D R A F T

FOR DISCUSSION ONLY

Uniform Covenants Not to Compete Act

[Tentative new name: Uniform Restrictive Employment Agreement Act]

Uniform Law Commission

June 2, 2021 Drafting Committee Video Conference

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June 1, 2021

Covenants Not to Compete Act

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Covenants Not to Compete Act

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Section 1. Title

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

Section 2. Definitions

In this [act]:

(1) "Apprentice" means an individual who is in an apprenticeship program eligible for registration under state or federal law to learn a skilled occupation.

(2) "Confidentiality agreement" means a restrictive employment agreement that:

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

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

(3) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) "Employer" means a person that hires or contracts with a worker.

(5) "Intellectual-property holdover agreement" means a restrictive employment agreement that requires a worker to transfer or relinquish the worker's intellectual-property rights to the employer.

(6) "Intern" means an individual who provides uncompensated service to earn credit awarded by an educational institution, learn a trade or occupation, or gain work experience.

(7) "Less restrictive agreement" means a restrictive employment agreement other than a noncompete agreement. The term includes a confidentiality agreement***, intellectual-property holdover agreement***, no-business agreement, no-recruit agreement, nonsolicitation agreement, payment-for-competition agreement, and training-repayment agreement. [***The term***

does not include a restrictive employment agreement that requires a worker to transfer or relinquish the worker's intellectual-property rights to the employer.]

(8) "No-business agreement" means a restrictive employment agreement that expressly prohibits a worker from working for a client or customer of the employer.

(9) "Noncompete agreement" means a restrictive employment agreement that expressly prohibits a worker from specified work. The term does not include a no-business agreement.

(10) "Nonsolicitation agreement" means a restrictive employment agreement that expressly prohibits a worker from soliciting a client or customer of the employer.

(11) "No-recruit agreement" means a restrictive employment agreement that expressly prohibits a worker from hiring or recruiting another worker of the employer.

(12) "Payment-for-competition agreement" means a restrictive employment agreement that by its terms or manner of enforcement imposes an adverse financial consequence on a worker for working for another employer but does not expressly prohibit the work.

(13) "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.

(14) "Record" means information:

(A) inscribed on a tangible medium; or

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

(15) "Restrictive employment agreement" means an agreement or part of an agreement between an employer and worker that prohibits or requires an action by the worker

after the work relationship ends or a sale of business is consummated. The term includes a noncompete agreement and less restrictive agreement.

(16) "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.

(17) "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.

(18) "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.

(19) "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.

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

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

(22) "Volunteer" means an individual who, by the individual's choice, provides uncompensated service.

(23) "Worker" means an individual who provides service to an employer. The term includes an employee, independent contractor, partner, intern, volunteer, and apprentice. 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 (20), a state should cite to the state's Uniform Trade Secrets Act Section 1(4) or the equivalent definition of trade secret.*

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:

(1) the common law of contract; or

(2) the common law of agency.

(c) This [act] does not affect [cite to other state law or rule that prohibits or limits enforceability of a restrictive employment agreement].

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 imbedded within a larger employment agreement. As subsection (a) states, this act regulates both standalone and imbedded agreements, but does not affect other parts of an employment contract.

Subsection (b) declares that the act supercedes specific common-law doctrine regulating a restrictive employment agreement. Parts of the act alter common-law doctrine on restrictive employment agreements (for example, Section 5(1)'s rule that flatly prohibits agreements with low-wage workers). Other parts codifies, builds on, or clarifies common-law doctrine (for example, Section 9(a)'s establishment of a red-pencil rule against modifying some restrictive agreements). Either way, this act becomes the source for regulation of restrictive employment agreements. The act does not replace basic contract and tort law. For example, defenses such as fraud, duress, and unconscionability that apply generally to contract actions are unaffected by this act.

In subsection (c), each state is expected to declare which statutes or rules regulating restrictive employment agreements remain in effect after passage of this act. For example, in every state the ethics rules regulating attorneys prohibits noncompetes (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 non-solicitation agreement to last up to two years after the work relationship ends is incompatible, because Section 7(5) of this act prohibits a non-solicitation agreement that extends beyond one year after the work relationship ends. These nonconforming statutes should be listed in Section 16. Repeals; Conforming Amendments.

