

DAY ONE PROJECT

Supporting Talent Mobility and
Enhancing Human Capital: Banning
Noncompete Agreements to Create
Competitive Job Markets

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Summary

Competitive job markets are critical to the success of the national economy, spurring innovation while boosting wages and labor equality. The moment is ripe for the new administration to foster competitive job markets by banning noncompete agreements (noncompetes). New empirical evidence shows that noncompetes have harmful effects on job mobility, wages, competition, entrepreneurship, and equality. Yet noncompetes are widely included in employment contracts. And inconsistent state rules on noncompetes (and their enforcement) have led to employee confusion and disputes among state courts.

A tough, consistent federal strategy to eliminate noncompetes is needed. Several recent federal and state initiatives addressing noncompetes have created momentum that the new administration can build on to rapidly address this issue. The Biden-Harris administration should (1) adopt a federal ban on noncompetes, (2) actively educate the public about their labor-mobility rights (and actively support those rights), and (3) take proactive steps to ensure compliance with labor-mobility policy. Specific steps the new administration could consider include:

- Barring noncompete agreements through legislation or executive order. If barring all noncompetes is not yet feasible, a federal ban on noncompetes imposed on low-wage and unskilled workers would be a good first step.
- Issuing executive orders that (i) restrict or eliminate government contracting with companies that use noncompetes; and (ii) require employers in states that restrict noncompetes not to sign noncompetes with employees in those states, and/or to give prominent notice of the unenforceability of noncompetes in those states.
- Requiring employment contracts to include a notice about employees' right to leave their employer.
- Banning secrecy imposed by employers regarding salary information.
- Requiring the Department of Labor, Federal Trade Commission, and Department of Justice Antitrust Division to collaborate to actively enforce laws and policies governing noncompetes nationwide.

Challenge and Opportunity

Noncompetes Hurt Workers and the Economy

Noncompete agreements are contracts that prohibit employees from working for or becoming a competitor for a certain period of time.¹ By restricting employees from switching employers or starting their own competing businesses, noncompetes have harmful economic effects. They depress wages, reduce entrepreneurship, and impede efforts to correct inequities in labor

¹ Doyle, A. (2020). What Is a Noncompete Agreement? The Balance Careers, July 6.

markets. In the past decade, a wealth of research—including diverse empirical, experimental, and theoretical studies²⁻⁸—have revealed the adverse effects of noncompete contracts and similar restrictions on the free movement of human capital.⁹ As a 2018 article states, “policymakers, economists, and legal scholars...overwhelmingly conclude that the harms of noncompetes far outweigh their potential benefits.”¹⁰ The research shows that lifting noncompete restrictions—thereby increasing job mobility—is good for entrepreneurship, wages, industry and regional economic growth, and equality.¹¹⁻¹⁶

Entrepreneurship. Increased enforcement of noncompetes favors large, incumbent firms. Studies find that markets become more concentrated when noncompetes are adopted and enforced.¹⁷ When employees sign noncompetes with established firms, start-up companies have difficulty recruiting talent. Indeed, a ban on noncompetes in California generated greater and faster innovation because employees with good ideas that their employer did not want to use were able to take those ideas elsewhere.^{18,19}

Wages. Noncompetes decrease wages.²⁰ Employers calibrate compensation largely based on competing external offers. When external offers are reduced, employers face less pressure to increase wages. In 2015, Hawaii passed a law banning noncompete and non-solicitation clauses

² Lobel, O. (2013). *Talent Wants to Be Free: Why We Should Learn to Love Leaks, Raids, and Free Riding*. New Haven: Yale University Press.

³ Marx, M.; Strumsky, D.; Fleming, L. (2009). Mobility, Skills, and the Michigan Non-Compete Experiment. *Management Science* 55(6).

⁴ Garmaise, M.J. (2011). Ties That Truly Bind: Noncompetition Agreements, Executive Compensation, and Firm Investment. *Journal of Law, Economics, & Organization*, 27(2).

⁵ Belenzon, S.; Schankerman, M. (2013). Spreading the Word: Geography, Policy, and Knowledge Spillovers. *Review of Economics and Statistics*, 95(3).

⁶ Younge, K.A.; et al. (2015). How Anticipated Employee Mobility Affects Acquisition Likelihood: Evidence from a Natural Experiment. *Strategic Management*, 36(5).

⁷ Starr, E.; Prescott, J.J.; Bishara, N. (forthcoming). Noncompetes in the U.S. Labor Force. *Journal of Law and Economics*, .

⁸ Ewens, M.; Marx, M. (2018). Founder Replacement and Startup Performance. *Review of Financial Studies*, 31(4).

