MEMORANDUM

To: Noncompete Drafting Committee Members and Observers

From: Stewart Schwab, Reporter

Date: November 11, 2020

Re: Updated Drafting notes, now adding §3 to §§1-2

Below are the drafting notes my research assistants compiled for me to explain the choices made and sources used. This updated memo adds notes for §3 of the statute, beginning on page 12. The notes for sections 1-2 are identical to what you saw in my memo of November 2. I put all the notes together in this updated memo so you don't have to keep track of old and new memos.

SECTION 1. This [act] may be cited as the Uniform Restrictive Employment Agreement [Act].

Notes: Other options include (1) Uniform Restrictive Covenants [Act] (2) Uniform [Act] Relating to Restrictive Covenants (3) Uniform [Act] Relating to Restrictive Employment Agreements.

Originally the Act was drafted to focus exclusively on noncompete agreements and the name was something along the lines of "Uniform Noncompete Agreement Act." However, after the Scope Committee suggested we include standards for lesser restrictive agreements, we changed the name.

SECTION 2. DEFINITIONS. In this [Act]:

(1) "Apprentice" is a worker participating in an apprenticeship program registered by the Office of Apprenticeship of the U.S. Department of Labor and meeting the standards established by the office, or registered in any state apprenticeship agency recognized by the office.

Notes: This is the definition of apprentice exemption set forth in Section 3(f) of this Act. This definition is identical to that found in New Jersey's pending restrictive covenant statute.

(2) "Confidential information" means valuable information about the employer's business not known to competitors, whether or not it is a trade secret, that a worker receives because of the worker's relationship with the employer.

Notes: Generally speaking, states have tackled confidential information in one of three ways.

The laundry list, when a state lists many different types of confidential information and declares that confidential information "includes, but is not limited" to these examples: Laundry lists are found in both the Alabama and Oregon statutes, which define confidential information with reference to more than ten different types of information.

We chose not to adopt the laundry list for several reasons. First, it looks messy and cluttered. Second, it might suggest that other types of information were considered and deliberately excluded as exemplars, which might lead to an otherwise protectable piece of information not being considered as "confidential information." Conversely, the "includes but not limited to" language might suggest that virtually any private information can be protected as confidential information, which goes against the ethos of the Act, which is to limit the use of restrictive covenants to situations where an employer's legitimate interests (other than limiting competition) need protection.

Confidential information means...confidential information?: This conclusory approach merely delegates to courts the task of defining confidential information. We opted against this vague definition because it directly counters a goal of uniform statute writing; the statute should provide clarity beyond what the common law can give. The uniformity goal of the act means that a national employer should not have to look at fifty state court precedents to determine the standards of protectable confidential information.

The Test: Georgia is one of only a few states that provides significant qualifications in its definition of confidential information. Additionally, the Arkansas statute (see also Florida unenacted) offers a value-based test. Georgia's test requires that the information have value and be learned by the worker during employment. For the reasons that the other options were not chosen, the test-based version succeeds. It

does not allow employers to rampantly use confidential information as an excuse to require a worker to enter a restrictive covenant. It provides greater certainty, but with the caveat that employers might try to litigate whether something is valuable to the business. Lastly, it does not presuppose that certain types of information will always, or will never, be protectable as confidential.

Also of note: Some states, such as Florida , Maine, and Massachusetts (see also New Jersey unenacted), note that confidential information does not need to be a trade secret. It's possible that trade secrets would become redundant with this definition, as trade secrets are a subspecies of confidential information. However, given the added protections specifically afforded to trade secrets and the inherent synergy that such information has with the 48 versions of the UTSA, it seems wise to separate the two terms.

(3) "Confidentiality agreement" means an agreement between an employer and worker restricting the worker from disclosing or using trade secrets or confidential information.

Notes: The main issue in drafting this paragraph was whether it would be wise to have separate definitions of confidentiality agreements and non-disclosure agreements in the Act, or at least whether to say "also known as a non-disclosure agreement" in our definition of confidentiality agreement. After researching the two types of agreements, we concluded that both serve the same purpose. We used the actions "disclosing" and "using" the information (which are used by the Uniform Trade Secrets Act in its definition of misappropriation) to highlight that confidentiality agreements include non-disclosure or non-use agreements as well. Given the interchangeability of non-disclosure agreements and confidentiality agreements, it is possible to exchange the current definition to an NDA-centric definition.

Arguably, the unenacted Minnesota noncompete statute is consistent with our approach, as it refers to confidentiality agreements while remaining silent on NDAs. However, this confidentiality agreement definition was chosen because of the obvious synergy between that and the definition of confidential information.

It is important to note that most states that include language relevant to nondisclosure or confidentiality agreements almost always state the two in the disjunctive. Some states, like Arkansas, Maine, Massachusetts, Rhode Island, and Utah (see also Tennessee, Missouri, and New Jersey unenacted), use language such as "...nondisclosure agreement or confidentiality agreement."

