D R A F T

FOR APPROVAL

Uniform Restrictive Employment Agreement Act

Uniform Law Commission

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July 8, 2021

Uniform Restrictive Employment Agreement Act

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Uniform Restrictive Employment Agreement Act

Prefatory Comment

This act regulates restrictive employment agreements, which are agreements that prohibit or limit an employee or other worker from working after the work relationship ends. The act does not say anything about an agreement monitoring what a worker can or cannot do while employed. A noncompete agreement (also called a noncompetition agreement, covenant not to compete, CNC, DNC, or do-not-compete agreement) is the most stringent of the restrictive employment agreements. A noncompete expressly prohibits the worker, upon termination of employment, from creating, joining, or working for a competing firm. A typical modern noncompete specifies the length of time, geographic area, and scope of business that the worker may not engage in.

While noncompete agreements get the most attention, they are part of a family of restrictive agreements: others include *nonsolicitation agreements* prohibiting the solicitation of former customers; *no-business agreements* prohibiting doing business with former customers whether solicited or not; *no-recruit agreements* prohibiting the recruitment or hiring of former co-workers; *confidentiality agreements* (also known as nondisclosure agreements) prohibiting the use or disclosure trade secrets or other confidential information; *payment-for-competition agreements* to pay the employer if the employee competes, solicits, recruits, or does business; and *training-repayment agreements* to pay back training expenses if the employee leaves early. All these agreements are covered by this act. *No-poach agreements* are cousins to restrictive covenants: while restrictive covenants are agreements between an employer and its employees, a no-poach is an agreement between two employers (perhaps joint venturers or franchisees of the same brand) not to hire each other's workers. No-poach agreements are not covered by this act.

Uniform Restrictive Employment Agreement Act -- core elements

- *Wide scope*: Regulates all restrictive post-employment agreements, including noncompetes, confidentiality agreements, no-business agreements, nonsolicitation agreements, no-recruit agreements, payment-for-competition agreements, and training reimbursements agreements.
- *Low-Wage Workers*: Prohibits noncompetes and all other restrictive agreements except confidentiality agreements and training-reimbursement agreements for low-wage workers, defined as those making less than the state's annual mean wage.
- *Notice*: Requires advance notice and other procedural requirements for an enforceable noncompete or other restrictive agreement.
- *Penalties*: creates penalties and enforcement by state departments of labor and private rights of action, to address the chilling effect of unenforceable agreements.
- *Red/Purple Pencil:* Prohibits a court from rewriting an overbroad agreement rather than declaring it unenforceable, with two alternatives.

Value of a Uniform Act

A Uniform Restrictive Employment Agreement Act provides real value to legislatures and stakeholders. Business-community and employee-advocate groups are frustrated both with the lack of clarity within most states on when noncompetes are enforceable or unenforceable and with the variety of approaches among states. State-to-state and within-state variations make it difficult for national employers to adopt consistent policies for the various jurisdictions in which they do business and for workers to know their rights and obligations under a noncompete. The same is true of employees who need predictability in our increasingly mobile society.

Importantly, unlike most employment-law topics, stakeholders do not divide cleanly on pro-employer/pro-employee lines. Employers want both to keep current workers from leaving, and to hire experienced workers from other firms.

There seems to be a broad consensus across the political spectrum that reform is necessary in this field. Press reports suggest that the Biden Administration may seek federal legislation to adopt a California style prohibition on noncompetition agreements. The American Enterprise Institute has prepared a report arguing that noncompete agreements hinder mobility of the American workforce and reduce the overall dynamism in our economy. The AEI author declares that “the prospects of federal legislation ... have never looked better” and concludes:

“The momentum is unmistakable—and likely irreversible, as each new legislative success makes the next one easier to achieve. The challenge now is to evolve to a more coherent and comprehensive approach to reform that delivers stronger benefits to workers, entrepreneurs, and the broader economy. In any event, the 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.”

If the Uniform Law Commission does not act promptly, federal legislation may preempt yet another area that is traditionally a matter of state law.

Background and Legislative Activity

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 used to restrain lesser skilled, low-wage employees, stifling worker mobility and access to higher-paying jobs. The overuse of noncompetes on low-wage workers 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, is that a covenant not to compete should be treated like any other contract, meaning it 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 a covenant not to compete should never be enforceable because it is always against public policy. California, North Dakota, and Oklahoma come close to this latter position, holding that a CNC is only enforceable in connection with the sale of a business.

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. Common-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 a CNC 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." The Restatement declares that a court may modify and enforce an overbroad CNC, but some common-law jurisdictions reject this "blue-pencil" rule.

A legitimate protectable employer interest is the key requirement for CNC enforceability 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 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. Some states add other legitimate employer interests such as protecting key employees and training and education of 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 general skills, experience, and on-the-job training learned on the first job to compete.

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. Among his findings are that some 20 percent of all workers say they are currently subject to a CNC, and almost 40 percent say they have been subject to a CNC sometime in their career. While highly paid workers are more likely to have a CNC (including 85 percent of executives), some 14 percent of those making under $40,000 a year had a CNC.

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 for 2 years within 3 miles of any Jimmy John's.
- 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.
- 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.
- 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.
- 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.

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.

Recent Federal Action. In 2016, the U.S. Treasury issued a report declaring that the overuse of restrictive covenants was harming the American economy. Later that year, the White House 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.

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 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 Legislative Activity:

States are also actively considering legislation about noncompetes. The pandemic reduced some activity, but Oregon, Virginia, and D.C. have enacted statutes within the last year.

Eigteen states have enacted some noncompete legislation in 2018-21. Most focus on low-wage workers rather than more comprehensive reform, and most focus only on noncompetes rather than all post-employment restrictions. These include:

–Nevada, 2021. Bans noncompetes for certain hours workers, prohibits employers from enforcing some nonsolicitation agreements, and provides employees with attorney's fees and costs if an employer violates the statute.

–Oregon, 2021. For the fourth time in six years, Oregon has updated its noncompete statute. In the most recent legislation, Oregon decreased the maximum duration of a noncompete from 18 months to 12 months, allows enforceability only against employees whose gross annual salary and commissions at the time of termination exceeds $100,533, adjusted yearly for inflation; and makes noncomplying noncompetes void rather than voidable. Prior amendments require employers to give advance notice of a noncompete.

–Washington, D.C., 2021. Voids most noncompetes

–Virginia, 2020. Voids noncompetes for low-wage worker. Requires employers to post notice of the act, but does not require individual notice before signing. Does not regulate nonsolicitation agreements.

–Some 36 bills in 18 different states are currently before a state legislature in some form.

Despite this legislative activity, most states still rely on common law to regulate noncompetes.

Policy Considerations and Empirical 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 CNCs 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. Broadly speaking, these rationales are summarized as revolving around innovation and entrepreneurship. Restrictive employment agreements, and noncompete agreements in particular, obstruct the flow of all knowledge, not just protectable interests, in a local economy, and such flows are key ingredients in innovation and forces behind economic development. Restrictive employment agreements also directly prevent someone from spinning off and creating a new business in the same line of work. Individuals with new ideas, better ideas, process improvements, or whatever else beyond are directly prevented from turning those ideas into new enterprises. With the country's startup rate stagnant 20 percent below pre-Great Recession levels and a majority of metropolitan areas seeing more firms die than start each year, restrictive employment agreements come with real economic costs.

The dangers have also been forcefully articulated in the context of low-wage workers, since those CNCs are often used simply to constrain workers without serving a countervailing legitimate business.

Empirical evidence testing these contrasting theories is new but growing rapidly. Professor Evan Starr has published a recent review of the empirical literature, which is briefly sketched here.

As a baseline, survey evidence from several sources suggests that approximately one in five U.S. workers are subject to a CNC. Higher-skilled and higher-paid workers are more likely 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 CNC signers. CNCs are also found regularly in states such as California that do not enforce them.

The contracting process of CNCs has also been empirically studied. Two studies find that DNCs are rarely negotiated over or rejected outright. They also find that CNCs 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 CNC have no additional earnings or training than workers without a CNC, but do have lower job satisfaction and longer job tenure. Starr finds that CNCs 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 noncompetes used in states that will not enforce them (e.g., California) have similar effects on employee mobility. Follow up work by Prescott and Starr 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 noncompetes.

The bulk of the empirical literature attempts to examine the overall effects of laws regulating noncompetes on wages, firm investment, entrepreneurship, and other outcomes. Two recent studies develop high quality evidence on the impacts of noncompete bans on workers. One study exploits a 2015 ban on noncompetes 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 noncompetes improved the livelihood of tech workers.

A similar recent study by Lipsitz and Starr examines Oregon's 2008 ban on CNCs 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.

Another study showed dramatic bundling of restrictive employment agreements. When an employer uses a noncompete agreement, it is very likely that it also uses other restrictive agreements against the same worker.

Uniform Restrictive Employment Agreement Act

Section 1. Title

This [act] may be cited as the Uniform Restrictive Employment Agreement Act.

Section 2. Definitions

In this [act]:

(1) “Confidentiality agreement” means a restrictive employment agreement that:

(A) prohibits a worker from using or disclosing information; and

(B) is not a condition of settlement or other resolution of a dispute.

(2) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) “Employer” means a person that hires or contracts with a worker.

(4) “No-business agreement” means a restrictive employment agreement that prohibits a worker from working for a client or customer of the employer.

(5) “Noncompete agreement” means a restrictive employment agreement that prohibits a worker from working elsewhere. The term does not include a no-business agreement.

(6) “Nonsolicitation agreement” means a restrictive employment agreement that prohibits a worker from soliciting a client or customer of the employer.

(7) “No-recruit agreement” means a restrictive employment agreement that prohibits a worker from hiring or recruiting another worker of the employer.

(8) “Payment-for-competition agreement” means a restrictive employment agreement that imposes an adverse financial consequence on a worker for working elsewhere but does not expressly prohibit the work.

(9) “Person” means an individual, estate, business or nonprofit entity, or other

legal entity. The term does not include a public corporation or government or governmental subdivision, agency, or instrumentality.

(10) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(11) “Restrictive employment agreement” means an agreement or part of an agreement between an employer and worker that prohibits, limits, or sets a condition on working elsewhere after the work relationship ends or a sale of a business is consummated. The term includes a noncompete agreement, confidentiality agreement, no-business agreement, nonsolicitation agreement, no-recruit agreement, payment-for-competition agreement, and training-repayment agreement.

(12) “Sale of a business” means sale or merger of all or part of a business, nonprofit, or other legal entity or of substantially all the operating assets or controlling ownership interest of the entity.

(13) “Sign” means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(14) “Special training” means instruction or other education a worker receives from a source other than the employer that is:

(A) designed to enhance the ability of the worker to perform the worker’s work;

(B) not normally received by other workers; and

(C) a significant and identifiable cost to the employer distinct from ordinary on-the-job training.

