence on the impacts of DNC bans on workers. One study[26] exploits a 2015 ban on DNCs for high tech workers in Hawaii, which allows researchers to compare high tech workers in Hawaii to other industries in Hawaii unaffected by the ban and to high tech workers in other states. The general findings are that after the ban for high tech workers, high-tech job mobility in Hawaii rose by 11 percent and new-hire wages rose by 4 percent, suggesting that banning DNCs improved the livelihood of tech workers.

A similar recent study by Lipsitz and Starr[27] examines Oregon's 2008 ban on DNCs for hourly workers. The findings are similar: comparing hourly workers in Oregon before and after the ban relative to a set of control states, they find that hourly wages rose 2-3 percent and job-to-job mobility rose 12-18 percent.

---

[22] Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants, 68 Vand. L. Rev. 1 (2015); Lavetti et al. 2019; Evan Starr, J.J. Prescott & Norman Bishara, Noncompetes in the U.S. Labor Force, U. of Mich. Law & Econ. Research Paper No. 18-013 (2019).

[23] Matt Marx, The Firm Strikes Back: Non-Compete Agreements and the Mobility of Technical Professionals, 76 Am. Sociological Rev. 695 (2011); Evan Starr, J.J. Prescott & Norman Bishara, Noncompetes in the U.S. Labor Force, U. of Mich. Law & Econ. Research Paper No. 18-013 (2019).

[24] J.J. Prescott & Evan Starr, Subjective Beliefs about the Enforceability of Noncompetes (mimeo 2019).

[25] Harlan M. Blake, Employee Agreements Not to Compete, 73 Harv. L. Rev. 625, 648-49 (1960).

[26] Natarajan Balasubramanian, Evan Starr & M. Sakakibara, "Enforcing Covenants Not to Compete: The Life-Cycle Impact on New Firms," 64 Management Science 552 (2018).

[27] Michael Lipsitz & Evan Starr, Low-Wage Workers and the Enforceability of Non-Compete Agreements (mimeo August 23, 2019).

V. UNIFORM NONCOMPETE STATUTE—KEY DRAFTING ISSUES

A drafting committee for a Uniform Non-Compete Statute will have many issues to consider.

CODIFY or REFORM. A basic decision is whether largely to codify the common law as still followed by most states, or embrace some of the recent reforms and push for significant change. The widely adopted Uniform Trade Secrets Act, published in 1979 and amended in 1985, was basically a codification rather than a reform project. While codification is inevitably more modest than reform, it has the salutary benefits of creating a common language and framework among jurisdictions.

Now might be the time for a uniform act to embrace reform. In particular, ~~there are two types of change that~~ a uniform act could spur two changes that would be difficult for common law evolution. First, there is a growing consensus that DNCs are inappropriate for most low-wage workers, yet this is the type of change that the common law is ill equipped to deliver. Common-law courts rarely can acknowledge that its basic principles should differ if employees make $30,000 or $300,000. Second, notice and transparency are increasingly recognized as important in this area—the empirical studies suggest that DNCs that are agreed to before work begins can lead to higher wages and greater training for workers, while DNCs that come without prior worker knowledge seem to limit mobility without corresponding benefits. A statute can specify notice requirements far more easily than can the common law.

SCOPE ISSUES: A drafting committee must decide which covenants and which workers to cover.

Including Non-solicitation and other Restrictive Covenants. Should a Uniform Act be limited to non-compete agreements, or should it also regulate other restrictive covenants such as non-solicitation agreements, confidentiality agreements, and training-repayment agreements?~~.~~ In part this is a policy question, but a statute is more useful when it covers the range of restrictive covenants.

Most statutes to date have limited their scope to non-competes, leaving regulation of non-solicitation and other restrictive covenants to the common law. There is a good argument to cast the net wider. In particular, a key issue in whether a non-compete is enforceable in a particular situation is whether a lesser restrictive covenant would adequately protect the employer's interest. Having that lesser covenant (such as a non-solicitation agreement) within the bounds of the statute should make that assessment more manageable.