(4) "Earned income" means the amount of, for an employee, wages, salaries, tips, and other employee compensation; for an independent contractor, the amount of net earnings from self-employment; and for a partner, the amount of the partner's salary, equity, dividends, percent of profits, benefits, and other compensation for the taxable year; but only if such amounts are includible in gross income for the taxable year.

Notes: "Earned income" is drawn from Washington's statute, which we used as an example because it simply provides a single number that captures all of an employee's annual compensation. We also considered following New Jersey's unenacted statute, which took a more narrative approach in defining "pay." While New Jersey's approach of explicitly listing the components of pay facially provides some clear guidance, generating such a list suggests that other types of compensation were considered and deliberately excluded, which we sought to avoid.

We also considered including the value of stock that employees hold in the employer as part of "earnings." Our aim would have been to include a group of employees, such as those of startup companies in Silicon Valley, who otherwise fall below the wage threshold because their compensation is almost exclusively in stock options. However, while employees are not always required to report stock options for tax purposes, when they are required to do so, they typically must report their stock options in box one of the Form W-2. This added language, therefore, would likely have done little additional work, while potentially causing great confusion.

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

Notes: This definition of "electronic" is a standard ULC definition and is taken from Section 2(5) of the Uniform Electronic Transactions Act.

(6) "Employer" means a legal or natural person who hires an individual for services in exchange for earned income.

Notes: There are generally three ways that existing statutes define "employer."

Reference method: First, some states, like Illinois, New Hampshire, Oregon, and Washington, refer to other enacted statutes that already contain a definition of employer. For states that already define "employer", this is a nice method of maintaining uniformity across state law. However, if we look at the Uniform Wage Garnishment Act, for example, which obviously has a different goal than a restrictive covenant act, we note that the definition for employer focuses on owing earnings to an employee. If we were to insert this definition into the Act, then interns could be subject to a noncompete, as they are not paid and therefore the Act would not cover their employer. Also, it is worth pointing out that this definition does not include a partnership where the only people working for the entity are partners. However, in this case, the "sale of business" noncompete should suffice to cover a partner who leaves the partnership.

Laundry List: Second, some states, like Georgia, Rhode Island, and Washington, attempt to define an employer by using an exhaustive list of potential employer classifications. For the reasons previously mentioned, we prefer not to use the laundry list approach.

Basic and Conclusory: Lastly, Nevada and West Virginia (see also Texas unenacted) define employer by using a circular formula similar to the Fair Labor Standards Act, such as an employer is someone who hires an employee.

Our Differing Approach: We defined the employer in a way that differs from current statutory approaches, but is also very broad.

1. "a legal or natural person": We have avoided the laundry list approach in the statute in favor of definitions. We want to emphasize that employers can be (and usually are) legal persons as well as natural persons.

2. "who hires an individual for services": Many statutes make the conclusory definition that an employer employs. Our alternative definition specifically focuses on the relationship wherein the worker provides services. Also, this definition is useful because it is not limited by a timeframe. In other words, the requirement of merely "hiring" a worker results in coverage of former, current, and even in some cases, future employers.

3. "in exchange for earnings": This component of the definition serves to limit the otherwise conceptually broad “employer” (e.g., is an individual an employer if they give a worker a DVD player to mow a lawn?). It also plays off the existing definition of earned income and seems to neatly tie together “worker” and “employer.”

(7) “Forfeiture for competition agreement” means an agreement that by its terms or its manner of enforcement imposes adverse financial consequences on a former worker if the worker engages in competitive activities.

Notes: This type of agreement began with conversations regarding clawback agreements and whether they should be included as a lesser restrictive agreement. However, given the varied types of agreements that impose financial penalties on workers or allow for the employer to recover its expenses under specific circumstances, the language and meaning of a clawback agreement ceases to make sense. In searching for a definition that would more accurately reflect the various types of these agreements, we found the “forfeiture for competition” clause in Rhode Island’s noncompete statute. Section 3(f) of the act established the enforceability of the various types of forfeiture agreements.

(8) “Intern” is [Look to FLSA Fact Sheet 71]

Notes: This is the definition of the Intern exemption set forth in Section 3(f). The FLSA Fact Sheet can be found **here**.

(9) "Less restrictive agreement" is an agreement between an employer and worker that does not completely forbid the worker from competing within the worker's profession, trade, or business after the working relationship has ended, and includes a non-solicitation agreement, a confidentiality agreement, and a forfeiture for competition agreement.

Notes: The main point of tension here is whether the Act should include lesser restrictive covenants. We include them because a purpose of this statute is to be as comprehensive as possible, and if there is a requirement that a valid noncompete only be used when a lesser restrictive covenant will not substantially protect the legitimate interest, then not to delve deeper into these lesser covenants would create a vacuum of uncertainty. Several states such as Alabama, Missouri, Oregon, and Rhode Island include less restrictive agreements in their statute (for specific examples, please see Notes in Section 3(h) as well as the definitions of the various lesser restrictive agreements). On the other hand, many states, including Washington, Utah, and Arkansas (see also Tennessee unenacted), specifically note that the statute only covers noncompete agreements. Many other states, however,

(10) "Noncompete agreement" means an agreement between an employer and worker arising out of an anticipated or existing work relationship under which the employer prohibits the worker from competing within the worker's profession, trade, or business after the work relationship has ended.