(15) "Stated rate of pay" means the annual compensation an employer agrees to pay a worker. The term includes a wage, salary, professional fee, other amount paid as compensation for personal service, and the fair market value of all remuneration paid in a medium other than cash. The term does not include a healthcare benefit, severance pay, retirement benefit, expense reimbursement, amount paid as a distribution of earnings and profit unless paid as compensation for personal service, or anticipated but indeterminable compensation including a tip, bonus, or commission.

(16) "Trade secret" has the meaning in [cite to Uniform Trade Secrets Act Section 1(4)].

(17) "Training-repayment agreement" means a restrictive employment agreement that requires a worker to repay the employer for training costs incurred by the employer.

(18) "Work" means providing service.

(19) "Worker" means an individual who works for an employer. The term includes an employee, independent contractor, partner, extern, intern, volunteer, apprentice, and sole proprietor who provides service to a customer. The term does not include an individual whose sole relationship with the employer is as a member of a board of directors or other governing board, investor, or vendor of goods.

Legislative Note: *In paragraph (16), a state should cite to the state's Uniform Trade Secrets Act Section 1(4) or the equivalent definition of trade secret.*

Comment

A cluster of definitions cover the relationship between employers, workers, and work covered by this act. “Work” is a defined term that means providing service, as distinct from selling a product or investing money.

“Worker” intentionally is a broad term that includes anyone who provides services, i.e., anyone who works. The term “worker” includes an employee but also includes an independent contractor, partner, intern, volunteer, and any other individual providing service. This broader umbrella avoids having to parse the controversial and confusing topic of who is an employee versus an independent contractor or partner. Some states, like Georgia, broaden the term “employee” to include independent contractors and others. Other states, such as Rhode Island, explicitly exclude independent contractors from their definition of employee. Other states remain silent on the issue. To avoid confusion, this act defines the term “worker” rather than redeploy the term “employee” in a broad sense. Substantively, the act includes independent contractors and others because the policy goals of protecting trade secrets and customer relationships and encouraging training while promoting mobility and competition are salient not only for employees but also for these other workers—hence the broader coverage of this act.

The term “worker” has limits, however. Someone who only sells goods as opposed to services—say an artisan selling the pottery the artisan made--is not a worker covered under this act. Therefore, an agreement by the artisan not to sell to others is not regulated by this act. Neither is a passive investor as opposed to an active manager of a business. The CEO who sits on the board of directors is a worker—not because of the board seat but because a CEO is a worker providing services to the company. The definition stipulates that an outside director, however, who has no other role with the entity, is not a worker. While arguably a director provides service to the firm in ways that a vendor or investor does not and thus is more like a worker providing service to the firm, still the director (unlike the CEO or other employees) is a legal owner of the firm and thus does not work for the firm. Whatever restrictive agreement a director might enter about when and how the director might compete with the firm raises such distinct policy issues that it is best not to regulate director agreements under this act.

An employer is a person that hires or contracts with a worker. From the definition of person, the employer can be an individual or (as is more common) a corporate or other legal entity. When the worker is an independent contractor or sole proprietor, the employer is the customer that contracts with the worker.

Importantly, the act’s definition of person excludes government, so the act covers private-sector employers but not public-sector employers. By including all employers in the business and nonprofit sectors of the economy, the act covers about 74 percent and 10 percent of the American workforce, respectively. Government employers are excluded from the act because the policy issues of noncompetes are quite distinct in this sector. It is not uncommon for a government worker to be restricted in the type of work after leaving the government. For example, a high official in a regulatory agency might be required not to work in the industry regulated by this agency for two years after leaving the agency. Often these restrictions on government workers are imposed by statute or regulation rather than individual agreement. Further, the policy reasons for such noncompetes differ dramatically from noncompetes in the private sector, focusing on ethical concerns that the government worker is not biased in regulating the industry to gain future employment in the industry, rather than whether the employer is improperly restricting competition against itself.

In addition to the broad coverage of all workers, a distinctive feature of this act is that it covers all restrictive employment agreements, not just noncompetes. Some state statutes only regulate noncompetes, explicitly excluding nonsolicitation agreements, confidentiality agreements, and other restrictive agreements.

While the array of covered agreements is broader than noncompetes, the definition of restrictive employment agreement is limiting. It has three core elements. First, the act only covers agreements about post-work activity. The act does not cover an agreement between an employer and worker about current working conditions. For example, an agreement that full-time employee E cannot work for anyone else while employed by X is not covered by this act, because the agreement does not limit actions after the work relationship ends. Second, a restrictive employment agreement is not one that covers any post-work action, but only an agreement that prohibits, limits, or sets conditions on working elsewhere after the work relationship ends. For example, an agreement that says a worker must return a work computer within seven days after ending work is not a restrictive employment agreement and thus not covered by this act. While the return-computer agreement covers an action by the former worker after the work relationship ends, it does not prohibit, limit, or set conditions on other work. Third, the agreement must be between an employer and worker. This means the act does not cover a no-poach agreement whereby two employers agree not to hire each other's workers. A no-poach agreement may run foul of federal or state antitrust laws, but is not subject to this act.

The act defines seven particular types of restrictive employment agreements and sets particular requirements for each of them. Even if an agreement does not meet the definition of a nonsolicitation agreement, confidentiality agreement or other named agreement, however, it is a restrictive employment agreement if it prohibits, limits, or sets conditions on working elsewhere after the work relationship ends or a sale of business is consummated. For example, consider these hypothetical agreements: (a) Employee agrees to pay employer $1,000 if she leaves employment without employer's permission; (b) Employee agrees to report to employer any information she's using in her next job if the information was used or acquired when working for the employer (or pay a penalty); (c) Employee agrees to move his permanent place of residence at least 200 miles away from employment site if employee leaves employment without employer's permission (or pay a penalty). Arguably none of these agreements meets the definition of one of the enumerated types of restrictive employment agreement, but the act still would regulate them as a restrictive employment agreement that limits or sets conditions on working elsewhere after the work relationship ends.

A noncompete agreement, also known as a covenant not to compete (CNC) or a do-not-compete (DNC) covenant, is generally considered the most restrictive of the restrictive employment agreements. The act defines a noncompete as an agreement that prohibits a worker from working elsewhere after the work relationship ends or a sale of business is consummated. The definition is intentionally broad. For example, it includes an agreement that says a worker will never work anywhere in the world after leaving the employer. Later sections of the act decree which noncompetes are prohibited and unenforceable (and our hypothetical "no work anywhere ever" agreement is certainly prohibited and unenforceable).

Some state statutes have narrower definitions of noncompete that include the concept of competition in the definition. For example, Massachusetts defines a noncompetition agreement as one where the employee "will not engage in certain specified activities competitive with his or her employer after the employment relationship has ended." Virginia defines a covenant not to compete as an agreement "that restrains, prohibits, or otherwise restricts an individual's ability, following the termination of the individual's employment, to compete with his former employer." But this confuses the need for a broad definition from the substantive requirement that an agreement cannot go beyond actual competition. The definition needs to cover agreements that go beyond actual competition with an employer so that the act can prohibit such overbroad noncompetes. Many states define a noncompete agreement with similar breadth to this act, including Alabama, Montana, and Washington, which define a noncompete agreement as a contract that restrains employees from engaging in a lawful profession, trade, or business.

A "nonsolicitation agreement" prevents a former worker from seeking out the business of the employer's customer or client. Closely related is a "no-business agreement" in which a former worker cannot do business with the employer's customer or client, regardless of whether the worker solicited (initiated contact) with the client or the client sought out the worker. Only a few states, such as Massachusetts, Oregon, Rhode Island, explicitly distinguish no-business agreements from non-solicitation agreements. They are similar agreements, with the no-business agreement restricting the former worker more tightly than the no-solicit. Because a no-business agreement is more restrictive than a nonsolicitation agreement, the act defines and treats them differently.

A "no-recruit agreement" is similar to a nonsolicitation or no-business agreement except that it involves co-workers rather than customers or clients of the employer. And while a nonsolicitation and no-business agreement distinguishes who was the moving force, the definition of a no-recruit agreement combines the two types. An agreement is a no-recruit agreement either if it limits the worker from reaching out to (i.e., soliciting) former co-workers or if it bans the worker from hiring (i.e., doing business with) a former co-worker regardless of who reached out first to whom. The act treats either type of no-recruit agreement identically. The act self-consciously does not define "solicit" or "recruit." Much debate can arise on whether a solicitation has occurred, such as whether merely sending a business card announcing a new position, or placing an announcement on LinkedIn, is a solicitation. These subtle fact patterns resist statutory definition and are best left to the courts.

A "confidentiality agreement" is often known as a nondisclosure agreement or NDA. It is broadly defined here as any agreement that "sets conditions on working elsewhere after the work relationship ends" (the basic definition of a restrictive employment agreement) by "prohibit[ing] the worker from using or disclosing information." The definition explicitly excludes, however, an agreement entered into as a condition of settlement. While such a confidentiality agreement might limit work elsewhere, other policy goals, such as the desire to resolve litigation, are at play in those situations. Furthermore, through this exclusion the act avoids the highly controversial topic of confidentiality agreements that purport to prevent a former worker from reporting a violation of law such as sexual harassment. While good public policy undoubtedly limits such confidentiality agreements, these strictures are better dealt with in a whistleblower or sexual harassment statute that has a different focus than the balance between trade secrets and worker mobility.

A "Payment-for-competition agreement" does not explicitly prohibit a worker from competing or soliciting clients, but requires a financial penalty that may similarly deter the worker's mobility. Such agreements can take a wide variety of forms. Examples include forfeiture of profit sharing or other bonus compensation that has not yet been paid to the worker because the worker is competing against the employer; diminution or delay of retirement benefits because the worker is competing against the employer; and a penalty for working with a customer or client of the worker's former employer.

A "Training-repayment agreement" is an agreement in which the worker agrees to repay training expenses if the worker ceases to work for the employer. For example, an employer may pay for a worker's tuition to attain a degree but require the worker to repay the cost if the worker leaves the employer for a competitor. An agreement that requires repayment regardless of whether the worker leaves is not a restrictive employment agreement covered by this act because it does not prohibit, limit, or set conditions on subsequent work. For example, an employer who agrees to pay $X for a worker's special training now in return for the worker's promise to repay the employer $X/5 for 5 years has not entered a training-reimbursement agreement covered by this act. Written like that, it applies exactly the same whether the worker stays or quits and thus does not prohibit, limit, or deter an employee from working elsewhere. More typical is an agreement that conditions repayment on whether the worker leaves. An example might be a worker who promises to repay a training expense if the worker leaves within five years of the training. This is a restrictive employment agreement regulated by the act (and under Section 13 would be overbroad). The agreement sets a condition on working elsewhere (to wit, if the worker works elsewhere within five years, the worker must repay training costs). Even though repayment is also triggered by quitting to stay home, the agreement deters, and thus sets a condition on, the worker from working elsewhere.