Even if the drafting committee decides not to include other restrictive covenants in the uniform statute, drafting expertise will helpfully clarify what non-coverage means. For example, the Massachusetts statutory physician exemption declares: "however, that nothing herein shall render void or unenforceable the remaining provisions of any such contract or agreement." This non-specific language is frustrating. Are monetary damages or penalty clauses enforceable? Restrictions on access to former patients? The precise drafting that a Uniform Act can offer would be helpful.

Including No-Poach Agreements. The drafting committee will have to decide whether to include no-poach agreements in its ambit. A no-poach agreement between two employers is conceptually distinct from a restrictive covenant between employer and employee. No-poach agreements more directly implicate antitrust laws, although both no-poach and noncompete agreements can both be characterized as unfair restraints on trade. Until recently no statute explicitly regulated no-poach agreements, but Washington and Maine have included no-poach bans in their 2019 statutes.

Covering Independent Contractors as well as Employees. Whether to include independent contractors should be an informed decision by the drafting committee. A few statutes include independent contractors, while most do not, and the decision seems haphazard rather than informed.

EXEMPTING CATEGORIES OF WORKERS

Exempting Low-Income Workers. There is considerable momentum for a low-wage carve-out, but a variety of proposals. The Uniform Act could provide useful consistency here.

The income thresholds chosen to date seem arbitrary, as illustrated by the wide variety ranging from $13/hour to $100,000/year. Equally important to providing consistency, the Uniform Statute could provide drafting skill here. In particular, it seems wise to avoid a flat dollar amount that does not consider wage inflation, although several states have enacted flat amounts. The $13/hour, $31,200, or $100,000 thresholds of Illinois, Maryland, and Washington may seem appropriate today, but may require statutory amendment when wage inflation erodes the worth of these levels. Slightly better are statutes that tie the exemption to the minimum wage, which in theory Congress or state legislatures raise over time to reflect wage inflation. Even here, though, these statutes are tying the threshold of the noncompete statute to a separate, politically fraught political process.

Better than an arbitrary income threshold may be exemptions tied to the FLSA exemptions. The FLSA exemption for bona fide executive, administrative, and professional employees and outside salespersons more closely tracks those workers that are likely to have access to trade secrets or long-term customers. While the FLSA non-exempt test includes income thresholds (currently $23,660 per year but anticipated in new regulations to rise in January 2020 to $35,308), it also includes job-duties tests that are related to the traditional protectable employer interests of non-compete law.

Perhaps the drafting committee for the Uniform Noncompete Act would suggest two variations: a FLSA non-exempt threshold and a wage threshold. The ULC has drafting experience in this area. For example, the Uniform Garnishment Act has language that includes employees and also a sub-category of independent contractors that are similar to employees, and a early draft had language (ultimately rejected) that implemented an inflation-adjusted wage threshold that relied on the consumer price index.

Exempting Physicians (and other Professionals). Most states that void DNCs for physicians do so by a separate statute, one that typically appears in the health code and comes through the legislative Health and Welfare committee rather than the Labor Committee that has promulgated

most Noncompetition Agreement statutes. The drafting committee must decide whether to include occupational exemptions in the Uniform Noncompete Act (and if so, which occupations).

NOTICE and TRANSPARENCY REQUIREMENTS: Some of the recent statutes regulate the process for an enforceable DNC, something the common law does not do. An important question for the Drafting Committee will be what if any process requirements should be included.

Written and Signed. Several statutes require an enforceable DNC to be in writing and signed by the employee. Common-law courts, by contrast, followed general contract principles and DNCs sometimes could be oral and unsigned.

Pre-hire Notice. Several of the recent statutes require employers to notify workers of the DNC before hiring. For example, Massachusetts requires that the DNC come with the offer letter or ten business days before the start date, whichever is earlier. Massachusetts also requires employers to notify employees that they can consult a lawyer. These notice requirements track recent empirical studies that suggest that employees given advance notice get higher wages and more training than employees without a DNC, where employees without notice seem to get no offsetting benefits.