Notes: This section's definition of a "noncompete agreement" is an amalgamation of several states' definitions. Rhode Island and Massachusetts use the basic language "arising out of an existing or anticipated employment relationship" (see also New Jersey unenacted). Multiple states, such as Alabama, California, Montana, and Washington, define a noncompete agreement as a contract that restrains employees from engaging in a lawful profession, trade, or business. Virginia defines a covenant not to compete as a contract that restricts an individual's ability to compete with his former employer. To achieve more precision, this section's definition merges each of these approaches.

(11) "Non-solicitation agreement" means an agreement between an employer and worker prohibiting the worker from soliciting the employer's workers, customers, or clients after the work relationship has ended.

Notes: This definition is drawn from Washington's definition of "non-solicitation agreement." Like the Washington statute, this definition only applies to agreements prohibiting solicitation after the work relationship has ended (and section 3(h)(2) will limit enforceability to persons with whom the worker personally worked). An agreement prohibiting solicitation while employed, as opposed to after the work relationship has ended, is outside the definitional scope of the act and thus is enforceable without the limitations of the act.

(12) "No-business agreement" means an agreement between an employer and worker prohibiting the worker from doing business with the employer's workers, customers, or clients after the work relationship has ended.

Notes: Only a few states, such as Massachusetts, Oregon, Rhode Island (see also New Jersey and Vermont unenacted). explicitly acknowledge no-business agreements as distinct from non-solicitation agreements. They are similar agreements, with the no-business agreement restricting the former worker more tightly than the no-solicit, but no-solicit seems more visible in the legal Notes. One option would be to include no-business agreements in the definition of no-solicit (or vice versa). We opted for separate definitions because a no-business agreement is more restrictive than a no-solicit, and in section 3(h) will treat the two agreements differently.

(13) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

Notes: This definition of "record" is a standard ULC definition and derives from Section 2(13) of the Uniform Electronic Transactions Act.

(14) "Restrictive employment agreement" includes a noncompete agreement and lesser restrictive agreements.

Notes: The purpose of this definition is to clarify that, for provisions relating to restrictive employment agreements (e.g., choice of law), both noncompete agreements and lesser restrictive agreements are included in the term.

(15) "Sale of business agreement" means an agreement made in connection with the sale of a business or partnership or substantially all of the operating assets of a business or partnership, or with the disposal of the ownership interest of a business or partnership.

Notes: This definition is drawn from Massachusetts statute, which excludes sale of business agreements from its definition of noncompetition agreements. Although Massachusetts' definition includes further specificity, we split its definition between the broader definition of any "sale of business agreement" here, and what constitutes a narrowly tailored and therefore enforceable sale of business agreement in section 3(h) of the act.

(16) "Sign" means with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

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

Notes: This is a standard ULC definition of "sign" that has been used in statutes such as the Uniform Wage Garnishment Act and the Uniform Commercial Code.

(17) "Trade secrets" are as defined by the [Uniform Trade Secrets Act].

Notes: This is fairly straightforward as 48 states have enacted the UTSA and almost all statutes that list trade secrets as a legitimate interest refer to their respective state's version of the UTSA. Of note, New York, one of the remaining two states, currently has a pending modified UTSA bill. Some states define trade secrets within the legitimate interests, rather than the definitions section of an Act. Please refer to the states listed in the Notes for Section 3(g)(2) to preview this method.

(18) "Worker" means an individual who provides services in exchange for earned income. The term includes employee, independent contractor, partner, and an individual who works in a supervisory, managerial, or confidential position. The term does not include a member of a board of directors. The definition of worker set forth in this subdivision shall be applicable only with respect to this [Act]. The definition is not intended, and shall not be relied upon, to create, change, or affect the employment status of any natural person or the meaning of the terms employee, employment, or employer that may apply in any other context or pursuant to any other provision of law.

Notes: We use the term "worker" rather than "employee" for several reasons. Primarily, for reasons explained below, our act covers partners and independent contractors as well as employees. "Worker" is a better umbrella term than "employee," and avoids some of the controversial baggage surrounding "employee."

States define "employee" in a variety of ways in noncompete statutes. Our definition takes into consideration the approaches of several states, as well as the overarching considerations of simplicity and consistency with this Act's definition of "employer." States such as Rhode Island refer to an employee as an "individual who works for hire" (see also New Jersey unenacted). However, to add specificity to the definition and further connect it to the definition of "employer," we sought to tie it to the worker's provision of services to the employer. This also mirrors the approach of Louisiana.