"Special training" is defined to be distinct from general, on-the-job training for which the employer cannot properly seek reimbursement if the worker leaves. The definition has four key requirements. First, the training must be from a source other than the employer. Second, the training must be given only to select workers. These two requirements address the concept of general training as not rising to a level that should be protectable by any sort of restrictive employment agreement. Third, the training must benefit the worker's performance. This requirement forces the training to add value to the worker, that can be taken to other employers, and therefore justify a repayment of the cost of special training. Lastly, the training must be a significant and identifiable cost. Tuition at a college or outside training center is a primary example here. Mushy claims of vague training do not qualify.

"Stated rate of pay" furthers the goal of predictability at the time of contracting. Employers and employees alike want to know whether an agreement is prohibited and unenforceable. The stated rate of pay is designed so that parties know before the worker starts work, whether the worker's pay meets the state average annual wage threshold. A worker who agrees to a salary of $100,000 clearly meets the threshold, as does a worker who agrees to a full-time job (40 hours a week) at a wage of $50 per hour. But a sales worker to be paid on a 20 percent commission of net sales would not have a definite annual compensation and so, under Section 5(1), a noncompete would be prohibited and unenforceable. By contrast, if the worker is guaranteed a minimum compensation to be charged against commissions the worker does have a definite annual compensation.

Section 3. Scope

(a) This [act] applies to a restrictive employment agreement. If a restrictive employment agreement is part of an agreement, other parts of the agreement are not affected by this [act].

(b) This [act] supersedes common law that applies only to a restrictive employment contract but does not otherwise affect principles of law and equity consistent with this [act].

(c) This [act] does not affect [cite to other state law or rule that is compatible with this act and puts additional limits on a restrictive employment agreement].

(d) This [act] does not affect an agreement to take an action to transfer, perfect, or enforce patent, copyright, or other similar rights.

Legislative Note: *A state should cite in subsection (c) statutes or rules that impose additional restrictions on a restrictive employment agreement.*

Comment

Some restrictive employment agreements are standalone contracts, but many are embedded within a larger employment agreement. As subsection 3(a) states, this act regulates both standalone and embedded agreements, but does not affect other parts of an employment contract.

Subsection 3(b) declares that the act supersedes specific common-law doctrine regulating a restrictive employment agreement but does alter more general common law. Parts of the act clearly alter common-law doctrine on restrictive employment agreements and the act takes priority. For example, Section 5(1) flatly prohibits noncompete agreements with low-wage workers. The common law in practice rarely would enforce a noncompete against a low-wage worker, but has no per se prohibition. Other parts of the act codify, build upon, or clarify common-law doctrine. For example, subsection 7(2) requires a noncompete to be narrowly tailored in duration, geographical area, and scope of actual competition. This narrowly tailored requirement is a familiar part of the common law of noncompetes. While a court decision on whether a particular noncompete is narrowly tailored rendered prior to the act is no longer binding precedent after the effective date of the act, a court construing the act's narrowly tailored requirement can consider the persuasiveness of the prior case to the extent the case is consistent with the act. The act does not replace general contract or tort law. For example, defenses such as fraud, duress, and unconscionability that apply generally to contract actions are unaffected by this act.

In subsection 3(c), each state should declare which statutes or rules regulating restrictive employment agreements remain in effect after passage of this act. For example, every state has ethics rules that prohibit noncompetes against attorneys (sometimes by court rule, sometimes by statute), and it is expected that every state will maintain its prohibition. Many states have a specific statute regulating or prohibiting the noncompetes of physicians, broadcasters, or tech workers. In general, such statutes are compatible with this act and a state may elect to keep in force such statutes.

Other statutes, however, may be incompatible with the act. For example, a statute that allows a nonsolicitation agreement to last up to two years after the work relationship ends is incompatible, because Section 11 of this act prohibits a nonsolicitation agreement that extends beyond one year after the work relationship ends. As specified in Section 21. Repeals; Conforming Amendments, a state should examine these nonconforming statutes and determine whether conforming revisions or repeal is required.

Subsection 3(d) clarifies that an agreement that requires a former worker to perfect or transfer intellectual property is outside the scope of this act. Many of these agreements would be outside the ambit of the act in any event because, while they may require some action by the former worker, they don’t prohibit, limit, or set conditions on working elsewhere. For example, the act does not cover an agreement by which a worker agrees to assist an employer after the work-relationship ends in perfecting a patent for an invention on which the worker participated while working for the first employer. But even if an agreement involving patent or copyright arguably sets conditions on working elsewhere, subsection 3(d) makes clear the act does not cover such an agreement. Any example might be an intellectual-property holdover or claw-back agreement. While this agreement arguably sets conditions on subsequent work in that the worker cannot use the invention elsewhere, such an agreement is not regulated by this act. The web of patent, copyright, and other relevant law is predominantly federal rather than state, is complex, and raises issues distinct from the goals of this act of promoting competition by workers while protecting employer’s legitimate business interests. Rather than restricting what workers can do after the work relationship ends, the primary function of an IP holdover agreement is to allocate ownership and license rights of patents and copyrights.

Section 4. Notice Requirements

(a) A restrictive employment agreement is prohibited and unenforceable unless:

(1) the employer provides a copy of the proposed agreement in a record to:

(A) a prospective worker 14 days before before the acceptance of work or the commencement of work, whichever is earlier;

(B) a current worker who receives a material increase in compensation 14 days before before the increase or the worker accepts a change in job status or responsibilities, whichever is earlier; or

(C) a departing worker who is given consideration in addition to anything of value to which the worker already is entitled 14 days before the agreement is signed;

(2) with the copy of the proposed agreement provided under paragraph (1), the employer provides the worker in a record a separate notice, in the preferred language of the worker if available, as prescribed by the [State Department of Labor] under subsection (d);

(3) the proposed agreement and the signed agreement clearly specify the information, type of work activity, or extent of competition that the agreement prohibits, limits, or sets conditions on after the work relationship ends;

(4) the agreement is in a record separately signed by the worker and the employer and the employer promptly provides the worker a copy of the executed agreement; and

(5) the employer provides an additional copy of the agreement to the worker not later than 14 days after the worker, in a record, requests a copy, unless the employer when acting reasonably and in good faith is unable to provide the copy within 14 days after the request and the worker is not prejudiced by the delay.

(b) A worker may waive the 14-day requirement of subsection (a)(1)(A) if the worker receives the signed agreement before accepting work. If the worker waives the requirement, the agreement is not enforceable until 14 days after the worker commences work.

(c) An employer must comply with subsection (a)(5) no more than once during a calendar year.

(d) The [State Department of Labor] shall prescribe the notice the employer provides under subsection (a)(2). The notice must inform the worker of the requirements under this [act] in language that an average reader can understand, including the requirements of subsection (a) and of Sections 5 through 12, as applicable, and state that this [act] establishes penalties against an employer that enters into a prohibited agreement. The [State Department of Labor] shall make the notice available to employers on its publicly accessible website or in other appropriate ways. The [State Department of Labor] may:

(1) produce a separate notice for each type of restrictive employment agreement; and

(2) translate the notice into languages other than English used by a substantial portion of the state's labor force.

Comment

This section and the following prohibitory sections declare that an agreement is "prohibited and unenforceable" unless it meets various requirements. The combined phrase is intentional. The law has long declared that certain CNCs are "unenforceable," which means the affected worker can ignore the covenant and not be successfully sued for breach. This act continues that consequence for agreements not meeting the act's requirements. But many CNCs are agreed to by employers and workers even when clearly unenforceable. As discussed above, the incidence of CNCs in California is nearly 20 percent of the workforce, even though they are generally unenforceable there. To deal with the problem of lingering unenforceable covenants, the act "prohibits" an improper agreement in addition to making it unenforceable. This has two effects. First, it communicates to employers, workers, and other readers of the act that such agreements are improper and banned. Second, it deals with the serious chilling effect that a CNC can have even if unenforceable. An improper CNC is prohibited, and the consequence can be statutory penalties under Section 15(e) in appropriate cases.

Section 4 establishes procedural notice requirements for a valid restrictive employment agreement. It is one of the most important sections of the act, both because it expands beyond the common law and because failure to comply makes an agreement prohibited and unenforceable even if the agreement meets the substantive requirements of the act. The act requires an employer to give both general notice of the act's requirements and bespoke notice of the particular restrictive agreement it is requesting of each employee.

Notice is critical for an effective restrictive agreement. Recent empirical studies suggest that workers who are given advance notice get higher wages and more training than workers without a noncompete, but that workers without notice get no offsetting benefits. Notice is thus a key component of a well-functioning labor market. A worker cannot evaluate the relative merits of a restrictive agreement that the worker does not know about. A worker who only learns of a noncompete after work has begun has few alternatives. Quitting a job is far more costly than turning down a job offer, and renegotiating pay or other items is usually unrealistic.

The common law, while establishing substantive requirements for an enforceable restrictive employment agreement, has created essentially no procedural requirements. Intricate, bright-line notice rules are not within the DNA of the common law. Legislation is needed for effective notice requirements.

Several state statutes require that employers give some type of notice to employees before a restrictive employment agreement is valid. The least protective approach requires disclosure of the terms of the noncompete agreement by the time work begins or the employee accepts the offer of employment. Washington and New Hampshire are two states that have taken this approach. A slightly more protective approach requires disclosure at the time of the job offer that the employer will require a noncompete agreement with a three-day review period for the worker to later review the actual agreement. Maine has taken this approach. At the other end of the spectrum, the most protective approach requires disclosure of the agreement's terms by the earlier of a formal offer letter or 30 business days before work begins. New Jersey's draft statute takes this approach. A middle-ground approach requires employers to provide employees with a copy of the agreement either with the formal offer of employment or 10 days before work begins, whichever is earlier. Massachusetts takes this approach.

This act opts for a middle-ground approach. Subsection 4(a)(1)(A) requires employers to provide workers with a copy of the proposed restrictive employment agreement either before the acceptance of work or 14 days before work begins, whichever is earlier. "Before acceptance of work" is preferable to "before a formal offer of employment" because it is sometimes unclear whether an offer is formal and often a worker may accept the position, at least in principle, before a formal offer. The critical window for a worker to understand and potentially negotiate whether a restrictive employment agreement will be required is before the worker accepts.

Subsection 4(a)(1)(B) covers the often-tricky situation of imposing a restrictive agreement on an incumbent worker. At least two common patterns emerge here. Sometimes an incumbent worker is in a job where a restrictive agreement is inappropriate, perhaps because the job gives no access to trade secrets or customers. The employer then contemplates shifting the worker to a job with trade secrets or customers and now legitimately wants to protect the trade secrets or customer relationships with a confidentiality, nonsolicitation, or noncompete agreement. For example, a back-office file clerk may be promoted to a high-level sales director. Other times the worker always was in a job that had access to trade secrets or customer relationships, but for whatever reason the employer did not have a restrictive agreement. The employer now wants to impose one. For example, the worker began work as a high-level sales director. In either case, the policy goal is to give sufficient notice that the parties can negotiate an appropriate agreement with appropriate compensation.

