Memorandum

To: Study Committee on Covenants Not to Compete
From: Stewart J. Schwab, Reporter
Date: March 13, 2020
Re: Interest-Group Positions on Noncompetes

I asked my student research assistants to search the internet for statements from interest groups about noncompete clauses, with a focus on their positions on choice of law, low-wage earners, notice provisions, and healthcare workers.

Some stakeholders have publicly available position statements on noncompete reform on their websites. More commonly, there are digitally available statements from public legislative hearings. Additionally, some states provide digitally available audio/video recordings of public hearings, so it was possible to comb through the videos for interest group statements made at the hearings.

Below are summaries from the research assistants, followed by a listing of sources.

I. Themes

On a state to state basis, the players largely remained the same. Some variation of a localized business organization (e.g., Maryland Chamber of Commerce, Associated Industries of Massachusetts etc.) appeared at hearings to support most aspects of current noncompete law and oppose comprehensive reform. In support of the bills, one would usually find three groups, the AFL-CIO, a lawyer's association (employment or trial lawyers), and a legal aid organization.

II. General Position of Employers on Issues

1. Low Wage- Employers do not seem to have a problem with this provision. The only issues that employers had were auxiliary in nature. For example, the Maryland Chamber of Commerce was worried that if one state had a noncompete prohibition for low wage employees, but the neighboring state did not, then a company, when choosing to open on the border of the two states, would choose the state without the low wage exemption. Otherwise, employers, as will be discussed in the trade secrets section, were largely concerned about the loss of trade secrets and other confidential information.

2. Choice of Law- No identifiable concern over choice of law provisions.

3. Notice- For the most part, employers did not seem overly concerned with reasonable notice requirements. However, the committee should be mindful of the definition of notice. For example, employers in Montana voiced concern when discussing a bill that would penalize an employer for falsely conveying information regarding whether an employee was subject to a noncompete. In particular, employers were concerned that this

would turn into a "he said, she said" contest, so for this scenario, specifying that the false conveyance be in writing would have helped alleviate some of this tension. Similarly, if a uniform act were to allow for "verbal" notice, then the same tension must be anticipated.

4. Trade Secrets/Proprietary Information- This is perhaps the biggest sticking point for employers when it comes to noncompete agreements. Employers are largely adamant (in spite of the constantly referenced California prohibition on noncompetes) that noncompetes are necessary to protect their confidential information. It is very likely that access to proprietary information or trade secrets as a protectible interest will go far in encouraging the employer community to accept a uniform noncompete act.

5. Existing Mechanism to Handle Disputes- This concept is generally viewed in one of two ways. First, some employers argue that their states already have substantial caselaw on this topic and that the caselaw tends to only allow for reasonable noncompetes. Thus, adding a new noncompete statute would only muddy the waters. Second, some employers value the clarity that statutes offer, given that often times the case law is anything but clear.

6. Specific to Professions- Employers have shown a hesitancy to accept noncompete reform pertaining to independent contractors. For example, the U.S. Chamber of Commerce (which incidentally is curiously silent on other noncompete issues) seems to oppose regulation of independent contractors. Additionally, peculiar situations do arise involving some independent contractors like, for example, insurance salespersons. One issue in South Dakota was whether a reduction from a 2-year to 1-year duration on non-solicitation agreements was acceptable when considering independent insurance contracts. The logic was that insurance policies are normally only for a year, so an insurance agent could independently contract for a year (max noncompete duration) and then just leave afterwards with the client list.

III. General Position of Public Interest Groups on Issues

1. Low Wage- Across the board, public interest groups believe that low wage earners should not be subject to noncompete agreements. They argue that such agreements greatly depress wages and fundamentally restrict the right to work.

2. Choice of Law- Generally, there is no commentary on this.

3. Notice- Across the board, interest groups claim that this is perhaps one of the most important aspects of a noncompete statute. In particular, they note that often times those who are subject to a noncompete do not understand what they are agreeing to. Moreover, interest groups note that often times employees are coerced into signed noncompete

agreements either after starting the job (i.e. sign or be fired) or as a condition for promotion and/or raises.

4. Trade Secrets/Proprietary Information- Interest groups note that other mechanisms exist to protect trade secrets (i.e. NDA, DTSA, UTSA etc.). Some, like reformers in Massachusetts now claim, opine that those other mechanisms are indeed enough protection and even ***Just*** allowing scientists or managers to sign noncompetes would be hazardous to the economy. Other groups, however, note that these such positions are exactly what noncompetes were designed for, and in a sense, use this argument as a tactic to leverage the idea that noncompetes should not apply to certain (i.e. low wage) workers.

5. Existing Mechanism to Handle Disputes- Generally, interest groups have two concerns with current enforcement mechanisms. First, taking a noncompete dispute to court is often cost-prohibitive, so those most harmed by these agreements cannot access justice. Second, many people do not understand noncompete agreements and what makes them enforceable, so the idea of going to court is foreign to them. Of note, language pertaining to void or voidable should be considered. For example, the previously mentioned new Oregon bill would change the statutory language from voidable to void. According to testimony, this would shift the burden of proof and make litigation easier for less sophisticated parties (employers did not see this as making a difference).