⁹ Lobel, O. (2020). Gentlemen Prefer Bonds: How Employers Fix the Talent Market. *Santa Clara Law Review*, 59(3).

¹⁰ Morrow, R. (2018). Noncompetes as Tax Evasion. *Washington University Law Review*, 96(2).

¹¹ Starr, E.; et al. (2019). Noncompetes and Employee Mobility. *Academy of Management*, 1.

¹² Lobel, O. (2015). The New Cognitive Property: Human Capital Law and the Reach of Intellectual Property. *Texas Law Review*, 93(4): 848.

¹³ Amir, O.; Lobel, O. (2014). How Noncompetes Stifle Performance. *Harvard Business Review*, Jan–Feb: 26.

¹⁴ Amir, O.; Lobel, O. (2013). Driving Performance: A Growth Theory of Non-Compete Law. *Stanford Technology Law Review*, 16(3).

¹⁵ Rauch, J.E. (2015). *Dynastic Entrepreneurship, Entry, and Non-compete Enforcement*. CESifo Working Paper Series No. 5370.

¹⁶ Franco, A.; Mitchell, M. (2008) Covenants Not to Compete, Labor Mobility and Industry Dynamics. *Journal of Economics & Management Strategy*, 17(3): 602–603.

¹⁷ Kang, H.; Fleming, L. (2020). Non-competes, Business Dynamism, and Concentration: Evidence from a Florida Case Study. *Journal of Economics & Management Strategy*, 29(3).

¹⁸ Saxenian, A. (2006). *Regional Advantage: Culture and Competition in Silicon Valley and Route 128*. Cambridge, MA: Harvard University Press.

¹⁹ Gilson, R.J. (1999). The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete. *New York University Law Review*, 74(3): 613–14.

²⁰ Starr, E. (2019). Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete. *ILR Review: The Journal of Work and Policy*, 72(4): 783 (finding that “an increase from non-enforcement to mean enforceability is associated with a 4% decrease in hourly wages”, even in lower-skilled jobs).

from employment contracts in the high-tech industry.²¹ A recent study found that Hawaii ban increased employee mobility in the high-tech sector by 11% and increased new-hire salaries by 4%.²² Noncompetes even decrease wages for employees who have not signed them. In a market that enforces noncompetes, wages and mobility are lower for everyone, including those not directly bound by noncompetes.²³ These impacts can last a long time. A 2017 study found that post-employment restrictions have persistent wage-suppressing effects that last throughout a worker's job and employment history.²⁴

Equality. Restrictions on job mobility have a disproportionate negative effect on certain demographics. In job markets, discovering one is competitive depends on the frequency with which one is exposed to information about one's comparative options in the market. In job markets where workers don't often move from job to job, the "price" of labor (i.e., the terms and conditions of an employee's contract) will lag behind an employee's true market value. If an employee discovers their undervalued labor compensation by receiving an external (better) offer from a competitor employer, the employee can use that information to negotiate a higher salary with their current employer. If the current employer offers to match the higher salary, the competitor employer can come back with an even higher offer. This process continues until one employer backs down, leaving the employee better and more fairly compensated as a result.

The existence of noncompetes cause this process to break down by taking away employee bargaining power.²⁵ Noncompetes harm equality in several ways as a result. First, noncompetes exacerbate the gender pay gap. Women are more likely to have geographic constraints based on family and spousal obligations. Noncompetes that restricts employee capacity to compete within a region therefore disproportionately hurt woman. Second, taking away employee capacity to entertain outside offers can cause historical pay gaps to persist or widen.²⁶ Employees cannot discover their true value without external offers. The more external offers are available, the more equity norms and competitive pressures from mobility drive employers to raise wages as retention efforts.^{27,28} Third, white women and people of color are more likely to have non-monetary preferences for a workplace that is free of discrimination and hostility and that values diversity. For example, if a woman discovers that her employer systematically allows harassment of its female employees, she will have a strong interest in examining other opportunities in the

²¹ Lobel, O. (2015). High Tech Hubs & Post-Employment Restrictions: Hawaii Joins California in its Ban of Non-Competes. Casetext, August 17. <https://casetext.com/analysis/high-tech-hubs-post-employment-restrictions>.

²² Balasubramanian, N.; et al. (2017). Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers. U.S. Census Bureau Center for Economic Studies, Working Paper No. CES-WP-17-09. Ross School of Business, Working Paper No. 1339.

²³ Starr, E.; et al. (2019). Noncompetes and Employee Mobility.

²⁴ Balasubramanian, N.; et al. (2017). Locked In. 2.