Some states, such as Oregon, require a "subsequent bona fide advancement" in order to impose a restrictive agreement on an incumbent worker. One issue is that bona fide advancement can be an ambiguous term. The larger problem is that this approach ignores the common pattern where an incumbent worker is in a job where a restrictive agreement is appropriate but for whatever reason the employer did not get one at the time of initial hire. Requiring a subsequent bona fide advancement essentially means the employer can never get the appropriate agreement--or perhaps must go through the charade of firing the at-will worker and then offering to rehire into the same job, now with a restrictive agreement attached.

Some common-law jurisdictions and several statutes allow a new noncompete agreement to be enforceable against an incumbent worker who keeps the same job so long as the employer gives consideration in addition to continued employment. Types of additional consideration can vary and may include a promotion, increased compensation, additional benefits, additional training, or even a one-time payment. States that have followed this approach use relatively general language. For example, Alabama's statute states that an agreement must be supported by "adequate consideration"; Washington's statute says the employer must provide "independent consideration"; and Massachusetts's statute states that the agreement must be supported by "fair and reasonable consideration independent from the continuation of employment."

On the other hand, the traditional rule followed by most states is that a worker's continued employment is sufficient consideration. Some states that follow this approach require that the employer actually retain the worker for a substantial amount of time, instead of merely promising continued employment. For example, Kentucky, New York, and Illinois courts have all recently held that mere continued at-will employment is insufficient consideration without it being for a substantial period. One challenge associated with requiring additional consideration beyond continued employment is that states could interpret "additional consideration" differently and it may be unclear to employers what kind of additional consideration is needed. Moreover, vague statutory language may leave open the question of how much additional consideration is required. This would also create a lack of clarity for employers and workers and lead to inconsistency in application. While a statute can attempt to define "additional consideration" to mitigate these problems, what type of and how much additional consideration is appropriate is a fact-specific question that ought to be driven by the context of the job at issue.

This act requires that the incumbent worker be given a material increase in compensation in order to impose a valid restrictive agreement. The employer must give notice of this restrictive agreement 14 days before the worker takes on new job responsibilities or gets the increase, whichever is earlier (if there is no significant change in the work, then the notice must be 14 days before the increase). In the hypothetical case of the file clerk, the employer must give a copy of the proposed restrictive agreement 14 days before the worker accepts the sales-director position or gets the pay increase, whichever is earlier. In the case of the always-a-sales-director, there is no change in job status or responsibilities, so the employer must give a copy of the restrictive agreement at least 14 days before the increase in compensation. In either situation, the advance-notice requirement gives some time for contemplation and negotiation of the new agreement.

Subsection 4(a)(1)(C) covers the situation when a restrictive agreement is negotiated on the eve of a worker's departure from the employer, usually as part of a severance package. The act requires consideration and 14 days notice before the worker must sign. The goal is similar to that in the Older Workers Benefit Protection Act, requiring a period of time for the departing worker to consider options before signing the agreement.

Subsection 4(a)(2) requires the employer to provide a worker the notice created by the relevant state agency of the act's requirements. This general notice about the act accompanies the employer's notice of the particular proposed agreement, so that the worker knows about both the particular agreement the employer is requesting and the act's requirements about that agreement. The agency may prescribe a separate notice for each particular type of restrictive agreement. For example, an employer requesting only a noncompete agreement does not need to inform a worker about the act's requirements for other types of agreements, if the state agency has a notice tailored to noncompete agreements.

This general notice requirement builds on the posting requirement in Virginia's noncompete act. The Virginia statute requires that employers to post a summary of the noncompete act where other labor-related postings are normally found. However, this requirement does not necessarily achieve the policy goal of informing the worker of the act's requirements at the time that information will be useful. After all, not every worker will be asked to sign a restrictive employment agreement, and not all workers asked to sign will read the poster or even be aware of the poster before entering the agreement. This act more effectively achieves the policy goal of informing affected workers of the act's requirements by requiring an employer to give an official form summarizing the act's requirements precisely at the same time and to the individual worker with whom it is proposing a restrictive agreement.

Subsection (a)(3) requires the employer to give bespoke specificity of the requested restrictive agreement. The employer must clearly specify the information that is deemed confidential (e.g., what items are claimed to be trade secrets), the type of work activity that is being restricted (e.g., customers with whom the worker has personally worked for a substantial amount of time), or the extent of competition (e.g., oral surgery but not general dentistry in a specified geographic region for a specific period of time) that the agreement prohibits or limits after the work relationship ends. The "clearly specify" requirement means that an employer cannot merely state that 'business information' is covered by a confidentiality agreement or that the worker 'cannot compete' in a noncompete agreement. Instead, the employer must specify exactly what type of information or what type of competition restrictions a worker will face post-employment. This specificity enables the worker to fully evaluate how the restrictive employment agreement will affect future work and make a fully informed decision of whether to sign the agreement.

Some common-law jurisdictions allow oral restrictive agreements. Some state statutes, such as those of Florida and Georgia, require restrictive employment agreements to be in writing and signed by the employee. Other states, such as Alabama and Massachusetts, require an enforceable agreement to be in writing and signed by both employee and employer. The inconsistency among the states creates unpredictability for employers and workers. Accordingly, subsection (a)(4) requires all restrictive employment agreements to be in writing or other appropriate record and signed by the worker and the employer. This procedural requirement fits nicely with the Act's notice requirement, and helps ensure that workers enter agreements voluntarily and with knowledge. The separately signed requirement is included for those situations where the restrictive employment agreement is part of a larger work agreement. In this situation, the worker and employer must sign the restrictive employment agreement on its own, which helps call attention to the provision, whether or not they also sign the larger work agreement.

Subsection (a)(5) grants a worker the right to obtain another copy of the agreement. Often a long-term employee cannot locate the restrictive employee agreement the employee signed a decade or two earlier, assuming it was ever signed and given to the employee. Unless the worker can get another copy, the worker cannot know the status of any post-employment restrictions and whether the worker can move to another firm. Granted, the employer may also have a hard time finding a copy of an agreement signed long ago. As such, the employer may need longer than 14 days to provide a copy, and can do so if the employer is trying in earnest to find the agreement and provide it to the worker and the worker is not prejudiced by the delay. The terminology 'prejudiced by the delay' refers to a situation where, for example, the worker may have requested a copy because of a competing job offer. However, if the job offer is set to expire in 16 days and the employer has not produced a copy of the agreement by then, the worker is free to take the job offer on day 16 unencumbered by the restrictive agreement, for the delay would otherwise harm the worker. Subsection (a)(5) also promotes the policy of employers keeping accurate employment records of workers subject to a restrictive employment agreement.

Subsection (b) boosts worker mobility by allowing a worker to waive the 14-day notice requirement. Sometimes a worker wants to start work immediately upon acceptance of the job and is willing to immediately accept the restrictive agreement. Waiver is especially justified when a public emergency requires the worker to begin work as soon as possible. But even personal need of the worker can be a compelling reason to start work quickly. To reduce the potential for abuse from the waiver, the act incorporates a quasi-trial period in which the worker can review the terms of the restrictive employment agreement for 14 days after work begins, and if the worker deems the terms unsuitable, terminate the work relationship without being subject to an enforceable agreement. Possibly an employer may hesitate giving a worker access to customers or trade secrets during this 14-day walk-away period without the assurance of an enforceable restrictive agreement, but this concern seems minor. On balance, allowing waiver of the 14-day notice best promotes the policy of enhancing worker mobility and limiting the potential for abuse of a restrictive employment agreement.

Subsection (c) requires the [Department of Labor] to prepare a notice that summarizes the core requirements of this act in language an average reader can understand. Short, simple words, short sentences, reasonably large font size, and contrasting colors to highlight the most important points are all useful ways to increase readability. The agency has considerable flexibility in the content of the notice. The agency should consider how many types of forms it wants to produce. It may be advisable to have a separate form for each type of restrictive agreement, and perhaps separate forms for employees and independent contractors and other workers. This allows each form to be shorter and more precisely worded. But having more forms may lead to needless repetition, confusing variations, and may overwhelm a worker who is handed several forms. The agency may decide, for example, to have a form for noncompete agreements, another for confidentiality agreements, and another for nonsolicitation and no-recruit agreements together. The American workforce speaks diverse languages and not all workers have a strong proficiency in English. The agency should consider whether the overall understanding of this act by the workforce would be enhanced by translating its forms into other languages used by a substantial portion of the state's labor force. The forms will need to be updated at least annually, to include the state's current annual mean wage and other relevant changes.

While the act gives the [Department of Labor] considerable discretion in creating forms, below are two sample templates: One form for a noncompete agreement; another for a nonsolicitation agreement. Other forms can be created in a comparable manner.

Noncompete Agreement

Notice Required by the Uniform Restrictive Employment Agreement Act

1. Why am I getting this notice?

You are getting this notice because your employer is asking you to sign a noncompete agreement that prevents you from competing against your employer after your employment ends. The law requires your employer to give you this notice. The notice explains the agreement and the law about it.

2. What must your employer give you?

Your employer must give you a copy of the proposed noncompete agreement and also a copy of the final signed agreement. You have 14 days before starting work to review the agreement unless you decide to start work earlier. If you are already working for your employer, you have 14 days to review the agreement before accepting it. Also, you can request another copy at any time during your employment.

3. Are some noncompete agreements illegal?

Yes. Noncompete agreements are prohibited and not enforceable against workers terminated without good cause and workers earning less than the state's annual mean wage, which is currently [fill in state's annual mean wage, which can be found at https://www.bls.gov/oes/current/oessrcst.htm]. Additionally, your employer can only use a noncompete agreement to protect a trade secret or customer or client relationship. When selling a business of which you are a significant owner, you may enter a noncompete agreement if you consent to the sale.

4. What work will I be restricted from if I sign the noncompete agreement?

Your employer must clearly tell you what kind of jobs you cannot take after your work ends. These can only be jobs that actually compete against the employer, not other jobs you might do. The restriction must be as limited as possible in geographic area and length of time. For most noncompete agreements, the maximum time it can prevent you from working elsewhere is one year. However, if you are selling a business, it can prevent you from working elsewhere for up to five years.

5. What options do I have?

You can:

a. Talk with a lawyer. A lawyer can explain the situation and help you decide whether to sign the agreement.

b. Negotiate with your employer. Even if the agreement is allowed under this law, you can ask your employer to change it.

c. Think it over and sign the agreement if you want to.

6. What if I sign an agreement that is prohibited by law?

If you sign an agreement that is prohibited under the [act], then the agreement is unenforceable. If your employer takes you to court and you win, you may be entitled to damages and attorney's fees. In some situations, you may also sue your employer.

Nonsolicitation Agreement

Notice Required by the Uniform Restrictive Employment Agreement Act

1. Why am I getting this notice?

You are getting this notice because your employer is asking you to sign a nonsolicitation agreement that prevents you from soliciting business from your employer's clients or customers after your employment ends. The law requires your employer to give you this notice. The notice explains the agreement and the law about it.

2. What must your employer give you?

Your employer must give you a copy of the proposed nonsolicitation agreement and also a copy of the final signed agreement. You have 14 days before starting work to review the agreement unless you decide to start work earlier. If you are already working for your employer, you have 14 days to review the agreement before accepting it. Also, you can request another copy at any time during your employment.