Another approach that states like Georgia take is to limit the definition of employee based on the overarching noncompete policy rationale (see also Missouri unenacted). Although this approach initially seems appealing because it is narrowly tailored to the statute's objectives, ultimately we decided that such a definition was unnecessarily complicated and perhaps even inaccurate. For instance, if an "employee" is defined narrowly as an individual who possesses trade secrets, confidential information, or customer contacts that are important to the employer, then the implausible result is that someone on the first day of the job, not yet introduced to anyone or any thing, is not deemed an "employee."

Some states, like Georgia, include independent contractors in their definition of "employee," (see also Minnesota and Missouri unenacted), while Rhode Island explicitly excludes independent contractors from its definition. Other states remain silent on the issue. We chose to follow the approach of those states that include independent contractors as employees, because most of the policy reasons against enforcing noncompetes (e.g., enhancing worker mobility) apply to independent contractors as well as employees. In particular, policy speaks against enforcing a noncompete agreement against independent contractors with low net earnings, and when the employer has no legitimate business interest in the enforcement.

We also included partners in the definition of "worker." While states such as Alabama, California, Hawaii, and Louisiana recognize that there is good reason to allow partners to enforce noncompete agreements against one another, several of them also include some sort of reasonableness provision or other restraint in their statutes. For example, Alabama has a geographic restraint and Louisiana has a geographic and temporal restraint. Section 3 of this Act provides similar restraints, thus ensuring that partners can enforce restrictive agreements against one another only when necessary. In contrast, we exclude members of boards of directors from the definition of "employee," as boards of directors are of a wholly different nature than partnerships and their members are often outside experts and organizational leaders.

SECTION 3. UNENFORCEABILITY OF A RESTRICTIVE EMPLOYMENT AGREEMENT. In addition to any requirement of the law of this state, a restrictive employment agreement is unenforceable unless:

Notes: The alternative to "unenforceable unless" is "enforceable when." We chose "unenforceable unless" for several reasons. First, stylistically, by using the double negative here we avoid more awkward double negatives later. For example, to write "the covenant is enforceable unless the agreement is not in writing and signed by the worker" adds confusion due to the requirement being worded in the negative. Second, the wording implicates burden of proof issues. (Note, the act does not explicitly discuss proof issues, leaving those to courts or general civil procedure codes." The term "unenforceable" suggests a presumption of unenforceability, while "enforceable" suggests enforceability. We chose the former as it more accurately reflects the ethos of the Act--namely, that restrictive covenants should only be used when justifiable. Third, most states that speak to this issue, including New Hampshire, New Mexico, Rhode Island, Washington, West Virginia, and Wisconsin (see also Missouri, Alabama, Florida, Oregon unenacted), include language similar to our use of unenforceability.

(a) The agreement is in a record signed by the worker.

Notes: Some states, such as Florida and Georgia, require restrictive employment agreements to be in writing and signed by the employee. Other states, such as Alabama and Massachusetts (see also New Jersey and Vermont unenacted), require an enforceable agreement to be in writing and signed by the employee *and* the employer. Remaining silent on a writing/signature procedure would lead courts to rely on the common law and would lead to inconsistency among the states. This inconsistency would create unpredictability for employers and workers regarding the enforceability of any oral or unsigned agreements that they enter. Accordingly, we followed the middle-ground approach of requiring restrictive employment agreements to be in writing and signed only by the worker. This procedural requirement fits nicely with the Act's notice requirement, and it ensures that workers enter agreements voluntarily and with knowledge. Although requiring both parties to sign the agreement would provide even further procedural safety, we thought that this additional requirement would provide marginal practical benefits while

potentially making otherwise valid agreements unenforceable where employers fail to sign an otherwise good agreement.

(b) The employer has provided a copy of the agreement to the prospective worker in a record by the earlier of a formal offer of employment or 10 business days before the commencement of the worker's employment. If the noncompete agreement is entered into after the commencement of the worker's employment, it must be entered into upon a subsequent bona fide advancement of the worker by the employer and the employer must provide a copy of the agreement to the worker in a record, and give the worker 10 business days to review and sign the agreement. The agreement expressly states that the worker has the right to consult with an attorney prior to signing the agreement.

Notes: Several states require, or have considered requiring, that employers notify employees of a noncompete agreement before hiring. The least protective approach requires disclosure of the terms of the noncompete agreement to the employee no later than the time of acceptance of 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 has taken this approach. On 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. 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 seem to get no offsetting benefits. *See* Starr, Prescott, & Bishara, *Noncompetes in the U.S. Labor Force*, at 28, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714. With this information in mind, we opted for the middle-ground approach that requires employers to provide employees with a

copy of the agreement either (1) with the formal offer of employment or (2) 10 business days before the commencement of employment—whichever is earlier.

We put significant thought into how to handle the enforceability of new noncompete agreements against incumbent workers. 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 some 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, and that continued employment for a substantial period is needed. 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 we could 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.

We then thought that the better approach might be to state that continued employment is sufficient consideration. We considered requiring that the employer retain the worker for a substantial

amount of time; however, that raised some complications regarding what is meant by a "substantial amount of time."