Consideration. Several recent statutes require that, for a new DNC to be enforceable against an incumbent employee, the employer must give consideration in addition to continuing employment. Whether and how to specify consideration requirements for incumbent employees will be an important task for the Drafting Committee.

Garden Leave. Massachusetts and Washington, in their new statutes, require employers to pay workers who cannot work in their field because of a DNC. This so-called garden leave (paying workers while they tend to their garden rather than work) is unheard of in American common law.

DRAFTING ISSUES WITHIN THE COMMON-FRAMEWORK: Regardless of how the drafting committee decides the scope issues, the low-wage and occupational exemptions, and the notice requirements, the Act will have to articulate the rules for workers potentially subject to noncompetes. Indeed, a danger of focusing too much on notice requirements and exemptions for low-wage workers and certain occupations is that a norm ~~presumption~~ might develop that noncompetes are presumptively enforceable against all other workers given notice. This would be a more relaxed standard than the current common-law approach.

Codifying the Basic Two-Part Test. For workers not otherwise exempt, the Uniform statute could codify the core two-part test from the common law: (1) there must be a legitimate employer interest; and (2) the DNC must be narrowly tailored in time, geography, and scope to that interest. Such a codification, emphasizing the primacy of a legitimate-interest requirement, would provide a real service. Too often courts and commentators describe the current law as a reasonableness inquiry, and the arguments in a particular case turn on whether 12 months or 18 months, or 20 miles or 30 miles, is reasonable in situations where no legitimate interest exists and therefore no DNC is reasonable. In the Jimmy Johns case, for example, its DNC would be obviously unenforceable if the inquiry were on whether there is a protectable interest in restricting a low-level sandwich artist, regardless of whether 2 or 3 miles was otherwise reasonable.

Inclusion or exclusion language. Some DNC statutes are written in the form: "DNCs are *void unless* they meet the following requirements." Other DNC statutes are written in the form: "DNCs are enforceable if they meet the following requirements. This subtle drafting issue is often overlooked, but can have real ramifications on burden-of-proof issues and the scope of enforceable DNCs.

Listing of Protectable Interests. A central task of a drafting committee will be to articulate the protectable interests. The Restatement § 8.07(b) lists only four, and perhaps the Uniform statute will be this or more restrictive.

--1. Trade secrets are a commonly stated protectable interest. It is a real asset that the Uniform Trade Secrets Act provides its definition in almost all states. The Uniform drafting committee could provide a service with its drafting expertise in deciding how closely (perhaps exactly) to the UTSA language it should come in defining the protectable interest. To date, many state statutes simply state trade secrets and "other confidential information" without definition. Better is the Arkansas statute that lists as a protectable interest "confidential business information that is confidential, proprietary, and increases in value from not being known by a competitor."

--2. Customer relationships are likewise a commonly listed protectable interest, but a term that could use careful statutory definition. In particular, it is important to distinguish customer relationships from customer lists, as does the Restatement of Employment Law.

--3. The Restatement of Employment Law singled out as a protectable interest "investment in the employee's reputation in the market." As Illustration 5 and comment d make clear, the archetypical case here is broadcasters, and the Restatement reflects the common-law approach that allows reasonably tailored DNCs for broadcasters to protect this interest. But presumably with the persuasive lobbying by broadcasters, at least ten states by statute have declared otherwise. The Drafting Committee will have to consider whether this should be an interest protected by statute. It may want to take the precise approach of Oregon, which carefully defines how much investment an employer must make in a broadcaster's reputation: "In the year preceding the termination of the employee's employment, expended resources equal to or exceeding 10 percent of the employee's annual salary to develop, improve, train or publicly promote the employee, provided that the resources expended by the employer were expended on media that the employer does not own or control."[28]

--4. Sale or purchase of a business seems a clear protectable interest in all states, even in states like California that otherwise void noncompetes.

Other protectable interests could also be listed by a Uniform Statute, taking the cue from some states that have expanded or altered the list.

--Extraordinary or specialized training. Several states, such as Georgia and Arkansas, list this as a protectable interest. Certainly employers have an interest apart from naked prevention of competition in getting sufficient return on their training investment before an employee leaves.