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 before the acceptance of work or 14 days before the commencement of work, whichever is earlier; or

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

(2) with the copy of the proposed agreement provided under subsection (a)(1), the employer provides to the worker an appropriate notice, in a record, under subsection (c) in the

preferred language of the worker, if available;

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

(4) the agreement is in a record separately signed by the worker and the employer and the employer provides a copy of the agreement to the worker promptly after signing; 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 not later than 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) that the worker receive a copy of the proposed agreement if the worker receives the agreement before accepting work. If the worker waives the requirement, the agreement is not enforceable until 14 days after the worker commences work.

(c) The [State Department of Labor] shall prepare a notice that informs a worker of the requirements under this [act] for a restrictive employment agreement to be enforceable. The notice must include the requirements of subsection (a) and Sections 5, 6, and 7 and state that this [act] establishes penalties against an employer that enters into a prohibited agreement. The [department]:

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

(2) shall produce the notice:

(A) in each language primarily used by a substantial portion of the state's

labor force; and

(B) in language that can be understood by an average reader.

Comment

This section 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 both general notice of the requirements of the act and bespoke notice of the particular restrictive agreement requested 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.[1] This indicates that notice is 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 the worker has begun work 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.

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 take this approach. A slightly more protective approach requires disclosure that a noncompete agreement will be required at the time of offer, and then a three-day review period for the worker to later review the actual agreement; Maine takes this approach. At the other end of the spectrum, the most protective approach requires disclosure of the agreement's terms by the earlier of either (a) the formal offer letter or (b) 30 business days before the commencement of employment. New Jersey's unenacted statute takes this approach. A middle-ground approach requires employers to provide employees with a copy of the agreement either (a) with the formal offer of employment or (b) 10 days before the commencement of employment, whichever is earlier. Massachusetts takes this approach.

This act opts for a middle-ground approach. Subsection (a)(1)(A) requires employers to provide employees 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 the formal offer of employment" it is sometimes unclear

[1] See Starr, Prescott, & Bishara, Noncompetes in the U.S. Labor Force, at 28, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714.

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 (a)(1)(B) covers the often-tricky situation of imposing a restrictive agreement on an incumbent worker. There are actually at least two common patterns here. Sometimes an incumbent worker is in a job where a restrictive agreement is inappropriate, perhaps because there is 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 marketing 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 restrictive agreement. The employer now wants to impose one. For example, the worker began work as a high-level marketing director. In either case, the policy goal is to give sufficient notice so that the parties can negotiate over an appropriate agreement with appropriate compensation. This subsection does so by requiring that a current worker receive a material increase in the stated rate of pay, and that this worker receive a copy of the proposed restrictive employment agreement before the worker accepts the change in job status or responsibilities or 14 days before the increase, whichever is earlier. In the case of file clerk, the employer must give a copy of the proposed restrictive agreement before the worker accepts the marketing-director position or gets the pay increase, whichever is earlier. In the case of the always-a-marketing-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 either situation, the advance-notice requirement gives some time for contemplation and negotiation of the new agreement.

Some common-law jurisdictions and several statutes require that, for a new noncompete agreement to be enforceable against an incumbent worker, the employer must give consideration in addition to continued employment. Types of additional consideration can vary and may include a change of job duties, 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 merely states that an agreement must be supported by "adequate consideration"; Washington's statute states that 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.

A better approach might be to state that continued employment is sufficient consideration, or perhaps continued employment for a substantial amount of time. Similar complications arise regarding what is meant by a "substantial amount of time." Ultimately, we used Oregon's statute for guidance and drew inspiration from its language regarding a "subsequent bona fide advancement." This language draws upon the policy of requiring additional consideration while also leaving some autonomy in the employment relationship. However, we felt that bona fide advancement was too ambiguous and sought to add clarity to the language to better reflect the underlying policy rationale. So, the act instead requires that the worker be given a material increase in the stated rate of pay. The notice of this restrictive agreement must then be given at the earlier of the worker taking on new job responsibilities or getting the increase, or, if there is no significant change in the work, then 14 days before the increase. The latter notice requirement allows an employer to bind an incumbent worker, who perhaps had access to trade secrets of which the employer did not initially realize, but only if the employer gives proper notice and a pay increase. Requiring a material increase in pay for a valid restrictive employment agreement against an incumbent employee also links to the policy rationale for requiring notice: when a worker has notice before taking the increase, the worker can weigh the pros and cons of entering into a restrictive employment agreement.