3. Are some nonsolicitation agreements illegal?

Yes. Nonsolicitation agreements are prohibited and not enforceable against workers terminated without good cause and workers earning less than the state's annual mean wage, which is currently [fill in state's annual mean wage, which can be found at https://www.bls.gov/oes/current/oessrcst.htm]. Your employer can only use a nonsolicitation agreement to protect client or customer relationships that are ongoing and whom you worked with personally, Additionally, the restriction must be reasonable and last for no longer than one year.

4. What work will I be restricted from if I sign the nonsolicitation agreement?

Your employer must clearly tell you which clients or customers you are restricted from soliciting. However, if your former client comes to you on their own, without you soliciting them, you will be permitted to do business with them.

5. What options do I have?

You can:

a. Talk with a lawyer. A lawyer can explain the situation and help you decide whether to sign the agreement.

b. Negotiate with your employer. Even if the agreement is allowed under this law, you can ask your employer to change it.

c. Think it over and sign the agreement if you want to.

6. What if I sign an agreement that is prohibited by law?

If you sign an agreement that is prohibited under the [act], then the agreement is unenforceable. If your employer takes you to court and you win, you may be entitled to damages and attorney's fees. In some situations, you may also sue your employer.

Section 5. Worker Not Subject to Restrictive Employment Agreement

A restrictive employment agreement, other than a confidentiality agreement or training-repayment agreement, is prohibited and unenforceable unless:

(1) when the worker signs the agreement and throughout employment, the worker has a stated rate of pay greater than the annual mean wage of employees in this state as determined by the [State Department of Labor] [U.S. Department of Labor, Bureau of Labor Statistics]; and

(2) the worker voluntarily quits without good cause attributable to the employer or is terminated for an individual performance-related cause.

Legislative Note: *In paragraph (1), a state should choose between the bracketed entities. A state may set the requirement of paragraph (1) at more than the annual mean wage of employees in the state, either for all workers or for certain categories of workers.*

Comment

Paragraph (1) is a core part of the act. It prohibits and makes unenforceable a restrictive employment agreement (other than a confidentiality agreement or training-reimbursement agreement) against low-wage workers. The state annual mean wage has several desirable features for being the threshold figure for determining unenforceability. First, it automatically adjusts for inflation as average wages rise. Second, the figure is easily accessible. The U.S. Department of Labor Bureau of Labor Statistics tracks this number on a state-by-state basis and updates its database yearly. Thus, even if a state does not collect or publish its own annual wage data, it can refer to an easily accessible source. Third, the figure varies by state, reflecting the particular economic status of each state. Fourth, the figure is not based on an arbitrary multiple of some other statistic. Fifth, the figure is a core aspect of the labor market rather than tangentially related.

Other possible thresholds lack one or more of these characteristics. For example, a fixed dollar amount does not adjust to inflation and, unless each state separately picks a number, it is not tailored to local labor conditions. A multiple of the minimum wage does not change readily with inflation and requires an arbitrary multiple to be meaningful. A threshold based on the poverty level requires an arbitrary multiple and the base number is not directly related to the labor market.

A major feature of the annual mean wage threshold is that it roughly corresponds to workers whose restrictive covenants would typically be unenforceable on common-law trade-secrets criteria anyway. Few workers making less than the annual mean wage have meaningful access to trade secrets. In 2020, the annual mean wage nationwide was $56,310, ranging from $41,600 in Mississippi to $70,010 in Massachusetts (with greater ranges in U.S. districts and territories). Workers making more than the annual mean wage typically have a college degree, while those making less than the annual mean wage have less education. Having a college degree, in turn, makes it twice as likely the worker has access to a trade secret. This threshold thus adds clarity and certainty to the question of enforceability without greatly altering the validity of a restrictive agreement for which the employer has a legitimate interest.

While empirical data are somewhat less clear for customer relationships than trade secrets, the annual mean wage threshold likely gives a rough correspondence with an unenforceable interest in customer relationships as well. A worker making less than the average mean wage rarely has enough star power or is engaged in a near-permanent customer relationship such that the customer will follow the worker to a new employer. Higher-paid customer representatives may have such power, and thus the employer is more likely to have a protectable interest in the customer relationships enjoyed by a worker paid more than the annual mean wage. It is likely that enforcing a restrictive employment agreement against a worker below the chosen threshold is unjustifiable.

Other economic policy rationales may justify using a multiple of the annual mean wage as a threshold, such as 150 percent or more. The goals of increasing competition in labor markets, nurturing startup ecosystems, and cultivating more innovation across firms may be furthered by having only very highly paid workers restrained by a restrictive employment agreement. Since workers with greater propensity to innovate or start a company are generally more experienced and higher paid, to fully exploit the potential entrepreneurship and innovation dividends of mobility may require a higher wage threshold for a restrictive employment agreement, especially in certain professions such as medicine or the tech industry.

Paragraph (1) uses "stated rate of pay" (as defined in Section 2(15) as the figure to compare to the annual mean wage, rather than all earnings or the amount earned in the prior year. This figure adds clarity at the critical moment of contracting. Both worker and employer should know the definite amount the worker will be making, based on the rate of pay and the expected hours, and thus should be able to easily determine whether it exceeds the annual mean wage. Annual earnings, particularly when they depend on commissions, bonuses, or premium pay, are much less certain at the time of hiring, and thus create ambiguity in enforcement at this critical time in the employment relationship.

This paragraph requires that the stated rate of pay must remain above the annual mean wage throughout the employment relationship, as well as at the initial acceptance of the restrictive agreement. For example, if the stated rate of pay barely exceeds the annual mean wage at acceptance and does not rise as quickly over the years as the annual mean wage, the restrictive agreement may become prohibited and unenforceable over time.

Paragraph (2) reflects the concern that enforcing a restrictive employment agreement against a dismissed worker is often inherently unjust. An employer cannot dismiss a worker, revealing that it no longer needs the services, and simultaneously prevent the worker from earning a livelihood elsewhere in the industry, which typically is where the worker is most valuable and can earn the most. A similar rationale exists when a worker is constructively discharged or otherwise quits for good cause attributable to the employer. An employer cannot force a worker out and also prevent the worker from working elsewhere. On the other hand, it is perfectly appropriate to enforce an otherwise proper restrictive employment agreement against a worker who voluntarily quits. Likewise, a worker who is terminated for misconduct or other individual good cause cannot use the misconduct to get out of an otherwise valid restrictive agreement. The common law generally considers termination an important or even decisive factor in deciding enforceability of a noncompete clause; this act adds clarity and precision by making this an absolute rule.

This Section exempts a confidentiality agreement and training-reimbursement agreement from its requirements, allowing an otherwise appropriate confidentiality agreement to be enforced against a low-wage worker or dismissed worker. Confidentiality remains a major requirement for any worker, and an appropriate confidentiality agreement does not greatly restrict mobility. Without an enforceable confidentiality agreement, an employer may hesitate to hire even a low-paid worker. On similar grounds, public policy should encourage employers to provide special training to low-wage workers, in order to improve their skills and enable them to earn more.

Section 6. Restrictive Employment Agreement

In addition to any other requirement of this [act], a restrictive employment agreement is prohibited and unenforceable unless it is reasonable.

Comment

A core tenet of the act, articulated in Section 6, is that every restrictive employment agreement must be reasonable to be enforceable. The reasonableness requirement has long been recognized in the law of restrictive employment agreements, which distinguishes this area from general contract law, which rarely considers reasonableness as a factor in enforcing a contract.

The reasonable inquiry considers all the facts, and generally requires a balancing of the employer's interest, the worker's interest, and the public interest. In cost-benefit terms, the reasonableness inquiry can be framed as asking whether the benefits of the agreement outweigh the harms.

Sections 7-13 of the act proscribe specific requirements for particular types of restrictive employment agreements. But even if an agreement meets the specific requirements of the relevant section, the agreement may still be unreasonable and therefore unenforceable. For example, section 11 declares that a nonsolicitation agreement is unenforceable if it lasts longer than a year. In a certain situation, however, even eight months may be an unreasonably long restriction, if for example customers in a particular industry frequently switch firms regardless of the particular worker who provides their service. In that case the nonsolicitation agreement is unenforceable because of section 6. In other words, there is no safe harbor for a restrictive employment agreement; every agreement must meet the test of reasonableness.

Additionally, as explained in Section 2's comment on the definition of "restrictive employment agreement," there may be a restrictive employment agreement that is not one of seven enumerated types of agreement. Such an agreement must meet the reasonableness requirement of Section 6, as well as the notice requirements of Section 4, the worker requirements of Section 5, and the other generally applicable requirements of the act.

Section 7. Noncompete Agreement

A noncompete agreement is prohibited and unenforceable unless:

(1) the agreement protects any of the following legitimate business interests:

(A) the sale of a business in which the worker is a substantial owner and consents to the sale;

(B) a trade secret; or

(C) the employer's ongoing customer relationships;

(2) when the worker signs the agreement and through the time of enforcement, the agreement is narrowly tailored in duration, geographical area, and scope of actual competition to protect an interest under paragraph (1), and the interest cannot be adequately protected by another restrictive employment agreement; and

(3) the prohibition on competition lasts not longer than:

(A) five years after the work relationship ends when protecting an interest under paragraph (1)(A); or

(B) one year after the work relationship ends when protecting an interest only under paragraph (1)(B) or (C).

Comment

Section 7 details the substantive requirements for the most stringent of restrictive employment agreements, a noncompete agreement. Paragraph (1) lists the business interests that can justify a noncompete agreement. Most importantly, the desire to prevent a valued worker from competing against the employer, while understandable, is not a legitimate interest.

The sale of a business is generally recognized as a legitimate interest justifying a noncompete. Indeed, even states that generally prohibit other noncompete agreements will allow for the enforcement of a noncompete pursuant to a sale of business. The seller of a business often will get a higher price if the seller agrees not to compete against the new owner's business. This noncompete benefits the seller/worker with a higher price and protects the new owner who paid this higher price. Paragraph 7(1)(A) outlines the criteria for a valid noncompete based on a sale of a business. First, the seller must be a substantial owner of the business, and thus will substantially benefit from the sale. An employee owning a few shares of company stock cannot enter a valid noncompete agreement based on the sale of a business, because the employee is not a substantial owner. Further, the seller must consent to the sale for a noncompete agreement to be valid. For example, suppose a senior officer of a close corporation has a 30 percent equity stake in the corporation. The corporation decides to sell a controlling stake to a new owner; the senior officer objects to the sale and is unwilling to work for the new owner. A noncompete purportedly justified by the sale of this business would be unenforceable against the senior officer who objects to the sale. (Indeed, it is hard to see why the senior officer would ever sign such a noncompete agreement.) Further, suppose the senior officer had signed a valid one-year noncompete agreement with the first owners before the sale. If the sale of a controlling ownership interest occurs without the senior officer's consent, the senior officer who objects to working for the new owners can no longer be bound to the noncompete. Instead, the acquirer must negotiate terms of the noncompete with the worker, who will only be bound by such an agreement if the legitimate business interest specified in Paragraph (1)(B) or (C) is satisfied.