[28]For the text of the 2019 Oregon statute, see https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/HB2992/Enrolled.

For example, an employer sending one of its pilots to specialized flight school costing the employer, say, $30,000, wants the employee to return and work long enough so the employer gains from the training. But this interest is independent of whether the employee goes to a competitor or goes into an entirely different line of business, and so the pay-back-training-investment agreement should not hinge on whether the employee goes to a competitor.

--Key Employees. Some states list the employer's desire to keep a key employee as a protectable interest. New York by rather expansive case law has allowed protection of uniquely skilled employees. Colorado's statute voids most DNCs, but among other categories explicitly allows reasonable DNCs for "executive and management personnel and officers and employees who constitute professional staff to executive and management positions." This exemption is similar in spirit to the FLSA exemption for bona fide executive, administrative, and professional employees that other states have incorporated into their noncompete law.

Blue or Red Pencil. Most common-law jurisdictions follow a blue-pencil rule, allowing court to edit an overly broad DNC and enforce the trimmed-down version. Other states follow a red-pencil rule, refusing to enforce an overly broad clause. By state, several state legislatures have taken sides in the blue- or red-pencil debate.

Choice of Law. Confusion and strife has occurred when an employee working in a nationwide business signs a seemingly enforceable DNC in one state, then quits and begins work in another state where that DNC is unenforceable. Whose law should apply is a major issue, and an important topic for a Uniform Noncompete Statute.

VI. CONCLUSION: WOULD A UNIFORM STATUTE BE HELPFUL (AND ADOPTED)?

The last few years has seen considerable policy discussion and proposed state legislation about noncompetes. As described above, about a dozen states have enacted noncompete statutes since 2015, and other states are considering legislation. Still, most states use the common law to regulate DNCs. The time might be ripe for the Uniform Law Commission to promulgate a Uniform Act.

Many think that greater uniformity would be useful. Part of the problem is that current noncompete law is mushy within a state, and it is hard for individual workers to know if their noncompete is enforceable against them. This has a chilling effect on employee mobility. A statute would presumably increase clarity, particularly if it included clear rules such as prohibiting DNC enforcement against low-wage workers. Some employers have clearly pushed beyond the boundaries of enforceable DNCs, relying on the chilling effect to keep employees from moving. The notorious Jimmy John's and Amazon policies are prime examples.

But the variety between states is also a problem. Because the law varies significantly by state, it is much harder for workers (and employers) to understand their rights. Most directly, it is hard to advise a worker on whether a DNC is enforceable, particularly when a worker crosses state lines to take a new job.

Uniformity could come at the federal level, although it is hard to see a federal noncompete statute becoming law. (Congress in 2016 did pass the Defend Trade Secrets Act, which in a related area gave federal protection for trade secrets while preserving state trade-secret laws.) Noncompetes have traditionally been regulated by state law, however, and many think a uniform law that protects this state-level regulation would be preferable to pushing for a federal statute.

I believe a Uniform Noncompete Act, if widely adopted, would be highly useful. The ambiguity of the common law, the variety between jurisdictions, and the recent proliferation of DNCs to low-wage workers are all problems that a Uniform Act could solve.

Can a Uniform Noncompete Act be adopted? One challenge is that the topic is more political than many of the successful Uniform Law Commission projects. The politics can be overstated, however. While some characterize noncompetes as a battle between employers and their exploited workers, a more accurate characterization is that employers are on both sides of the issue. Employers want to keep their current workers with enforceable DNCs, but they also want to hire outside workers in the face of overly broad DNCs. So employers and employer groups can be amenable to statutes that regulate but do not ban all DNCs. For example, in 2019 Washington banned DNCs for workers making under $100,000 per year, and it was widely publicized that major Washington employers Microsoft and Amazon went along with the statute (Amazon reportedly lobbied to have the threshold reduced from $180,000).[29]

The states that are traditionally most skeptical of DNCs include California, North Dakota, and Oklahoma. These are not of the same political stripe. Several blue states are among those recently adopting statutes (Massachusetts, Washington, and Oregon), but so have more diverse states like Idaho, Maine, and New Hampshire.