Subsection (a)(2) requires the employer to provide a worker with the appropriate 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 term 'appropriate' refers to the type of notice that the employer should provide. For example, an employer requesting only a noncompete agreement does not need to inform a worker about 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 necessary achieve the policy goal of informing the worker of the requirements under the act. After all, not every 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 the relevant official form summarizing of the act's requirements precisely at the same time and to the individual worker with whom it is proposing a restrictive agreement. This form in turn serves as a legible guide for the worker to understand whether the agreement is enforceable. Because it is important that the form be understood by affected workers, the act requires an employer to provide each worker the form in their preferred language, if available.

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 restricts or prohibits after the work relationship ends. The importance of this language is that employers cannot merely state that 'business information' is covered by a confidentiality agreement or that the worker 'cannot compete' as per a noncompete agreement. Instead, the employer will need to 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 and signed by the worker and the employer. This procedural requirement fits nicely with the Act's notice requirement, and it ensures that workers enter agreements voluntarily and with knowledge. Additionally, requiring both parties to sign the agreement provides further procedural safety. 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 agent of the employer are specifically required to sign the restrictive employment agreement on its own whether or not they sign the larger work agreement.

Subsection (a)(5) grants a worker the right to obtain a copy of their 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. This will allow the worker to better understand the status of their post-employment restrictions and thus potentially inform the worker whether it is possible to 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, for the delay would otherwise harm the worker. Subsection (a)(5) also promotes the policy of employers keeping strong records of entered restrictive employment agreements.

Subsection 5(b) further 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 restrictive employment agreement abuse.

Subsection (c) requires the [Department of Labor] to prepare a notice that summarizes the core requirements of this act. 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 forms will need to be updated at least annually, to include the state's current annual mean wage and other relevant changes.

The American workforce speaks diverse languages, with not all workers maintaining a strong proficiency in English. The act therefore requires the agency to produce each of its forms in every language primarily used by a substantial portion of the state's labor force. The agency should make the forms easy to read by average workers. 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.

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 format.

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 provide this notice to you. 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 not enforceable against [physicians,] volunteers, apprentices, interns, workers below 18 years old, 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. This is recommended.
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 the costs of litigation and damages. 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, 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];

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

(3) when the worker signs the agreement, the worker is at least [age of majority] and is not an intern, volunteer, or apprentice.

Legislative Note: *a state should choose between the bracketed entities.*

Legislative Note: *a state may set the unenforceability threshold at a higher than 100 percent multiple of the annual mean wage, either for all workers or for certain professions.*

Comment

Paragraph (1) is a core part of the act. It prohibits and makes unenforceable a restrictive employment agreement (other than a confidentiality 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.[2] 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. 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,

[2] https://www.bls.gov/oes/current/oessrcst.htm.

makes it twice as likely the worker has access to a trade secret.[3] 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. Thes goal 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.[4]

Paragraph (1) uses "stated rate of pay" (as defined in Section 2(19)) as the figure to compare to the annual mean wage, rather than all earnings or amount earned in the prior year. This figure is used to add clarity at the 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 is more or less than 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

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[3] For details see, U.S. Dep't of Treasury Office of Economic Policy, Non-Compete Contracts: Economic Effects and Policy Implications 4, https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf (Mar. 2016); Elka Torpey, *Education Pays*, U.S. Bureau of Labor Statistics, https://www.bls.gov/careeroutlook/2019/data-on-display/education_pays.htm (Feb. 2019); According to a 2016 Report on Non-Compete Contracts by the Treasury Department, workers with four-year degrees are twice as likely to possess trade secrets as those without four-year degrees. In 2018, the median annual earnings corresponding to educational attainment was approximately as follows: bachelor's degree-$62,000, associate's degree-$45,000, and less than an associate's degree-$40,000 or less. Generally in line with these statistics, the Treasury Department Report also showed that workers earning less than $40,000 possess trade secrets at less than half the rate of their higher-earning counterparts.

[4] Marx, Matt, Jasjit Singh, and Lee Fleming, "Regional Disadvantage? Employee Non-compete Agreements and Brain Drain." (2015); Samila, Sampsa, and Olav Sorenson, "Non-Compete Covenants: Incentives to Innovate or Impediments to Growth." (2011); Marx, Matt, "Punctuated Entrepreneurship (Among Women)." (2018); Starr, Evan, Natarajan Balasubramanian, and Mariko Sakakibara, "Screening Spinouts? Non-Compete Enforceability and the Creation, Growth, and Survival of New Firms." (2018).