Protecting a trade secret is another widely recognized legitimate interest justifying an appropriately tailored noncompete agreement (assuming, as required by paragraph (2), that the trade secret cannot adequately be protected by a confidentiality agreement). For example, a top officer may have access to strategic business plans and other trade secrets. If the officer were to leave for a competing company, it may be hard to identify whether the officer is using the trade secret in violation of the confidentiality agreement. A noncompete can then be a valid response.

Protecting a customer or client relationship is yet another widely recognized legitimate interest for a noncompete agreement. An employer may be reluctant to hire or fully use a worker if there is a substantial risk the worker, after the employer sets the worker up with an important client, will quit and take the client to another firm. A noncompete can protect against this risk. Paragraph (1)(C) recognizes and sets limits on this interest. Most importantly, the client or customer must be ongoing in nature. It is not enough that an employer once had a relationship with a certain client or customer. If there is not a likelihood of future business based on past business with the employer, a one-time deal with a customer, no matter how important, will not be considered a legitimate interest and cannot justify a noncompete.

The act does not recognize other interests that are sometimes used to justify a noncompete agreement, because such recognition leads to hairsplitting or confusing verbiage that unduly broadens the applications of noncompete agreement beyond their legitimate uses. Often, another purported legitimate interest is intertwined with one of the legitimate interests the act recognizes. For example, some statutes and common-law courts describe the interest in protecting as trade secret in somewhat broader terms as protecting a "trade secret or other confidential information." This act rejects the broader terminology as confusing at best and possibly pernicious. Much confidential information is a trade secret as defined in the Uniform Trade Secrets Act, and thus can support a noncompete agreement. Indeed, it is hard to articulate a clear example of confidential information sufficient to justify a noncompete but not amounting to a trade secret. Paragraph (2) cuts through the verbiage by declaring such an example does not exist, and only a trade secret can justify a noncompete. As Section 8 of the Act provides, a valid confidentiality agreement can cover information beyond that of a trade secret. A noncompete agreement cannot.

"Goodwill" is another example of intertwined interests. Some statutes and common-law courts declare that "goodwill" is a legitimate interest for a noncompete. Goodwill is often defined as the propensity for a customer to give repeat business, and thus is the functional equivalent of protecting a customer relationship, which the act recognizes as a legitimate interest. Sometimes a court might define goodwill more broadly, however, as the overall value of a business beyond the accounting value of its assets. This is too vague a concept to justify a noncompete, because it is not tied to work in which the worker is engaged.

The act recognizes a customer and client relationship as a legitimate interest, but does not extend this to vendors or business relationships in general. Business relationships are too broad and vague a concept. Vendor relationships are an uncommon issue for worker noncompete agreements, and are better handled as an aspect of confidential information protected by a confidentiality agreement.

The act does not recognize as a legitimate interest for a noncompete the claim that a worker is the best one at the job. This is dangerously close to the naked goal of preventing competition by a good competitor. For example, if a company tries to bind a welder to a noncompete on the mere basis that he is the most outstanding welder, that alone would not justify such a restriction. See Rem Metals Corp. v. Logan, 565 P.2d 1080 (1977) (reasoning that "[a]lthough [the worker] received training and experience while employed by plaintiff which developed his skill as a repair welder of titanium castings" and was "plaintiff's best welder," the plaintiff did not show special circumstances that justified a noncompete). As Professor Corbin put it in his treatise, "Princeton could not have enjoined Albert Einstein from leaving to take a position at Harvard just because he was famous and his scientific writings enhanced Princeton's reputation." (Arthur L. Corbin, 6A Corbin on Contracts § 1391B (Supp. 1991).

Even if a noncompete protects one of the legitimate business interests enumerated in Paragraph (1), Paragraph (2) sets forth the additional requirement that the noncompete be narrowly tailored. In large part this paragraph codifies the common-law requirement that the geography, duration, and scope of actual competition be narrowly tailored. Importantly, the noncompete can cover no more than the actual competitive activities of the employer. If the employer competes only in Ohio, the noncompete cannot cover Indiana as well. If the trade secret loses value in six months, the noncompete cannot last a year. If the employer engages only in oral surgery, the noncompete cannot cover general dentistry as well.

Paragraph (2) imposes a temporal requirement on the validity of the noncompete as well. To be enforceable, the noncompete must be narrowly tailored at the time it was entered and through the time of enforcement. For example, if the employer at the time of contracting competed in Indiana and Illinois and the noncompete appropriately prevents competition in both states, but the employer no longer does business in Illinois, the employer cannot enforce the noncompete in Illinois.

Lastly, a noncompete is prohibited if the legitimate business interest can be adequately protected by another type of restrictive agreement. By completely prohibiting competition, a noncompete is the most onerous type of restrictive agreement. For example, a nonsolicitation agreement or no-business agreement prevents a worker from approaching or working with certain clients, but does not prevent the worker from starting or joining a rival business. Likewise, a confidentiality agreement prevents a worker from using or disclosing a trade secret, but does not prevent the worker from starting or joining a rival business. Therefore, even if a noncompete is otherwise narrowly tailored, it is overbroad if a less restrictive agreement would be good enough at protecting the employer's interest in a trade secret or customer relationship. A noncompete should be the last resort to protecting a legitimate employer interest, not the first.

Paragraph (3) delineates bright-line outer time limits for a noncompete. The restricted period cannot be longer than five years to protect the sale of a business, and one year for other noncompetes. One year is a significant burden for a worker to be restricted from the industry where the worker is most productive, and at the same time a year often diminishes the value of a trade secret or the strength of a worker's relationship with prior customers. On balance, after a year the detriment to a worker's professional life generally exceeds the continued value to further protecting the employer's trade secrets or customer relationships.

The balance is often different in the context of a sale of a business, and the outer limit for a noncompete here is five years rather than one. The sale price is often higher if the seller/worker includes a noncompete. An owner who has created a successful business has demonstrated the ability to create another successful business, and the threat of doing so makes the purchase of the first business without a noncompete a riskier proposition for a buyer. Some observers may indeed argue for a longer maximum period of restriction, such as 10 years. Overall, however, five years is a long time to diminish the original owner's goodwill and skill while simultaneously cementing the purchaser's reputation in the relevant market. The overriding goal of promoting competition calls for a five-year limit.

Some might argue that the noncompete maximum might be longer if the employer paid the worker during the noncompete period--paying so-called garden leave. While the act allows for a noncompete agreement that compensates the worker during this restricted period, and this might affect the reasonableness inquiry under Section 6, garden leave does not extend the maximum allowable period. Not only is it difficult to determine statutorily the appropriate amount of garden leave that might justify an extension, but even with garden leave the social cost remains from excluding a worker from the industry where presumably the worker is most valuable.

Great value comes from the certainty and predictability of having a clear, outer time limit. Any noncompete outside the one-year or five-year time limit is prohibited and unenforceable. Again, this is an outer limit rather than a safe harbor. A court may construe a particular noncompete to be unreasonable under Section 6 or not narrowly tailored under paragraph 7(2) even if the duration of its restricted period is less than the maximum time limit.

Section 8. Confidentiality Agreement

A confidentiality agreement is prohibited and unenforceable unless the agreement allows the worker to use and disclosure of information that:

(1) arises from the worker's general training, knowledge, skill, or experience

gained on the job or otherwise;

(2) is readily ascertainable to the relevant public; or

(3) is irrelevant to the employer's business.

Comment

Section 8 covers the specific rules for a confidentiality agreement, also known as a nondisclosure agreement. The fundamental principle, articulated in Paragraph (1), is that a confidentiality agreement cannot prevent a former worker from using information derived from the worker's general training, knowledge, skill, or experience. Such information belongs to the worker, even when gained on the job. Admittedly, the line between confidential information and general experience or training is sometimes a fine one, but the limitation is essential to ensure that confidential information is not overly expansive.

Paragraphs (2) and (3) give other limits for a confidentiality agreement, tracking but going somewhat beyond the definition of trade secret. A confidentiality agreement cannot prevent a worker from using or disclosing information that is known or readily accessible by the relevant public. The relevant public is, in general, competitors or others in the industry or field. Even if most people do not know and cannot find out a piece of information, if a competitor can readily find it, a confidentiality agreement cannot bind a worker from using or disclosing this information. Further, the confidentiality agreement cannot cover information that is not relevant to the employer's business, perhaps because it has nothing to do with the financial success of the business. For example, a confidentiality agreement that says a former worker can say nothing about the firm is undoubtedly too broad. While a protectible piece of confidential information might be an employer's pay practices, the manager of a tech firm's favorite donut is irrelevant to the success of the business and therefore cannot be included as part of a confidentiality agreement.

The act places no time limit on a confidentiality agreement. A trade secret, for example, might retain its value indefinitely, and if so the worker can be prevented from using or disclosing it indefinitely. That being said, the moment the piece of protected information becomes readily accessible to the relevant public, the agreement ceases to be enforceable.

Section 9. No-Business Agreement

A no-business agreement is prohibited and unenforceable unless the agreement:

(1) applies only to an ongoing client or customer of the employer with whom the worker had worked personally; and

(2) lasts no longer than six months after the work relationship ends.

Comment

This section covers an agreement that limits a former worker from doing any business with former clients or customers. Such an agreement is similar to but broader than a nonsolicitation agreement. The difference is that, under a non-solicitation agreement, the worker cannot recruit customers, but could do business with customers that come to the worker of their own accord. Under a no-business agreement, by contrast, the worker cannot do any business with the customer, regardless of who solicited whom. The 6-month maximum duration for a no-business agreement, compared to the one-year outer limit duration for a non-solicitation agreement, reflects the more restrictive nature of the no-business agreement. The act prohibits either type of agreement, however, if it extends beyond clients or customers with whom the worker personally worked. The goal of these agreements is to protect customer relationships, and if there was no relationship between the worker and a customer, there is no legitimate interest but only the desire to prevent competition.

Section 10. Nonsolicitation Agreement

A nonsolicitation agreement is prohibited and unenforceable unless the agreement:

(1) applies only to an ongoing client or customer of the employer with whom the worker had worked personally; and

(2) lasts no longer than one year after the work relationship ends.

Comment

The act's treatment of nonsolicitation agreements in this section is similar to that of no-business agreements, with the distinction that a no-business agreement may be allowed for only 6 months whereas a nonsolicitation agreement in some circumstances may be enforceable up to a year after the work relationship ends. This time difference arises because a solicitation restriction is less onerous; it does not prevent the worker altogether from working with the employer's former clients or customers. For example, if an accountant signed a nonsolicitation agreement but then opened her own practice, clients could follow the accountant of their own accord and the accountant could do business with them.

Even within the outer limits of a nonsolicitation agreement, Section 6's basic requirement of reasonableness remains. A court may find unreasonable, for example, an agreement that prevents a former accountant from soliciting work from his mother even though the accountant did his mother's taxes while at the firm. Much depends on case-by-case analysis of such factors as whether the institutional backing of the firm was necessary for the mother to agree to have done business with the accountant at the former firm.