²⁵ Lobel, O. (2017). Companies Compete But Won't Let Their Workers Do the Same. New York Times, May 4. <https://www.nytimes.com/2017/05/04/opinion/noncompete-agreements-workers.html>.

²⁶ Ibid.

²⁷ Babcock, L.; Laschever, S. (2003). Women Don't Ask: Negotiation and the Gender Divide. Princeton, NJ: Princeton University Press.

²⁸ Lobel, O. (2020). Knowledge Pays: Reversing Information Flows & The Future of Pay Equity. Columbia Law Review, 120(3).

market. A noncompete restricting her mobility will prevent her from escaping the discriminatory workplace.

Noncompetes are on the Rise

The use of noncompetes is on the rise in the United States. Employment agreements routinely prohibit workers from accepting a competitor’s job offer, and/or from working in a competing business for a specified period in a certain geographic area.²⁹ The Treasury Department recently estimated that nearly 30 million workers are bound by noncompete provisions.^{30,31} A study of executive employment contracts found that 70% of the firms investigated imposed noncompetes on their top employees.³² A forthcoming 2021 study found that noncompetes are also common for non-executive employees with base salaries below \$100,000 per year.³³ A 2019 report noted that “the use of noncompetes is so pervasive that even volunteers in non-profit organizations, in states that do not even enforce them, are asked to sign away their post-employment freedom.”³⁴

Workers currently have limited recourse when it comes to contesting noncompetes. Court decisions in cases involving noncompetes are highly unpredictable, and litigation can be prohibitively expensive and burdensome for individual employees. Some states—recently including Massachusetts, Washington, Maryland, and New Hampshire^{35–37}—have passed laws voiding most noncompetes, but this state-specific legislative patchwork can be difficult for workers to understand. Many employees, especially those outside the professional class, end up complying with noncompetes even if they aren’t enforceable in the state in which they work (or are planning to move to for a new job). Moreover, more and more people are employed at companies with a national presence. Such companies often demand adherence to a noncompete nationwide, even for employees in a state that won’t enforce noncompetes.³⁸ Inconsistent state rules have also led to conflicts across state lines when an employee bound by a noncompete moves to a state that doesn’t enforce them. This has resulted in a “race to the courthouse” when employees change jobs, as each side tries to get its own state law to apply.³⁹ It has even led to the unseemly spectacle of courts in different states attempting to prohibit each other from

²⁹ Quinton, S. (2017). These Days, Even Janitors Are Being Required to Sign Non-Compete Clauses. USA Today, May 27. <https://www.usatoday.com/story/money/2017/05/27/noncompete-clauses-jobs-workplace/348384001/>.

³⁰ U.S. Department of Treasury (2016). Non-compete Contracts: Economic Effects and Policy Implications. Washington, DC: 6.

³¹ Starr, E.; et al. (2019). Noncompetes and Employee Mobility. 5.

³² Garmaise, M.J. (2011). Ties That Truly Bind. 396.

³³ Seaman, C.B. (2021). Noncompetes and Other Post-Employment Restraints on Competition: Empirical Evidence from Trade Secret Litigation. *Hastings Law Journal*.

³⁴ Starr, E. (2019). The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements. 2. <https://eig.org/wp-content/uploads/2019/02/Non-Competes-Brief.pdf>.

³⁵ Massachusetts Noncompetition Agreement Act (2018). Massachusetts General Laws, chapter 149, §24L.

³⁶ The Associated Press (2019). Washington Senate Votes to Restrict Non-Compete Contracts. U.S. News & World Report, March 5. <https://www.usnews.com/news/best-states/washington/articles/2019-03-05/washington-senate-votes-to-restrict-non-compete-contracts>.

³⁷ Dolgih, E.; Walton, K.B. (2019). United States: New Hampshire Bans Non-Compete Agreements For Low Wage Employees. *Mondaq*, July 24. <https://www.mondaq.com/unitedstates/Employment-and-HR/829186/New-Hampshire-Bans-Non-Compete-Agreements-For-Low-Wage-Employees>.

³⁸ See generally the aforementioned work of Evan Star.

³⁹ *Application Group v. Hunter Group*. (1998). 61 Cal. App. 4th 881.

https://www.lawpipe.com/California/Application_Group_Inc_v_Hunter_Group_Inc.html.

enforcing their respective state policies.⁴⁰ Finally, the complex legal landscape surrounding noncompetes further entrenches established companies. Companies with substantial legal and financial resources can be more aggressive in using noncompetes to drive out competition even when their legal claims are on weak grounds.⁴¹ Incumbents may even use a reputation for suing employees who leave as a strategy to deter other employees from leaving.^{42,43}

National Leadership is Needed

Noncompetes aren't just bad for workers, but for our economy and society as a whole. We do better when workers can easily move between jobs. Increased mobility makes it easier for employees to find employers that most value their skills, and for employers to find employees who are good fits. But without guaranteed labor mobility, the anti-competitive impulses of individual firms create a collective-action problem. Smart policy is needed to ensure everyone benefits from a continuous, high-quality, and flexible labor pool over time.

