

May 17, 2021

Dear Uniform Law Commission Covenants Not to Compete Act Drafting Committee Chairs,

I am writing on behalf of my organization, the Economic Innovation Group (EIG), as an observer to the commission with ***a specific concern relating to Section 5 and the annual mean wage threshold***. I apologize for missing the session during which this was discussed among the full group and if anything in this note is redundant to topics covered at that time. If you're not familiar with [EIG](#), we are a bipartisan research and advocacy organization [working at the federal level](#) with a bipartisan, bicameral group of lawmakers on noncompetes reform in the shape of the [Workforce Mobility Act](#), sponsored by Senators Young (R-IN), Kramer (R-ND), and Kaine (D-VA) and Representatives Gallagher (R-WI), Meijer (R-MI), and Eschoo (D-CA).

While the mean wage threshold in the draft represents a sensible starting point, *I worry that its treatment in the current text and related comments presents the threshold as a neutral, template-able provision and not a significant policy variable around which states should carefully weigh alternatives.*

The comment text is spent justifying the threshold but does not discuss ***economic*** considerations that state lawmakers may wish to weigh before arriving at it. Specifically, we have found it helpful to break out the motivations for noncompetes reform into two general buckets. The first revolves around worker rights and the idea that noncompetes cannot be justified for lower wage workers without bargaining power or access to the sort of knowledge that an employer may have more semblance of legitimacy in protecting. This subject matter is well-covered in the current draft.

The second, though, is around *innovation and entrepreneurship*. Noncompetes directly obstruct the flow of all knowledge, not just protectable interests, in a local economy, and such flows are key ingredients in innovation and forces behind economic development. Noncompetes also directly prevent someone from spinning off and creating a new business in the same line of work. Individuals with new ideas, better ideas, process improvements, or whatever else beyond are directly prevented from turning those ideas into new enterprises. With the country's startup rate stagnant 20 percent below pre-Great Recession [levels](#) and a majority of metropolitan areas seeing more firms die than start each year, noncompetes come with real economic costs.

The workers' rights issue area dominates the reform discussions around noncompetes in part because of the media attention it has garnered, as well as the fact that it involves less gray area around intellectual property and trade secrets. But it also means that, while many lawmakers may be aware of the wage and mobility gains on the table with low-wage reform, *some lawmakers may not yet be aware of the potential entrepreneurship and innovation dividends of reforms with a higher wage threshold* (since workers with greater propensity to innovate or start a company

are generally more experienced and higher paid). Research from Evan Starr and many others suggests these potential dividends may be substantial.¹

We speak from experience that these arguments resonate with lawmakers, once they are heard. One of our conversations with the office of a lead sponsor of the District of Columbia's noncompetes reform bill centered around this very issue. The diversification of the DC economy was a key economic development priority of theirs, and after weighing the full set of arguments in favor of more comprehensive noncompetes reform, they put forward—and enacted—a near universal ban. Similarly, [Hawaii's choice](#) to prohibit most uses of noncompetes for tech sector workers was done with a clear economic competitiveness rationale in mind, same with the comparable legislation proposed in [Georgia](#). As demonstrated with the diverse set of lawmakers sponsoring the Workforce Mobility Act, we are finding real bipartisan resonance for many of these arguments, particularly in parts of the country where entrepreneurship and innovation are top of mind (not just California, but parts of the Midwest yearning for the industries and enterprises of the future).

I recognize that a key goal of the commission is uniformity. With that in mind, I would suggest a few possible revisions to reflect this concern while preserving the body of the act.

- Add a discussion to the first “Comment” paragraph that the annual median wage can be considered a minimum floor for permitting enforceability but that states may find reasons to go higher in general or in particular sectors (e.g. technology or medicine) in order to stoke competition or increase job-to-job mobility or startup rates in line with their economic development priorities.
- Add a paragraph that lays out the reasons why some states may want to push higher. Ultimately, clearly articulating this policy variable and laying out a ramp or set of options may help further uniformity, allowing states to build off of the broad foundation provided by the act, rather than strike out independently. Sample text could be:

States that embark on noncompetes reform with specific economic policy goals in mind may choose to set the unenforceability threshold at a higher level on the wage scale (still expressed as a percentage of annual mean wages, however, for the benefits associated with that benchmark discussed [below]). Stoking competition, nurturing startup ecosystems, or cultivating more innovation across more firms are all economic policy goals that may motivate having a smaller share of the workforce covered by noncompetes.

Thank you very much for considering these comments. I hope they are constructive as you move to finalize the draft and that they do not come too late in the process. They are motivated by the concern that windows for substantive reform on any issue do not open often, and we hope that states embarking on comprehensive, holistic noncompetes reform can do so in confidence that they have considered the question from all relevant angles. I would be happy to speak to these

¹ 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).

issues to the full group during an upcoming meeting. If we can provide any further citations, information, or suggested text, please let me know. Thank you for the invitation to observe the commission, it has been a pleasure and inspiration watching this important work advance.

Sincerely,

Kenan Fikri
Research Director
Economic Innovation Group