There is a growing consensus that DNCs should not be enforceable against low-income workers, although less consensus of what the threshold should be. Common-law courts cannot adopt such a rule. A Uniform Act could adopt a low-income cut-off after careful study and with an articulated rationale, perhaps using an exempt/non-exempt job category along the lines of the federal Fair Labor Standards Act rather than a high-wage/low-wage cut-off. An Act with this feature might be highly popular.

Ultimately, this might be a good time for the ULC to act. Five or six states have adopted very recent statutes that can provide models, and other states are contemplating action. But most states rely on the common law, which has some real issues particularly with low-income workers. Some of the issues require drafting skill, and the ULC could provide a real service.

[29] See Tom James, Amazon lobbies to exempt employees from labor protections, AP News (March 8, 2019), available at https://www.apnews.com/5c01ffdd9fbb48639fc43bc376f501e4.

APPENDIX Tables

Table A-1 States by Form of Noncompete Regulation

Common Law	Codification of Common Law	Comprehensive Statutory Scheme	Statutory Treatment of Specific Professions	Statutory voiding of DNC for low-income workers
Alaska	Florida	Alabama	Alabama	Illinois
Arizona	Georgia	Arkansas	Arizona	Maine
Connecticut	Hawaii	California	Arkansas	Maryland
Delaware	Idaho	Colorado	Colorado	Massachusetts
DC	Michigan	Guam	Connecticut	New Hampshire
Illinois	Missouri	Louisiana	Delaware	Rhode Island
Indiana	New Hampshire	Maine	DC	Washington
Iowa	South Dakota	Massachusetts	Florida	
Kansas	Texas	Montana	Hawaii	
Kentucky	Utah	Nevada	Idaho	
Maryland	Wisconsin	North Dakota	Illinois	
Minnesota		Oklahoma	Louisiana	
Mississippi		Oregon	Maine	
Nebraska		Washington	Massachusetts	
New Jersey			New Hampshire	
New Mexico			New Jersey	
New York			New Mexico	
North Carolina			New York	
Ohio			North Carolina	
Pennsylvania			Oregon	
Puerto Rico			Rhode Island	
Rhode Island			South Dakota	
South Carolina			Tennessee	
Tennessee			Texas	
Vermont			Utah	
Virginia			Vermont	
West Virginia			Washington	
Wyoming			West Virginia	
Virgin Islands				

Table A-2 States with Specific Noncompete Statute for Physicians	
State	Type of Physician exemption
Colorado	DNC void, but damages allowed for breach
Idaho	DNC void for physicians with J1 visa
Massachusetts	DNC void, but damages allowed for breach
New Hampshire	DNC void, but damages allowed for breach
Texas	DNC okay for buyout and patient access
DC	Health professional recruitment DNC void
Delaware	DNC void, but damages allowed for breach
New Mexico	DNC void
Rhode Island	DNC void
Connecticut	DNC limited to 1 year and 15 miles
Tennessee	DNC limited to 2 years and 10 miles
Texas (again)	2 new statutes, each deal differently with hospital districts 1st current statute, 2nd DNC void
West Virginia	DNC limited to 1 year and 30 miles; Void if terminated by employer
Florida (pending/died)	DNC void
Connecticut (pending)	DNC limited to 1 year and 15 miles; Void if terminated by employer
Illinois (pending)	DNC void
Indiana (pending)	DNC void
Minnesota (pending)	DNC void
Ohio (pending)	DNC void
Pennsylvania (pending/died)	DNC void
WV (pending/postponed)	DNC void, but damages allowed for breach

Table A-3 States with Specific Noncompete Statute for Broadcasters	
State	Broadcaster Exemption
Massachusetts	Void but allow for damages
Oregon	Allow if broadcaster investment
Utah	Allow if written, signed, cause
Arizona	Void
Connecticut	Void
DC	Void
Maine	Presumed unreasonable
New York	Void
Illinois	Enforceable only if broadcaster breaches
Washington	Enforceable only if broadcaster breaches
Ohio (pending)	Void
Rhode Island (pending)	Void