Section 11. No-Recruit Agreement

A no-recruit agreement is prohibited and unenforceable unless the agreement:

(1) applies only to a worker currently working for the employer with whom the

worker had worked personally; and

(2) lasts no longer than six months after the work relationship ends.

Comment

This section covers agreements that restrict a worker from recruiting former co-workers. Some courts and commentators use the term "solicit" to cover both the enticement of customers and coworkers. The policy issues are sufficiently distinct, however, that separate terms are preferable. Common-law courts are skeptical of no-recruit agreements, just as they are reluctant to sanction as a violation of the duty of loyalty an employee who recruits fellow workers even without a no-recruit agreement. This act provides the outer limits on a no-recruit agreement: it cannot last longer than six months and cannot prohibit recruitment of someone with whom the worker did not work. No legitimate justification exists for an agreement that prohibits the recruitment of someone who never worked with the former worker, given that the employer did not create an environment for the two individuals to meet each other. The act's smaller six-month limitation reflects that no-recruit agreements are frowned upon. Of note is that the six-month limitation applies to all no-recruit agreements, regardless of whether the former worker first approached the co-worker or vice versa. There is no distinction like that between a no-business agreement and nonsolicitation agreement for customers or clients.

Courts should remain skeptical of a no-recruit agreement even within the act's outer limits. A no-recruit may well be unreasonable under Section 6, for example, if it prevents someone from recruiting their former officemate (who might have also been a college classmate) into a new business. In general, only a recruitment that creates a mass defection of key personnel might be reasonably prohibited. A recruitment restriction affects not only the worker's ability to compete, but also indirectly affects the mobility of the former employer's workforce.

Section 12. Payment-for-Competition Agreement

A payment-for-competition agreement is prohibited and unenforceable unless the agreement:

(1) imposes a financial consequence that is no greater than the actual competitive harm to the employer caused by the worker; and

(2) lasts no longer than one year after the work relationship ends.

Comment

As discussed in the Comment for definition 2(8), payment-for-competition agreements take on many forms. The thread connecting the act's restrictions on these agreements is that the required payment cannot exceed the actual competitive harm the worker causes the employer. This harm can be quantified by how much business the employer lost because of the former worker's action. For example, if an agreement requires a worker to pay a former employer for soliciting the employer's client or customer, the payment is limited to the actual amount of money the employer would have earned from the specific customer. The agreement does not have to be limited to cash payments to be covered by the act. For example, if a worker owned stock in the former employer's business, then an agreement requiring the forfeiture of stock for competing would be prohibited unless the amount of forfeited stock is no more in value than the employer's losses from the worker's competition. As with other less restrictive agreements, the outer duration for a payment-for-competition agreement is one year.

Section 13. Training-Repayment Agreement

A training-repayment agreement is prohibited and unenforceable unless the agreement:

(1) requires repayment only of the cost of special training;

(2) lasts no longer than two years after the special training is completed; and

(3) prorates the repayment for work done during the two-year post-training period.

Comment

Section 13 covers agreements that require a worker to pay back an employer for certain training costs if the worker leaves the employer. The only costs that an employer can recoup are those that were incurred by offering special training as defined in Section 2(14). An employer cannot require repayment for general on-the-job training. Even when training meets the definition of special training, the repayment cannot exceed the actual cost, nor can the employer require repayment if the worker worked for the employer for more than two years after receiving the training. The logic underlying this limit is that by working for the employer for two years after having completed the special training, the employer was able to recoup its investment in training.

Unlike the focus of other restrictive employment agreements on actions after work ends, an important aspect of a training-repayment agreement is on the time after training but before work ends. It is this period where the employer recoups its training investment. An employer cannot keep a worker unduly long under the threat of repayment expenses because this becomes a chokehold on the worker's career. As a policy matter, the act is balancing the goal of encouraging employers to invest in special training with the goal of allowing worker mobility.

The act draws the line at two years after the special training is completed. After two years of continued work for the employer, the worker is deemed to have repaid the special training. The pro rata requirement of paragraph (3) means that a worker who stays with the employer for one year after training ends is deemed to have repaid half the costs of special training.

For example, consider an agreement where the employer agrees to pay $X for special training now in return for the worker's promise to work for Y years after the training finishes. If the employer works Y years for the employer, the worker owes the employer nothing and is free to leave with no strings. If the worker quits after only Z years (Z < Y), the worker agrees to pay the employer [X/Y]*[Y-Z]. Thus, if training X costs $20,000, Y = 2 years, and the worker quits after 1 year (Z=1), the worker owes [$20,000/2] = $10,000.

The act has two requirements for repaying special training.: First, an agreement cannot require repayments for longer than two years after a worker leaves work (Y must be less than or equal to 2 in the example). Second, the repayment structure can't be back-ended, but must proportionately credit all time worked at the firm after training ends.

Section 14. Nonwaivability

Except as provided in Section 4(b), a party to a restrictive employment agreement may not waive a requirement of this [act] or stipulate to a fact to avoid a requirement of this [act], except in the context of resolving an issue in litigation or other dispute resolution.

Comment

This section prevents a worker or employer from waiving a requirement of this act, but for the exception in Section 4(b). The act's requirements are mandatory for the same reason that restrictive employment agreements are not enforceable like other contracts. The overall public interest in competition and mobility in labor markets means that these agreements are prohibited and unenforceable even when agreed to by employer and worker. Those policies would be vitiated if the act's requirements were waivable. On similar grounds, an employee cannot stipulate that the requirements of this act have been met, regardless of whether the stipulation is fact or fiction. If stipulations were generally allowed, an employer could require an employee to sign an agreement stating, for example, that the worker works personally with all customers in the region as required for a valid nonsolicitation agreement under Section 10, when the reality is otherwise and the nonsolicitation agreed is overbroad. Stipulations are allowed during litigation or other dispute resolution to move along the proceedings.

Section 15. Enforcement and Remedy

Alternative A

(a) The court may not modify a restrictive employment agreement to make the agreement enforceable.

Alternative B

(a) The court may not modify a restrictive employment agreement that restricts a worker beyond a duration imposed under this [act] to make the agreement enforceable. The court may modify an agreement that otherwise violates this [act] only on a finding that the employer reasonably and in good faith believed the agreement was enforceable under this [act] and only to the minimum extent necessary to protect the employer's interest and render the agreement enforceable.

End of Alternatives

(b) A worker who is a party to a restrictive employment agreement or an employer that has hired or is considering hiring the worker may seek a declaratory judgment that the agreement is unenforceable.

(c) In addition to other judicial remedies, a court may award statutory damages under subsection (e) and reasonable attorney's fees to a private party that successfully challenges or defends against enforceability of a restrictive employment agreement or proves a violation of this [act].

(d) An employer seeking to enforce a restrictive employment agreement has the burden of proving compliance with this [act].

(e) An employer that enters a restrictive employment agreement that the employer knows or reasonably should know is unenforceable under this [act] commits a civil violation. The [Attorney General] [Department of Labor] may bring an action on behalf of the worker, or the worker may bring a private action, against the employer to enforce this subsection. The court may award statutory damages of not more than $[5,000] per worker per agreement for each violation of this subsection.

Legislative Note: *A state should indicate whether the Attorney General, Department of Labor, or other state official has the authority to bring these actions.*

Comment

Subsection (a) covers the power of courts to modify an overly broad restrictive employment agreement. The various states have two predominant approaches to judicial modification--red pencil and reformation/blue-pencil. The latter approach is sometimes subdivided.

The red-pencil approach is straightforward. If the restrictive employment agreement is overly broad, a court will not enforce it. For example, suppose a noncompete declares that a worker cannot work in Nebraska but a reasonably tailored agreement would cover only Cheyenne and Kimball counties in western Nebraska because the employer does not compete elsewhere. The noncompete is therefore overbroad and, under the red-pencil approach, the court will not enforce it even in Cheyenne and Kimball. The rationale for the red-pencil approach is that it discourages employers from entering overly broad agreements by risking nonenforcement. Nebraska, Virginia, and Wisconsin are among the red-pencil states.

A danger of the red-pencil approach is that it forces courts into either-or choices that, over time, leads to judicial approval of overly broad clauses. To continue our western Nebraska example, suppose the noncompete includes Cheyenne, Kimball, and also Banner county where the company operated for a short time long ago. A court might think Banner is a stretch but, faced with the only choices of rejecting the noncompete entirely or allowing the slight overreach, feel that justice in this case is better served by enforcing the noncompete. Overtime, this can lead to judicial accretion of overly broad agreements.

Under the reformation approach, a court can modify an overly broad restrictive agreement and enforce the agreement as modified. To continue the example where the noncompete says "Nebraska" but the firm competes only in Cheyenne and Kimball, under the reformation approach the court could limit the agreement to the western counties of Nebraska in which the employer actually competes and enforce the agreement as modified. This approach is sometimes called purple pencil, because it blends red and blue (but has more of a blue tint).

The blue-pencil method allows judicial reformation in a specific, limited way. Under this approach, a court can strike out (ideally with a blue pencil) unenforceable terms but cannot change any contractual language. If the agreement with the strikeouts becomes reasonable, the court may enforce it. To continue the western Nebraska example, under the strict blue-pencil approach the court could strike the term "Nebraska" but cannot add the names of Cheyenne and Kimball. The noncompete is thus enforceable. However, if the noncompete had listed each of the 93 counties in Nebraska rather than using the term "Nebraska," under the blue-pencil approach the court could strike the 91 other names and enforce the noncompete for Cheyenne and Kimball. A major criticism of the blue-pencil method is that it creates artificial distinctions such as this. Commentators have spent much effort describing fine distinctions between blue pencil and other reformation approaches, although in recent years the trend seems to be away from strict blue pencil towards a reformation approach (or towards red pencil).

Under either the judicial reformation approach or its blue-pencil variant, courts can modify only when the employer can show that, even though the agreement is overbroad, the employer reasonably and in good faith thought it was enforceable. Without this reasonable and good-faith rule, an employer might be tempted towards overly broad clauses. To continue our example where the firm competes only in western Nebraska, an employer might write a noncompete covering the entire United States (or under the strict blue-pencil approach, listing every county in the United States), hoping that this will chill some workers from the firm leaving for Maine, and if litigation ever arises the reformation court will still enforce the noncompete agreement in Cheyenne and Kimball.

Alternative A allows a state to adopt the red-pencil rule. Again, the rationale is straightforward. This act articulates clear rules for restrictive employment agreements. If the restrictive employment agreement does not comply with the act, the agreement is prohibited and unenforceable and a court will not enforce the agreement.

Alternative B allows judicial reformation in some circumstances but not others. In particular, Sections 7 through 13 have stated durations that are the outer time durations for the restricted period. A noncompete cannot keep a worker from competing for longer than one year, unless in connection with a sale of a business when it cannot be longer than five years. A nonsolicitation agreement cannot be longer than a year. A no-recruit agreement cannot be longer than six months. And so on. An agreement that exceeds these specified outer time limits is prohibited and unenforceable and a court cannot rewrite the agreement. If a nonsolicitation agreement restricts a worker for 18 months, a court cannot modify it to one year.