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 an 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.

Paragraph (3) declares that the young, volunteers, interns, and apprentices cannot be subject to a restrictive employment agreement. These workers are at the start of their careers and the societal benefits from their ability to seek better opportunities outweighs the gains from restricting mobility. Indeed, one of the oldest noncompete cases involved a blacksmith apprentice bound by a noncompete until he challenged the agreement, and the court found the agreement to be an unlawful restraint on trade.[5] On a similar rationale, a worker under the age of majority generally cannot be bound by any contract, including a restrictive employment agreement. Indeed, in most situations this paragraph creates a belt-and-suspenders approach, as these types of workers rarely earn the threshold amount required under Paragraph (1).

This Section distinguishes a confidentiality agreement from all other restrictive employment agreements, allowing an otherwise appropriate confidentiality agreement to be enforced against a low-wage worker, a dimissed worker, a young worker, or an intern, volunteer, or apprentice. Confidentiality remains a major requirement for any worker, including these types of workers, 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, intern, or volunteer.

Section 6. Requirements for 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

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

consents to the sale;

(B) a trade secret; or

(C) the employer's current and ongoing customer relationships;

(2) when the worker signs the agreement and through the time of enforcement, the agreement is reasonable and narrowly tailored in duration, geographical area, and scope of actual competition to protect an interest under paragraph (1), and the interest cannot be substantially protected by a less restrictive 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 6 details the substantive requirements for the most stringent of restrictive employment agreements, a noncompete agreement. Paragraph (1) lists the business interests that a 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. The seller of a business often will get a higher price if the seller agrees not to compete against the new owners' business. This noncompete agreement benefits the seller/worker with a higher price and protects the new owner who paid this higher price. Paragraph 6(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 not be enforceable 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 acquiror 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 if the officer is using the trade secret. 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 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 Secret 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 7 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 customer and client relationships 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 noncompetes, 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 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 this is the most outstanding welder, that alone would not justify such a restriction. 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 additional requirements that the noncompete be reasonable and 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. In addition to the reasonably tailored requirement, the act separately requires that the agreement be reasonable. This captures situations where enforcement is unreasonable even with the noncompete being narrowly tailored. This might occur, for example, if the noncompete imposes an undue burden on the worker.

Paragraph (2) imposes a temporal requirement as well. To be enforceable, the noncompete must be reasonable and narrowly tailored at the time it was entered and through the time of enforcement.

Lastly, a noncompete is prohibited if the legitimate business interest can be adequately protected by a less restrictive agreement. Even if a noncompete is otherwise narrowly tailored, it is overbroad if a less restrictive agreement is good enough. A noncompete should be the last resort to protecting a legitimate employer interest, not the first. For example, if a nonsolicitation agreement would adequately protect an accounting firm's interest in protecting its customer relationships with a worker, the firm cannot use a noncompete however narrowly tailored the noncompete is.

Paragraph (3) delineates bright-line outer 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 in all likelihood 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. It is often apparent that the sale price is higher if the seller includes a noncompete. An owner who has created a successful business has demonstrated the capability to create another successful business, and the threat of doing so makes the purchase of the first business without a noncompete a riskier proposition. Some observers may indeed argue for a longer maximum period of restriction, such as 10 years. Overall, however, five year is a long time to diminish the original owner's reputation while simultaneously cementing the purchaser's reputation in the relevant market. The overriding goal of promoting competition calls for a five-year limit.

Some argued 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, it does not extend the maximum allowable period. Not only is it difficult to determine statutorily the appropriate amount of garden leave that might make this happen, even with garden leave the social cost remains from excluding a worker from the industry where presumably the worker is most valuable.

There is great value in 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. However, this is an outer limit rather than a safe harbor. A court may construe a particular noncompete to be unreasonable or not narrowly tailored even if the duration of its restricted period is less than the maximum time limit.