Table A-4 States with Statutes Voiding Noncompetes for Low-Wage Workers (including pending statutes)	
State (enactment year)	Low-Wage Exemption Definition (dollar amount)
Illinois (2018)	Minimum wage or $13/ hour
Maine (2019)	400 % of Poverty level
Maryland (2019)	$15/ hour or $31,200/year
Massachusetts (2018)	FLSA non-exempt
New Hampshire (2019)	200% of minimum wage
Rhode Island (2019)	FLSA non-exempt; 250% of poverty level
Washington (2019)	$100,000/year
Connecticut (pending)	Twice minimum wage
Hawaii (pending)	Minimum wage or $15/hour
Indiana (pending)	$15/ hour
New Jersey (pending)	Statewide average
New York (pending)	2 different pending bills: 1. $75,000/year 2. $15/hour or minimum wage
Pennsylvania (pending)	30% below median wage or $20/ hour
Texas (2019)	Minimum wage or $15/hour
Virginia (pending)	Less than statewide average

Table A-5 State Noncompete Statutes Enacted Since 2015: Thumbnail sketches

Arkansas, 2015.[30] Comprehensive statutory scheme generally favorable to enforcement of DNCs. Lists 11 protectable employer interests, makes restrictions of two years presumptively reasonable, and declares that courts shall reform overbroad clauses (blue pencil).

Colorado, 2018.[31] Amended its physicians noncompete law, allowing physicians to continue treating patients with "rare disorders" even if that would otherwise violate a DNC. This was the first amendment to its Noncompete Statute enacted in 1982.

Idaho, 2018.[32] Amended its noncompetition law (which already allowed DNC only for key employees or key independent contractors) to make enforcement more difficult, by removing presumption that a breach of a non-compete caused the employer irreparable harm.

Illinois, 2018.[33] Voids DNCs for workers below minimum wage or $13/hour

Maine, 2019.[34] Voids DNCs for workers below 400 % of poverty level (approximately $50,000). Disclosure required before offer of employment. DNC not effective unless employee has worked one year or 6 months after signing. $5,000 civil fine. No-poach agreements banned, including through franchise agreement or contractor-subcontractor agreement.

Maryland, 2019.[35] Voids DNCs for workers earning equal to or less than $15/hour or $31,200/year. Statute explicitly does not apply to agreements with respect to taking or use of a client list or other proprietary client-related information.

Massachusetts, 2018.[36] Comprehensive noncompete statute covering independent contractors and employees; requires pre-hiring notice; in writing and signed; independent consideration required for DNCs agree to after employment starts; garden leave required; maximum 12 months, unless unlawful taking of property 2 years; DNCs limited to FLSA exempt workers. Explicitly does not cover no-solicitation and no-business agreements. Massachusetts also adopted the Uniform Trade Secrets Act in 2018.

---

[30] The Arkansas statute is available at https://law.justia.com/codes/arkansas/2015/title-4/subtitle-6/chapter-75/subchapter-1/section-4-75-101.

[31] Colorado: See https://www.littler.com/publication-press/publication/rare-amendment-colorado-amends-its-non-compete-statute-first-time-1982. The statute is available at https://www.colorado.gov/pacific/sites/default/files/Colorado%20Non-Compete%20Law%20§%208-2-113%20CRS.pdf.

[32] https://legislature.search.idaho.gov/search/?IW_FIELD_TEXT=COMPETE&IW_DATABASE=2018+regular+legislative+session.

[33] Illinois Freedom to Work Act, available at http://ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3737.

[34] Act to Promote Keeping Workers in Maine, available at https://mainelegislature.org/legis/bills/getPDF.asp?paper=HP0538&item=7&snum=129.

[35] Maryland Non-compete and Conflict of Interest Clauses Act, available at https://legiscan.com/MD/text/SB328/2019.

[36] The Massachusetts statute is available at https://www.mass.gov/info-details/mass-general-laws-c149-ss-24l.