Ultimately, we used Oregon's statute for guidance and used its language regarding a "subsequent bona fide advancement." We felt that this language draws upon the policy of requiring additional consideration while also leaving some autonomy in the employment relationship. Requiring a bona fide advancement for a valid restrictive covenant against an incumbent employee also links to the policy rationale for requiring notice: when a worker has notice before taking the advancement, the worker can weigh the pros and cons of accepting the advancement with its restrictive covenant.

(c) In conjunction with the copy of the agreement, the employer has provided the worker with written notice of this Act in a record.

Notes: This requirement serves as a precursor to Section 5's posting requirement and is intended to provide workers with notice that their employer may be asking them to sign an illegal restrictive employment agreement before they commit in writing. In theory, a worker who is approached with a restrictive employment agreement by their employer will be given both a copy of the agreement and a copy of this Act simultaneously. They can then review these two documents together to ensure that the agreement complies with the law.

(d) The worker, at the time of hire and during employment, has earned income of at least $50,000 per year. This amount is adjusted annually for inflation as set forth in Section 4. This requirement does not apply to confidentiality agreements.

Notes: The $50,000 wage threshold is designed to track workers who are most likely to be in positions with access to trade secrets or sensitive client information. 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 for those who attained a bachelor's degree was approximately $62,000; the median annual earnings for those who attained an associate degree was approximately $45,000; and the median annual earnings for those who

attained less education was approximately $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.

We also seriously considered using the Fair Labor Standards Act's non-exempt threshold for bona fide executive, administrative, and professional employees, which is the approach followed by states such as Massachusetts and Rhode Island. The FLSA uses particular criteria to define its low-wage worker threshold, which has two main benefits. First, the FLSA's income threshold of $35,308 closely tracks individuals who are likely to possess trade secrets or other sensitive information. Second, the FLSA's job-duties test goes beyond what is an otherwise speculative correlation between income and access to trade secrets/client contacts, and it instead allows for a more fact-sensitive inquiry on a case-by-case basis. The job-duties tests that are used for FLSA purposes are arguably related to the traditional protectable employer interests of do-not-compete law, as workers who are in high-level positions are most likely to have access to sensitive employer information. Ultimately, however, such a case-by-case approach would frustrate the Act's goal of uniformity.

A third approach that we considered, based on the approach of states such as Illinois and Maryland, was to define "low-wage worker" and tie that definition to a flat dollar amount. While a benefit of this approach is its clarity, the method for selection of the threshold was arbitrary. Where the prevailing policy concern for banning noncompete agreements for low-wage workers is that those workers are unlikely to possess trade secrets or critical client contacts, there is little meaningful distinction between a cutoff of one threshold versus another that is slightly higher or lower.

Yet another approach that we considered, based on states such as New Hampshire, was to define "low-wage worker" and tie that definition to the minimum wage. A section following this approach could have used the federal, state, or local minimum wage, and could have varied in its mathematical nuance. One drawback of using the state or local minimum wage approach is that it would allow for variation from state to state, leading to less uniformity. A further drawback of using the minimum wage approach as a whole is that selecting the mathematical model would have itself been an arbitrary process designed to achieve a particular wage threshold.

An additional approach that we considered was using the federal poverty level to define "low-wage worker," as Rhode Island and Maine do in their statutes. Although one benefit of this approach is that it connects the definition to the economic climate, we struggled to determine a rational basis for establishing what percentage of the poverty line to apply.

Finally, we considered following the approach of states like Virginia and defining "low-wage worker" based on statewide average weekly earnings. However, we decided that this approach would likely introduce too much variability among the states as to where the exemption threshold lies. Moreover, it is unclear whether statewide average weekly earnings track the rationale for exempting low-wage workers from noncompete agreements.

(e) The worker voluntarily quit or was terminated for individual cause.

Notes: The statutes of Massachusetts, Washington, and Nevada (see also New Jersey and New York unenacted) contain language indicating that when a worker is terminated without cause that the noncompete will not be enforceable. This reflects the common law approach to when a noncompete will be enforceable and adds certainty to employers as to whether a noncompete will be enforceable upon the termination of an employment relationship. One way to exclude such an exemption while still remaining true to the ethos of this Act would be to include a garden leave requirement for workers that are terminated without cause, but the scope committee specifically chose to exclude such a clause. Also of note, the Nevada statute focuses its language on the reduction of workforce whereas the other states focus on whether the employer had cause for termination. This distinction may result in different outcomes when the cause for termination are (multiple) layoffs rather than individual terminations.

(f) The worker is at least 18 years old and is not an intern, volunteer, or apprentice.

Notes: Similar to the low-wage and physician exemptions to the enforceability of a noncompete agreement, the following categories of worker have been deemed in multiple states to be impermissible signees to a noncompete agreement.