Section 7. Requirements for Less Restrictive Agreement

A less restrictive agreement is prohibited and unenforceable unless the agreement is reasonable. The following agreements are not reasonable:

(1) a confidentiality agreement that includes:

(A) the worker's general training, knowledge, skill, or experience gained on the job or otherwise; or

(B) information that is:

(i) readily accessible to the relevant public; or

(ii) not relevant to the employer's business;

[(2) an intellectual-property holdover agreement that requires a worker to transfer or relinquish an intellectual-property right who was not hired to create intellectual property or whose intellectual property does not arise from the employer's research and development

program or use the employer's resources to develop or lasts longer than one year after the work relationship ends;]

(3) a no-business agreement that extends beyond an ongoing client or customer of the employer with whom the worker had worked personally or lasts longer than six months after the work relationship ends;

(4) a no-recruit agreement that extends beyond a fellow worker currently working for the employer with whom the worker had worked personally or lasts longer than six months after the work relationship ends;

(5) a nonsolicitation agreement that extends beyond an ongoing client or customer of the employer with whom the worker had worked personally or lasts longer than one year after the work relationship ends;

(6) a payment-for-competition agreement the financial consequence of which exceeds the actual competitive harm to the employer caused by the worker or lasts longer than one year after the work relationship ends; and

(7) a training-repayment agreement that requires repayment to the employer other than for the cost of special training, requires repayment for longer than two years after the special training is completed, or does not prorate the repayment during the two-year post-training period.

Comment

The basic requirement of this section is that a less restrictive agreement be reasonable to be enforceable. The section then articulates, for each type of less restrictive agreement, criteria that make an agreement unreasonable and thereby prohibited and unenforceable. This does not imply that an agreement that meets the criteria of Paragraphs (1) through (7) is necessarily reasonable. It may well be that an agreement that does not fail the tests in Section 7 will still be unreasonable and therefore unenforceable. In other words, this Section sets the outer limits for an enforceable agreement but does not create a safe harbor.

Paragraph (1) covers a confidentiality agreement, sometimes called by others a nondisclosure agreement. The fundamental principle, articulated in Paragraph (1)(A), is that a confidentiality agreement cannot prevent a former worker from using information derived from the worker's general training, 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.

The limits of confidential information are expressed in Paragraph (1)(B)(i), which track but go 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. Thus, 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 limitations on confidentiality agreements. A trade secret, for example, might retain its value indefinitely, and thus the worker can be prevented indefinitely from disclosing it.

The act places no restrictions on a confidentiality agreement that purports 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. The focus of this act is the limits on restrictive agreements that limit competition. Other law deals with appropriate restrictions not based on the balance between competition and contract. For similar reasons, this act does not regulate agreements entered into as a condition of settlement, for there are other policy goals at play in those situations.

Paragraph (2) 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 non-solicitation 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 that the worker personally worked with. 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.

Paragraph (3) restricts 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. 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 harsh six-month limitation reflects that no-recruit agreements are frowned upon, and courts should remain skeptical of a no-recruit within the act's outer limits. A no-recruit may well be unreasonable if it prevents someone from recruiting their former office mate (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 former employer's workforce movability. 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 non-solicitation agreements for customers or clients.

The act's treatment of nonsolicitation agreements in Paragraph (4) is similar to that of no-business agreements, with the distinction that a no-business may be allowed for only 6 months whereas a nonsolicitation in some circumstances will be enforceable up to a year after the work-relationship ends. This is because a solicitation restriction does not prevent the worker from altogether 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 and the accountant could do business with them. Even within the outer limits of a nonsolicitation agreement, the 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 her 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 client to agree to have done business with the accountant at the former firm.

As discussed in the Comment for Section 2(12), the payment-for-competition agreements covered in Paragraph (5) of this Section take on many forms. The thread connecting all of these agreements is that the required payment cannot exceed the actual competitive harm. This harm is quantified with respect to how much business the former worker draws in from their former employer. For example, if a worker was required to pay a former employer for soliciting the employer's client or customer, the payment would be limited to the actual amount of money made by the worker from the specific customer. Indeed, payment is not even just 'cash' per se. If a worker owned stock in the former employer's business, then an agreement requiring the remuneration of stock for competing would be prohibited unless the amount of forfeited stock is equivalent in value to the worker's earnings that are tied to competition with the former employer. As with other less restrictive agreements, the outer duration for a payment-for-competition agreement is one year. For example, the costs to a worker who must pay the former

employer for competing for 5 years may be so prohibitive as to effectively prevent the worker from leaving at all, thus stifling a competitive marketplace.