6. Specific to Professions- The committee should consider whether optional profession specific exemptions should be included in a noncompete act. Just consider the AMA statement on noncompetes or Massachusetts' desire to see tech employees not subject to these agreements. Perhaps it would help the act to gain traction by allowing the states to preserve unique interests while still creating a framework that can be uniformly adopted.

IV. Positions of Health-Care Interest Groups on Noncompetes

The majority opinion seems to be that DNCs should not be enforceable against physicians--or, at a minimum, they should be heavily scrutinized.

Beyond the AMA, most other healthcare interest groups that take a position on DNCs believe they should not be enforced against healthcare workers. The Department of Health and Human Services, Department of the Treasury, and Department of Labor also released a report in 2018 about competition in the healthcare system, and they recommended that states scrutinize restrictive covenants for their impact on patient access to care and on the supply of healthcare providers.

For those parties that support enforcing DNCs against healthcare workers, the argument seems to be that without restrictions, doctors will poach (a) the most profitable clients, restricting the broader community's access to care from those providers or (b) clients in general by departing doctors, harming the old employer.

Federal Gov't Agencies

U.S. Dep't of Health of Human Services; U.S. Dep't of the Treasury; U.S. Dep't of Labor
2018 Report on Reforming America's Healthcare System Through Choice and Competition takes the position that we need to reform policies that inhibit choice and competition and produce higher prices for the American people. The Report recommends that states scrutinize restrictive covenants, particularly their impact on patient access to care and on the supply of providers. *See* https://www.hhs.gov/about/news/2018/12/03/reforming-americas-healthcare-system-through-choice-and-competition.html; https://www.hhs.gov/sites/default/files/Reforming-Americas-Healthcare-System-Through-Choice-and-Competition.pdf at 61-63.

Healthcare Interest Group Positions

American Medical Association
The AMA ethical standards allow competition that is based on certain factors, such as quality of services, skill, experience, conveniences offered to patients, fees, or credit terms. On the other hand, the AMA recognizes that covenants-not-to-compete restrict competition, can disrupt continuity of care, and may limit access to care. The AMA believes physicians should not enter into covenants that: (a) unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and (b) do not make reasonable accommodation for patients' choice of physician. *See* AMA Code of Medical Ethics Opinion 11.2.3.1.

American Academy of Family Physicians
In 2014, a member of the AAFP's Board of Directors published an article encouraging physicians to refuse to sign restrictive covenants. *See* https://www.aafp.org/news/blogs/leadervoices/entry/don_t_accept_limits_on.html

American Academy of Emergency Medicine
Officially opposes the use of DNCs in physician contracts. *See* https://www.aaem.org/resources/key-issues/em-contracts/restrictive-covenants

American College of Emergency Physicians
The ACEP believes that Emergency physicians should not be required to agree to any unreasonable restrictive agreement that limits the right to practice medicine for a specified period of time or in a specific area after the termination of employment or contract to provide services as an emergency physician because such restrictions are not in the public interest. *See* https://www.acep.org/patient-care/policy-statements/emergency-physician-rights-and-responsibilities/

American Hospital Association
A statement by the EVP suggests that with looser restrictions on physician-owned hospitals, the hospitals will cherry-pick the most profitable patients, thus restricting the broader community's

access to full-service care. *See* https://www.aha.org/press-releases/2018-12-03-statement-health-care-competition-report.

Empirical Studies

Journal of Human Resources 2018 Study
Found evidence consistent with the theory that physician practices use DNCs to prevent patients from being poached by departing doctors. There was also some evidence that jobs requiring DNCs tend to last longer. Also found that the presence of enforceable DNCs increases earnings growth and investment among service firms. *See* http://kurtlavetti.com/UIPNC_vf.pdf.

V. Summary: Refreshingly Bipartisan, Employers and Employees Coming Together

Trial lawyers acknowledge that even though noncompete reform might reduce the amount of cases they can take on, that it is the right thing to do. Employers willingly come to the table to work out the terms of noncompete statutes. In fact, regarding Texas' recent low wage earner bill, four proponents of the bill testified at the public hearing whereas no opponents of the bill chose to testify. For low-wage employees, this makes a lot of sense. After all, the main sentiment echoed by employers is that they want to protect their trade secrets and low wage employees are not normally privy to such information. So, a question remains. How can a noncompete statute be drafted in a way that adequately reflects the interests of all interested stakeholders? Based on the information gathered, I will attempt to reference each issue in a way so as to reconcile the different interests of the employers and employees.