Interns: Two states, Massachusetts and Rhode Island (see also New Jersey unenacted), exempt interns from noncompete enforceability. These states specifically note, however, that the intern exemption is restricted to undergraduate or graduate students.We chose not to include this requirement, as this less narrow version of "intern" reflects the ethos of the Act in limiting the use of noncompete agreements. This version also considers unanticipated situations where an intern may not be a student, but still should be protected by the statute.

At least 18 years old: Two states, Massachusetts and Rhode Island (see also New Jersey unenacted), exempt persons age 18 or younger from noncompete enforceability. Of note, the New Jersey pending bill does not include employees who are age 18; rather, they must be under the age of 18. We initially chose to use a higher age, 21, to be more inclusive and acknowledge that persons under 21 may not be able to understand the agreement in which they are entering into. In discussions, we determined that if a person can't drink alcohol or smoke a cigarette unless they are 21, then they should not be able to enter into a potentially detrimental noncompete agreement either. However, one might argue that our policy justifications differed from the statutes requiring the person to be at least 18, as those states may be more concerned with the legal minor status of the individual. Hence, we chose to go with the more commonly used age exemption provisions.

Apprentice: The concept of exempting individuals in apprenticeship positions is echoed in Vermont's (see also New Jersey unenacted) statute. The logic of this inclusion is that such individuals may not be covered by the definition of work as they may not work for earnings. This exemption would prohibit the use of noncompetes for apprentices while synergizing with the allowance of lesser restrictive covenants, for example, the forfeiture for competition agreement for the receipt of training.

Volunteer: No states include a volunteer exemption. "Volunteer" is included as a catch-all for persons who are not necessarily covered by the definition of worker and should not be able to enter into an enforceable noncompete agreement.

Seasonal worker (not included): New Jersey's unenacted statute exempts seasonal or temporary employees from noncompete enforcement. The idea behind this exemption is that in an area highly

dependent on tourism, one should not be restricted in employment during a slow season because of their work during a busy season. For illustration, imagine an area like Nantucket in Massachusetts, where tourists come for the summer. Perhaps the demand for workers is so high that a person can make 50,000 dollars just working for a few months in a shop. Should that person be prevented from working in a different shop during the non-busy months? In remaining true to the ethos of this Act, such a worker should be able to work for a competitor during the non-busy times of year. However, one could argue that a narrowly tailored agreement would only apply to the holiday season, and thus, the inclusion of a seasonal worker exemption is redundant, and the blanket exemption too restrictive.

(g) The purpose of the agreement is to protect one or more of the following legitimate business interests:

Notes: There was a question as to whether we should phrase a protectable interest as a legitimate business interest or just a legitimate interest. Granted, the choice is rather mundane. However, because the Act protects business-relevant interests and many statutes, such as Florida, Georgia, Idaho, Massachusetts, Michigan, Missouri, and Texas (see also New Jersey and Connecticut unenacted) term the phrase legitimate "business interest," we chose to go with this language.

(1) the sale of a business;

Notes: This legitimate interest was added to reflect the common-law position that restrictive covenants are more likely to be reasonable where they are protecting a new business owner from competition by the former owner, who may possess and benefit from strong customer goodwill and special business expertise.

(2) an employer's trade secrets or other confidential business information;

Notes: This legitimate interest had three points of contention. First, there was a question as to whether listing trade secrets as well as confidential business information was redundant. After all, trade secrets are a subset of confidential information. Conversely, some suggest that the protectable interest

should be limited to trade secrets. However, most state statutes specifically list both confidential information as well as trade secrets, so we chose to include both. Second, some states, like Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Maine, Massachusetts, and Oregon, list trade secrets and confidential information as separate legitimate interests. We chose to list them together as one legitimate interest, to highlight their close connection and to mirror states that refer to "other" confidential information that does not rise to the level of a trade secret. Some states that use this or a similar approach include Alabama, Florida, Georgia, Maine, Massachusetts, Missouri, Oregon, Virginia, Washington, and West Virginia (see also New Jersey and Vermont unenacted). As the reader will note, there is some overlap between some states that distinctly separate trade secrets and confidential information with states that refer to a form of "other" confidential information. This, in a sense, cements the idea that the two interests are inextricably linked. It is tempting, from an optics standpoint, to separate the two and make it seem like the statute has more protectable interests. However, this would undercut the efficiency and clarity of the statute, for two incredibly intertwined interests should not be separated merely for the sake of posterity. Lastly, there was a question as to what the scope of confidential information should be. For example, is your boss's favorite sandwich at her local delicatessen a form of confidential information? We determined that the approach most consistent with this Act is to narrow the types of protectable information to those directly related to the business.

(3) the employer's customer relationships; or

Notes: We chose to include only customer relationships instead of also including vendor relationships, or even stating the interest as "business relationships." One reason we chose not to include vendor relationships is that it is an uncommon issue. We scoured Westlaw for cases involving vendors and restrictive agreements, and our search results had limited hits. The main cases that we found were based in Illinois, where the common law evolved to allow for the protection of "near-permanent business relationships." Furthermore, in the cases that we found, these types of relationships are usually nestled under confidential information, thus rendering this interest a bit redundant. The following states refer to customer relationships as forming the basis of a legitimate business interest: Alabama, Arkansas, Florida, Georgia, Idaho, and Missouri (see also Illinois and Missouri unenacted). The following states include a

reference to a vendor relationship in their statutes: Alabama, Georgia, and Idaho (see also New Jersey unenacted).