Paragraph (6) covers agreements that require a worker to pay back an employer for certain costs. The only costs that an employer can recoup are those that were incurred by offering special training as defined in Section 2(18). 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. In this way, unlike the focus of the act for other restrictive agreements on actions after work ends, an important aspect of a training-repayment agreement is on the time after training but before work ends. A worker who works for two years after training is deemed to have repaid the special training; the pro rata requirement means that a worker who leaves after one year of training is deemed to have repaid half the costs of special training.

Section 8. Nonwaivability

Except as provided in Section 4(b), a party to a restrictive employment agreement may not waive, or stipulate to a fact to avoid, a requirement of this [act].

Comment

This section prevents a worker or employer from waiving a requirement of this act, but for the exception in Section 4(b). 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. Without Section 8, an employer could require an employee to sign a contract stating, for example, that the requirements of Section 4(a)(2) have been met, when in reality, the employer never gave the required notice. 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 are waivable.

Section 9. Enforcement and Remedy

Alternative A

(a) The court may not modify a restrictive employment agreement to make it 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 it 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) The court may remedy an actual or threatened breach of a valid restrictive employment agreement with injunctive relief, actual damages or liquidated damages specified in the agreement, and costs.

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

(d) The court may award injunctive relief, actual damages, statutory damages specified under subsection (f), costs, 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].

(e) An employer seeking to enforce a restrictive employment agreement has the burden of proving every element.

(f) 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 specify that the Attorney General or Department of Labor, or both, in bringing an action under subsection (f), has its usual powers to investigate claims and*

reach conciliation or settlement.

[Section 10. Healthcare Provider

A noncompete agreement, no-business agreement, no-recruitment agreement, or nonsolicitation agreement is prohibited and unenforceable against a physician or other healthcare provider as defined by [cite to state law regulating healthcare providers] when working as a physician or other healthcare provider.]

Legislative Note: *A state should identify the statutes that provide for regulation of the types of healthcare providers that would be subject to this Section.*

[Comment

This section enacts a fundamental policy that patients have the right to choose and to continue treatment with their own healthcare provider. The policy is analogous to the prohibition on noncompetes and restricting lawyers. This section makes the listed agreements unenforceable against a healthcare provider even when ancillary to a sale of a business. This is similar to the regulation of the equivalent lawyer agreements, which generally are not enforceable even ancillary to a sale of a business. Just as the Rules of Professional Conduct allow for the enforceability of some payment-for-competition agreements against lawyers, however, this section allows for the enforceability of payment-for-competition agreements against a healthcare provider, so long as the agreement meets the other requirements of this [act].]

Section 11. Choice of Law and Forum

(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 must 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 forum provision that applies to a restrictive employment agreement is prohibited and unenforceable unless it requires that a dispute arising under the agreement must 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) or where the worker resides at the time of the dispute.

Comment

A central purpose of this [act] is to have clear, predictable, and uniform laws govern restrictive employment agreements. If many jurisdictions adopt this uniform act (and courts further the goal expressed in section 12 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.

This section does not require the parties to have a choice of law or choice of forum provision. Nor does it limit the powers of any court or arbitrator or change a state's general choice of law 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, the choice-of-forum 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.

Subsection (b) does not insist on a single forum in a choice-of-forum provision, but does require that the provision allow the dispute to be handled by a court or arbitrator in the state where the worker primarily works or worked at the time of termination. In that sense, subsection (b) calls for a nonexclusive forum selection provision but does not require an exclusive forum selection provision in the jurisdiction of work. The parties can still agree, at the time of initial contracting or later, to use a different forum, as long as the jurisdiction where the worker primarily works or worked remains an option.

Section 12. 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 13. Saving Provision

Except as provided in Section 14, 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 14 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 are well placed to be applied to agreements entered only after the effective date. Notice is a critical policy, but it seems 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. however, 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 14, depriving parties the benefit of their bargain when such agreements may have been entered innocently would cause too much tumult.

Section 14. 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 14 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.

Second, Section 5 applies immediately to all existing restrictive employment agreements except confidentiality agreements, which Section 5 does not cover. This means that current agreements as well as future agreements are unenforceable against low-wage workers, workers terminated without individual cause, and minors, interns, volunteers, and apprentices. Section 5 is the most important substantive innovation of the act, and it reflects 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.

[Section 15. 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 16. 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}. See Section {3(b)}.]*

Section 17. Effective Date

This [act] takes effect . . .