Under Alternative B, the courts have greater discretion with an agreement that is overbroad in some other way than the maximum time duration. For example, Section 6 requires all restrictive employment agreements to be reasonable. Suppose, for example, that a noncompete unreasonably prohibits competition for nine months when a court finds that six months would be reasonable, and further finds that the employer reasonably and in good faith thought nine months was enforceable. Under Alternative B, a court can reform the agreement from nine to six months because the nine months did not exceed the stated maximum duration of Section 7.

Under this act, many restrictive employment agreements are appropriate and enforceable. In that case, a court may use standard remedies when a worker fails to honor such an agreement. If the agreement calls for liquidated damages, the court can apply ordinary contract doctrine in determining whether to grant such damages. This is standard civil procedure not changed by this act, and thus needs no provision under this act.

Subsection (b) authorizes a declaratory-judgment action for a worker or second employer that is unsure whether a restrictive agreement is enforceable. The goal here is to promote certainty and clarity and reduce the chilling effect on worker mobility from not knowing whether an agreement is enforceable. Rather than force a worker either to stay put or move and risk being a defendant in a later lawsuit, it allows the worker or the potential employer of the worker) to obtain a judicial declaration that the restrictive agreement is unenforceable.

Subsection (c) authorizes a court to award attorney's fees to a worker or second employer who successfully challenges or defends against a prohibited agreement. Without access to attorney's fees, a worker often will be unable to contest the enforceability of the agreement, and a second employer may decline to hire a worker under the cloud of even a prohibited restriction. The act only authorizes attorney's fees for a private party. Successful public litigation under subsection (e) will not qualify for the award of attorney fees. Additionally, subsection (c) allows the worker to receive statutory damages in addition to actual damages. The potential remedies are available when a worker successfully challenges or defends against the substantive enforceability of the agreement, and when a violation of the act is shown, such as the employer's failure to provide appropriate notice under Section 4 or requiring a low-wage worker to enter a prohibited restrictive agreement under Section 5.

Subsection (d) does not alter the general rules on burden of proof, but it does decree that the employer has the burden of proving compliance with the act, regardless of whether the employer is a plaintiff seeking to enforce an agreement or a defendant in an action challenging the agreement. This placement of the burden of proving compliance is consistent with the act's scrutiny of restrictive agreements, and also places the burden on the party that likely has greater access to the relevant information. For example, an employer is in a better situation to explain why a certain geographic area is appropriate or type of activity is truly competitive with the employer's business, for it is the employer's own activities.

Subsection (e) creates penalties on an employer that enters into a prohibited restrictive employment agreement. Of note, merely offering a prohibited agreement that is not entered into will not create penalties. Furthermore, innocent violations, such as mistakenly suggesting an eight-month restriction when six months would be sufficient, will not create penalties if a reasonable employer would not have realized that such a restriction would be prohibited. However, if the employer suggests a two-year post-employment restriction for a noncompete pursuant to the protection of a trade secret, then the penalty provision is triggered given that it is clearly prohibited under Section 7(3)(B).

Ultimately, the purpose of the penalty provision is to prevent the proliferation of unenforceable restrictive agreements. Merely declaring that an overbroad agreement is unenforceable does not deal with its chilling effect on many workers, deterring them from seeking better job opportunities when it is perfectly appropriate to do so. By bracketing the $5,000 penalty figure, states are given some discretion on choosing an appropriate penalty amount. While a single $5,000 violation may seem insignificant to a large employer, when 20 workers have entered into restrictive covenants in violation of this Act, suddenly the employer is faced with a hefty fine. Similarly, if an employer bundles multiple prohibited restrictive employment agreements (e.g., nonsolicitation, noncompete, and no-recruit) against a single employer, the fines become substantial.

As the bracketed alternatives in subsection (e) indicates, each state should determine whether either or both the state Attorney General or Department of Labor should enforce this act. States differ in which agencies enforce employment laws. However a state allocates this enforcement responsibility, the agencies should have all their usual powers of enforcement.

Government agencies do not have unlimited enforcement resources. Importantly, they may not even be aware of violations that occur in the field, especially those of small scale. The act therefore also creates a private cause of action, specifically with the potential award of attorneys' fees and statutory damages, to create another avenue of enforcement. Of course, the public and private causes of action cannot be duplicative in that an employer will be subject to only a single set of statutory damages for the same restrictive employment agreement.

Section 16. Choice of Law and Venue

(a) A choice of law provision that applies to a restrictive employment agreement is prohibited and unenforceable unless it requires that a dispute arising under the agreement be governed by the law of the jurisdiction where the worker primarily works for the employer or, if the work relationship has ended, the jurisdiction where the worker primarily worked when the relationship ended.

(b) A choice of venue provision that applies to a restrictive employment agreement is prohibited and unenforceable unless it requires that a dispute arising under the agreement be decided in a jurisdiction where:

(1) the worker primarily works or, if the work relationship has ended, a jurisdiction where the worker primarily worked when the relationship ended; or

(2) the worker resides at the time of the dispute.

Comment

A central purpose of this act is to have a clear, predictable, and uniform law that governs restrictive employment agreements. If many jurisdictions adopt this uniform act (and courts further the goal expressed in section 17 of applying and construing the act with uniformity in mind), the choice-of-law provision matters less because the law of many jurisdictions will be substantively the same. Until then, each state adopting this act enhances uniformity by insisting that the choice-of-law provision call for the law where the worker works, rather than, for example, the law where the contract was negotiated or signed or where the employer has its principal place of business or incorporation.

The venue provision of subsection (b) similarly requires that a dispute be decided in the state where the worker primarily works or worked at the time of termination, or where the worker resides at the time of the dispute. The purpose here is to make the substantive provisions of the act a reality by requiring a venue where a worker can realistically challenge an improper restrictive employment agreement as a practical matter. A right to contest an agreement in a far-off jurisdiction is in many cases not of practical importance, because the logistics and costs are insurmountable. In this respect, the venue provision has a similar purpose to the attorney's fee provision of Section 15(c). Each is needed to give a worker a realistic opportunity to challenge a restrictive employment agreement that violates this act.

This section does not require the parties to have a choice-of-law or choice-of-venue provision. Nor does change a state’s general choice-of-law or -venue doctrine. Rather, it focuses on the agreement between employer and worker and declares that the choice-of-law provision, if the parties have made one that applies to a restrictive employment agreement, must choose the law of the state where the worker primarily works or worked. Further, an agreement's choice-of-venue provision, if there is one, must choose that the dispute be decided in the state where the worker primarily works or worked, or where the worker currently resides.

Sometimes a worker, such as a traveling salesperson, works in several states at the same time. Here, the primary place of work supplies the governing law. Additionally, a worker may move between states over time while working for the same employer. If the choice-of-law provision calls for the primary place where the worker works when the dispute occurs, then the governing law changes as the worker changes jurisdictions. However, if the provision calls for a specific state, which the parties may have anticipated as the primary place of work, and the worker moves, the choice-of-law provision is no longer enforceable.

Section 17. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 18. Saving Provision

Except as provided in Section 19, this [act] does not affect the validity of an agreement in effect before [the effective date of this [act].

Comment

Delaying the full applicability of this act only to agreements entered into after its effective date means that the act's policies will take more time to have their full effect. A danger of this delay is that employers might rush to lock in agreements that will be prohibited by the act. An argument could be made that the act in all its particulars should go into immediate effect. Another option would be to delay the effective date of the act to, say, a year after enactment, and then apply it to all restrictive employment agreements regardless of the date of agreement. The logic with this approach is that it would permit employers time to renegotiate restrictive employment agreements with their workers before an agreement becomes prohibited and unenforceable.

On balance, this section combined with Section 19 on Transitional Provisions applies some core provisions immediately while allowing others to be phased in as agreements are negotiated and entered into after the act's effective date. In particular, Section 4's notice requirements should not apply to otherwise valid agreements entered into before the effective date of the act, when advance notice is no longer possible. Notice is a critical policy, but it is harsh to strike down an otherwise valid restrictive employment agreement entered into before the act solely because the employer did not give the proper notice not required before this act. It is better to give employers and workers time to adjust by allowing pre-act restrictive employment agreements to remain mostly subject to pre-act rules. Except for those situations specified in Section 19, depriving parties of the benefit of their bargain when such agreements may have been entered innocently would cause too much tumult.

Section 19. Transitional Provision

Sections 4(a)(5) and 5 apply to a restrictive employment agreement regardless of the date on which the agreement was signed.

Comment

Section 19 highlights the situations where the act will apply to a restrictive employment agreement regardless of the date entered.

First, the act applies immediately to give a worker the right upon written request to receive a copy from their employer of the restrictive employment agreement, even if entered into before the act's effective date. This allows workers to better understand the status of their post-employment restrictions. If the employer does not provide the agreement as specified under Section 4(a)(5), the agreement will become unenforceable even if it was enforceable under prior law. If the employer cannot produce the agreement in a timely manner, it cannot enforce the agreement.

Second, Section 5 applies immediately to existing restrictive employment agreements (except confidentiality agreements and training-repayment agreements, which Section 5 does not cover in any event). This means that an existing agreement as well as a future agreement is unenforceable against low-wage workers and workers terminated without individual cause. Section 5 is one of the most important substantive innovations of the act, reflecting policies of the highest order. The bulk of the agreements prohibited by Section 5 are probably unenforceable anyway under current law. The uncertainty of current law, however, creates a profound chilling effect on the mobility of low-wage and early-career workers that should be eliminated as soon as possible.

Enacting this act is a valid exercise of the state's police power, so there is no constitutional issue with applying parts of the act to an existing contract. True, the contract clause of the United States Constitution (Art. I, § 10, Clause 1) says: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." But as the Supreme Court has explained: "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracs previously entered into between individuals may thereby be affected. . . . In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good." Manigault v. Springs, 199 U.S. 473, 480 (1905). In the famous case of New York Central R.R. v. White, 243 U.S. 188 (1917), the Court upheld state workers' compensation legislation even though the legislation modified existing contracts. As Chief Justice Hughes, speaking for the Court, summarized in Home Building & Loan Ass'n v. Blaisdell, "the reservation of the reasonable exercise of the protective power of the States is read into all contracts . . . ." In a 1949 case, the Supreme Court upheld state laws forbidding an employer from hiring or firing workers because they are or are not union members, curtly rejecting a challenge that applying these laws to existing union-security contracts violated the contracts clause of Article I, Section 10: "That this contention is without merit is now too clearly established to require discussion." Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 531 (1949).

[Section 20. Severability

If a provision of this [act] or its application to a worker or employer is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.*

[Section 21. Repeals; Conforming Amendments

(a) . . .

(b) . . .

Legislative Note: *The state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to a restrictive employment agreement. See Section 3(b).]*

Section 22. Effective Date

This [act] takes effect . . .