(4) the employer's recovery of expense in providing special training to a worker who has worked for the employer for less than two years after the training is completed;

Notes: This was perhaps the most contentious protectable interest. One issue is that if the agreement limits recovery to situations of competition, rather than all situations where the workers leaves shortly after being trained, the employer interest would appear to be stifling competition rather than recovering training expenses. However, several states, such as Florida, Georgia, Alabama, Arkansas, and Colorado (see also New Jersey unenacted) have passed laws that allow special training to be a protectable interest. Colorado's statute, from which our language is heavily influenced by, struck a balance between employer recovery and competition. By requiring the worker to have worked for two years to avoid a noncompete, the worker is incentivized to continue working for the employer, but not for an unreasonable time. Of course, this definition is not without complications. Is two years the right amount of time when, depending on the expense of training, a longer or shorter time frame could be more appropriate? What does "special training" actually mean? Lastly, given the requirement that employers use the least restrictive agreement, would a forfeiture for competition agreement not, 99% of the time, be required rather than a noncompete? For the sake of completeness, this legitimate interest might be worth including in this Act, but, we should not forget that the Restatement also remained silent on this issue.

(h) The agreement is narrowly tailored in duration, geographical area, and scope of business to further an interest of Section 3(g), and that interest cannot be substantially protected by a less restrictive agreement. An agreement is presumptively narrowly tailored if, in the case of:

Notes: The following requirements of this subsection are discussed as follows.

Duration and Area: The problem with claiming that X amount of years in Y area is presumptively enforceable is multifaceted. First, potentially each type of protectable interest would have a different sensible time frame or geographic area. This would result in a very complicated statute, similar to that of Florida and Georgia, which lays out various permutations. Second, it is arbitrary to force a specific number on a presumption of enforceability, given the range of trade secrets. Third, who should have the burden of proof? If a noncompete to protect a trade secret is presumed enforceable at a three-year duration, but the worker believes that such a length is not reasonable, the worker would be forced to prove otherwise. This could also result in employers using the maximum duration as presumed enforceable by the statute, whereas in a narrowly tailored scheme, they might choose to play it safe and actually think about the proper duration as is necessary to protect their interests.

We do include a specific time maximum in section 3(h)(1), for a noncompete pursuant to a sale of business. There are a few reasons for this. First, this is a floor, not a ceiling. In other words, just because a 3-year restriction is presumptively reasonable, that does not mean that in certain cases a 10-year would not be reasonable as well. Secondly, and relatedly, for this particular legitimate interest, 3 years is on the lower side of necessary duration, thus remaining consistent with the ethos of the Act. Lastly, unlike other durations, this interest is more general in nature. For example, a piece of protectable confidential business information may only be relevant to a marketing plan within 6 months of the date that the noncompete is signed or a trade secret may pertain to a highly sensitive prototype device that will not be marketable for 7 years. Here, the interest is generally in not having a former owner compete with the new owner and therefore is much easier to apply broadly. In this way, it is more reasonable to attach a presumptively narrowly tailored duration.

Protected by lesser restrictive covenant: The use of this provision is rather simple. A goal of this Act is to reduce the usage of overly broad restrictive covenants in the employment relationship, and this provision serves this goal by forcing an employer to use the least restrictive agreement that can suitably protect its interest.

(1) a noncompete agreement pursuant to a sale of business agreement, the worker has had a substantial investment in the entity and receives a significant benefit from the sale, and the noncompete is for no more than three years;

Notes: This section further refines Section 2's definition of a "Sale of business agreement," again using language from Massachusetts' statute. We parsed Massachusetts' language into two parts because we felt it was more precise to define the agreement itself more broadly in terms of the contract's formation, and then to separately define the narrow tailoring in terms of the parties' interests.

(2) a non-solicitation agreement is presumptively narrowly tailored if it is limited to fellow workers or customers or clients with whom the worker personally worked and was introduced to by the employer, and lasts no more than one year after termination;

Notes: To understand this clause it is best to consider its parts seperately.

Solicitation of fellow workers: The idea here is that but for a worker's relationship with the employer, the worker would not have had access to a pool of potential recruits and as such, they should not be able to poach those workers from the employer. This is especially relevant for businesses, such as Yoga Studios, that rely primarily on the worker's services rather than the products they sell.

Solicitation of former customers: The idea here is that a worker who brings a client to the firm should be able to solicit that client if their business relationship is terminated, because the employer would not have had this client but for the worker. An example of this would be if an accountant wanted to do her brother's taxes, so she brought his business to the firm. Then, the accountant leaves and wants to continue working on her brother's taxes. Should the first employer legitimately be able to prevent this?