Nevada, 2017.[37] Enacted a new statutory scheme in reaction to state Supreme Court case. Statute allows blue-penciling.

New Hampshire, 2019.[38] Prohibits DNC for workers making less than twice the federal minimum wage.

Oregon, 2019 and 2016. Revised its 2008 statutory scheme, in 2019 adding requirement that employers give post-termination notification of a written signed DNC. Maximum duration is 18 months. Limited to FLSA exempt workers, and above median family income.

Rhode Island, 2019.[39] DNCs not enforceable against students, FLSA non-exempt workers, or employees whose annual earnings are less than 250% of federal poverty level (for 2019, $30,350). Act does not cover non-solicitation agreements, non-disclosure agreements, or DNCs connected to sale of business.

Utah, 2018.[40] Amended its Post-Employment Restrictions Act, limiting DNC against broadcasters (to be enforceable, employee must be exempt, party of employment contract of term no longer than four years; EE terminated for cause or breaches contract; enforceable up to one year).

Washington, 2019.[41] DNC only enforceable against employee making more than $100,000 a year or independent contractor earning $250,000 from the enforcing employer; DNC can last no longer than 18 months; employer must provide garden leave.

[37] Nevada: available at https://www.leg.state.nv.us/Session/79th2017/Bills/AB/AB276.pdf.
[38] New Hampshire Act Relative to Noncompete Agreements for Low-Wage Employees, available at https://legiscan.com/NH/text/SB197/2019.
[39] Rhode Island Noncompetition Agreement Act, available at http://webserver.rilin.state.ri.us/PublicLaws/law19/law19204.htmhttp://webserver.rilin.state.ri.us/PublicLaws/law19/law19204.htm.
[40] Utah Post-employment Restrictions Act, available at https://le.utah.gov/xcode/Title34/Chapter51/C34-51_2016051020160510.pdf.
[41] http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bill%20Reports/House/1450-S.E%20HBR%20PL%2019.pdf.

Table A-6 States with Pending Noncompete Legislation	
Pending Overhaul Statutes **2 failed, 6 current**	**Pending Exemptions/Minor Changes** **3 failed, 15 current**
Arkansas- failed	Connecticut
Connecticut	Florida- failed
Illinois	Georgia
Maine	Hawaii
Missouri- failed	Illinois
New Jersey	Indiana
Pennsylvania	Louisiana
Vermont	Minnesota
	Montana
	New York
	Ohio
	Pennsylvania
	South Dakota- failed
	Texas
	Virginia
	West Virginia
	Wyoming – failed

Table A-7 Types of Legislative Committee Proposing Pending Noncompete Statutes	
Committee	State (type of pending bill)
Insurance and Commerce	Arkansas (general)
Labor and Public Employees	Connecticut (general)
Public Health	Connecticut (physician)
Commerce and Tourism	Florida (interests
Labor, Culture, and the Arts	Hawaii (tech employee))
Health Care Licenses	Illinois (physician)
Labor and Commerce	Illinois (general)
Pensions and Labor	Indiana (low wage)
Employment, labor and Pensions	Indiana (physician)
Commerce, Consumer Protection, and International Affairs	Louisiana (physician)
Labor and Housing	Maine (general)
Labor and Workforce Development	Massachusetts (minor changes to statute)
(1) Health and Human Services policy (2) Labor	Minnesota (physician)
Commerce and Labor	Nevada (minor changes to statute)
Labor	New Jersey (general)
Labor	New York (low wage)
Business and Labor	North Dakota (minor changes to statute)
Labor and Industry	Pennsylvania (general)
Professional Licensure	Pennsylvania (physician)
Finance	Pennsylvania (charity no DNC)
Labor and Industry	Pennsylvania (low wage)
Labor	Rhode Island (broadcaster)
Commerce and Energy	South Dakota (duration)
Business and Industry	Texas (low wage)
Energy Resources	Texas (independent oil contractor exemption)
Commerce and Economic Development	Vermont (general)
Commerce and Labor	Virginia (low wage)
Labor and Commerce	Washington (general)