1. Low Wage- While the exact definition to draw upon remains to be determined, this provision is generally accepted among both employer and employee lobbying groups.
2. Choice of Law- A reasonable choice of law provision should be acceptable.
3. Notice- The statute should specify, with great clarity, what constitutes adequate notice. Such a provision should also consider how employers should approach an employee when attempting to have them sign a noncompete as a condition of continued employment.
4. Trade Secrets/Proprietary Information- This is a rather touchy issue that might need to be resolved through an amalgam of methods. For example, if a low wage earner is classified as an individual making 100k or more a year, then an engineer making 80k a year would seemingly not be subject to a noncompete. A question remains as to whether that engineer's employer would trust the NDA/trade secret regime to protect its assets. This can potentially be solved in two ways. First, by restricting the low wage earner exemption to something fairly low (i.e. 30k a year), then the argument can easily be made that employers, like engineers, managers, etc, should be paid more if they are going to be in a position to access trade secrets. A second alternative is compiling a convincing report to show employers that the trade secret/NDA regime will provide enough protection so as to render noncompetes redundant.
5. Existing Mechanism to Handle Disputes- The idea here is to make the courts accessible to workers who wish to contest the validity of their noncompetes. One such way to do

this would be to require that guilty employers pay attorney's fees to the prevailing plaintiff (as some states have done). Yet, perhaps there is balancing to make this more acceptable to both employers and employees that can be done in the minutia of the language. For example, one can balance the interests by using the term "voidable" but also requiring that the employer pay the prevailing plaintiff's attorney's fees. Or, perhaps using the term "void" and having a civil penalty similar to what Montana proposes would offset the need for attorney's fees.

6. Specific to Professions- To gain acceptance on both sides, perhaps it would be wise to build in optional clauses to the uniform statute that would allow for specific professions (i.e. tech, physician etc.) to be exempt from non-compete agreements and for certain independent contractors (insurance agent) to not be covered by the statute.

At the end of the day, this is a classic "you can't have your cake and eat it too" scenario. Employers want to hire their competitors' employees, but they also want to keep their own employees without worrying about poaching from their competitors. This issue can be framed in a way that will allow employers to see that noncompetes are both good and bad for them. At the same time, the issue can be framed in a way that showcases how even though the benefit/cost of noncompetes to employers is de minimis, that the effect on employees as a whole is quite detrimental. This is likely one reason why employer and employee groups have been working together on these issues. Another reason, which is likely obvious to anyone reading this report, is that employers look bad when stories surface about Sandwich Makers not being able to switch locations because of noncompete agreements. Employers have something to gain by coming to the table. They gain a reputation boost with both their employees and their customers. As one policy analyst that I spoke with remarked, "It's hard for employers to justify things like requiring fast food workers to sign noncompete agreements. It's not a matter of employers refusing to accommodate such a bill, it's a matter of how many concessions they are willing to make."

This report was written for Professor Stewart Schwab by Kai Mindick '21. The Healthcare section was written by Julia Hollreiser '20.

Sources

The following position statements are in the "Documents" folder, available at https://drive.google.com/drive/folders/1yfYwp4Xib1Ref_1oveX_Ivl9bfZ-riES?usp=sharing

1. United States Senate FTC Hearing Comment
2. Center for American Progress (search for "recommendations" to find most relevant portion)
3. Joint Public Interest Group Petition for FTC Rulemaking
4. Veeva (tech company) Statement on noncompete agreements
5. FTC noncompete workshop transcript
6. Key takeaways from FTC noncompete workshop
7. Testimony of Ocean Tourism Coalition/Hawaii (for, low wage)
8. U.S. Chamber of Commerce position on independent contractors
9. Amazon position on low wage (article discussing Amazon's lobbying)
10. American Medical Association Position Statement
11. Associated Industries of Massachusetts Position Statement
12. Connecticut Trial Lawyers (for, comprehensive)
13. Connecticut AFL-CIO (for, comprehensive)
14. Connecticut Attorney (against, comprehensive)
15. Connecticut Greater Hartford Legal Aid (for, comprehensive)
16. Connecticut Business and Industry Association (neither for nor against, comprehensive)
17. Companions and Homemakers Inc, (against, comprehensive)
18. Maine Lawyer's Association Statement (for, low wage)
19. Maine AFL-CIO Statement (for, low wage)
20. Maine Chamber of Commerce Statement (neither for nor against, low wage)
21. U.S. Workforce Mobility Act hearing, testimony of Economic Innovation Group
22. U.S. Workforce Mobility Act hearing Evan Starr Testimony
23. U.S. Workforce Mobility Act hearing citizen testimony
24. Notes from Conversation with Massachusetts Senate Policy Analyst (complete prohibition)
25. Notes from Maryland Chamber of Commerce Position at Maryland Public Hearing (low wage)

26. Notes from Rhode Island Public Interest Position at RI Public Hearing (low wage)
27. New Hampshire Audio Clip (low wage)
28. New Hampshire Hearing Report (low wage)
29. Montana Audio Notes (civil liability)
30. South Dakota Audio notes (duration modification)
31. Texas Video Notes (low wage)
32. Oregon Video Notes (comprehensive)
33. Washington Video Notes (comprehensive)