Duration: The one-year duration was chosen as it strikes a proper balance of promoting competition while also protecting the interests of the employer. If the employer were able to enforce a five-year non-solicit, and that employer monopolized a particular market, then the potential for a successful competitor to hit the market would be diminished. This is especially the case for industries where the workforce is

specialized. For example, if a hairstylist wanted to open up a competing business and they needed to hire other hairstylists, the former employer may have a potential monopsony on the workforce and could preclude, for an untenable period of time, the former worker from hiring and growing a competitor business.

Of note: Some states, like Alabama, Missouri, Oklahoma, and South Dakota provide that non-solicitation agreements that are narrowly tailored are enforceable to protect customers. Most states, however, do not include language regarding the solicitation of fellow workers.

(3) a no-business agreement, it is limited to fellow workers or customers or client with whom the worker has personally worked, and lasts no more than 6 months after termination;

Notes: There is a question as to whether a non-solicitation agreement should cover the same ground as a no-business agreement. The difference is that, under a non-solicitation agreement, the worker cannot actively 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. We chose to separate these two types of agreements, in such a way that a no-business agreement can be used in conjunction with a non-solicitation agreement. Furthermore, the 6 month duration, which is less than the one-year presumptively reasonable duration for a non-solicitation agreement, reflects the more-restrictive nature of the no-business agreement relative to the non-solicitation. We also briefly considered defining only no-business agreements and then inserting non-solicitation agreements under the no-business umbrella. This would operate in a similar fashion to the combination of non-disclosure and confidentiality agreements. Unlike NDAs and CAs, however, no-solicit and no-business are not functionally equivalents, hence our decision to distinguish them.

(4) a confidentiality agreement is presumptively narrowly tailored if it does not prohibit a worker from:

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

(B) reporting what the worker reasonably believes to be a violation of law; and

(C) disclosing sexual harassment.

Notes: There was a question as to whether the $50,000 low-wage exemption should apply to confidential information. Our act allows confidentiality clauses to be enforced against low-wage as well as high-wage workers. All workers regardless of wage level already have a duty under the Uniform Trade Secret Act not to disclose trade secrets. As written, our act allows employers to extend to all workers this duty to confidential information beyond trade secrets.

As for the elements, each has a simple principle underscoring their inclusion. Element (A) emphasizes the fundamental principle that a worker's training, skill, or experience 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 needed to ensure that confidential information is not overly expansive. Element (B) simply reflects the value that employers should not be able to stifle the reporting of illegal activity. Element (C) follows the trend of banning non-disclosure agreements that repress reporting information related to sexual misconduct.

(5) a forfeiture for competition agreement is presumptively narrowly tailored if the financial consequence is reasonable and the agreement:

Notes: A forfeiture agreement, being only financial in nature, does not completely restrict a worker's ability to change employers unless the amount is extremely high. The "reasonable" requirement ensures that the amount is not excessive.

(A) Compensates the employer for no more than the identifiable actual cost of providing special training to an worker who works for the employer for less than two years after the training is completed; or

Notes: Recovery of special training expenses, as opposed to general on-the-job training, is a legitimate business interest, but it is inappropriate to require a worker to remain excessively long after the training. This subsection insists that an employer cannot insist on any repayment if the worker leaves more than two years after the training is complete.

(B) Applies only to clients or customers with whom the worker personally worked with and was introduced to by the employer, and lasts no more than one year after termination; or

Notes: This provision echoes the same logic as the non-solicitation agreement requirements to be presumptively narrowly tailored.

(C) Is limited to diminution or delay of retirement benefits because the worker is competing against the employer; or

Notes: This provision was inspired by the general exception to Rule 5.6 of the Model Rules of Professional Conduct, which allows financial penalties to be a permissible carveout against the general prohibition on noncompetes for attorneys. A similar logic applies to this subsection, allowing diminution of retirement benefits for workers that leave early, which may be a lesser sanction than a complete prohibition on competition. For employees, ERISA requires vesting of retirement benefits after a certain period of time, and thus is a separate limitation on forfeiture agreements.

(D) Is limited to forfeiture of profit sharing or other bonus compensation that has not yet been paid to the worker because the worker is competing against the employer.

Notes: This provision was taken directly from Oregon's statute. It accounts for an individual who may have worked X amount of hours or performed Y obligations and thus be entitled to a year-end bonus, and having hit that benchmark, chooses to leave the employer and compete. This logic is sound, especially because it does not deprive a worker of base wages; rather, the target of this provision is in

excess of salary. One could argue that there are industries where the salaries are low but offset by potentially high bonuses. However, if this is the case, the worker can always choose to stay until the bonus is paid. Furthermore, depending on the bonus structure, it may be that the worker focused on meeting the bonus requirements earlier than the deadline, and thus, by leaving and competing against their former employer, creates an unfair situation for their former co-workers who may have planned to rely on the entirety of the period to satisfy the bonus requirements.