The problem of noncompetes is not a problem that can be solved by states on their own. National leadership is needed. Several federal bills limiting the use of noncompetes (either entirely or just for low-wage workers) have already been drafted.⁴⁴⁻⁴⁶ The White House issued a Call for Action in 2016 urging states to limit the use of post-employment restrictions.⁴⁷ Also in 2016, the U.S. Treasury Department issued a report on noncompetes warning that when noncompetes are enforced, "innovations spread more slowly, possibly inhibiting the development of industrial clusters like Silicon Valley."^{48,49} In 2020, the Federal Trade Commission convened a meeting to consider a rule prohibiting noncompete clauses.⁵⁰ But so far the FTC has taken no action.

The Biden-Harris Administration can build on this momentum to eliminate noncompetes in the United States once and for all.

⁴⁰ *Advanced Bionics v. Medtronic Inc.* (2002). 29 Cal. 4th 697. <https://scocal.stanford.edu/opinion/advanced-bionics-corp-v-medtronic-inc-32274>

⁴¹ Bolton, P.; Scharfstein, D.S. (1990). A Theory of Predation Based on Agency Problems in Financial Contracting. *American Economic Review*, 80(1).

⁴² Agarwal, R.; et al. (2003). Reputations for Toughness in Patent Enforcement: Implications for Knowledge Spillovers Via Inventor Mobility. *Strategic Management*, 30(13): 1350.

⁴³ Shamsie, J. (2003). The Context of Dominance: An Industry-Driven Framework for Exploiting Reputation. *Strategic Management*, 24(3): 199-206.

⁴⁴ Workforce Mobility Act of 2018 (2018). S.2782, 115th Congress.

⁴⁵ Mobility and Opportunity for Vulnerable Employees (MOVE) Act (2015). S.1504, 114th Congress.

⁴⁶ "Bill Would Ban Noncompetes for Low-Wage Workers—Proposed Legislation," *Human Resources Management - Compensation Guide (CCH)* 34,005 (2015).

⁴⁷ The White House (2016). The Obama Administration Announces New Steps to Spur Competition in the Labor Market and Accelerate Wage Growth. October 25. <https://obamawhitehouse.archives.gov/the-press-office/2016/10/25/fact-sheet-obama-administration-announces-new-steps-spur-competition>.

⁴⁸ U.S. Department of the Treasury (2016). *Non-Compete Contracts: Economic Effects and Policy Implications*. Washington, DC: 6. <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf>.

⁴⁹ Dynan, K. (2016). The Economic Effects of Non-Compete Agreements. U.S. Department of the Treasury. <https://www.treasury.gov/connect/blog/Pages/The-Economic-Effects-of-Non-compete-Agreements-.aspx>.

⁵⁰ Open Markets Institute. (2019). Re: Petition for Rulemaking to Prohibit Worker Non-Compete Clauses. <https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa04862ff52116d1dd04c1/1588200595775/Petition-for-Rulemaking-to-Prohibit-Worker-Non-Compete-Clauses.pdf>.

Plan of Action

To support talent mobility and enhance human capital, the Biden-Harris Administration should (1) adopt a federal ban on noncompetes, (2) actively educate the public about their labor-mobility rights (and actively support those rights), and (3) take proactive steps to ensure compliance with labor-mobility policy. Below, we recommend specific steps that the new administration could take towards these goals.

(1) Adopt a Federal Ban on Noncompetes

A federal ban on noncompetes could potentially be achieved by a Federal Trade Commission (FTC) rule barring noncompetes, action through the Department of Justice (DOJ), an executive order, and/or legislation. If barring all noncompetes is not yet politically feasible, targeting noncompetes imposed on low-wage and unskilled workers would be a good first step.

FTC rule/DOJ action. The FTC and the DOJ's Antitrust Division have only recently started to consider anti-competitive practices in the labor market to be within their scope of regulating competition and unfair trade practices.⁵¹ The FTC could use its regulatory power under Section 5 of the FTC Act's prohibition on "unfair methods of competition"⁵² to issue a federal rule to ban noncompetes nationwide in appropriate circumstances, such as concentrated markets.⁵³ The FTC could enforce this rule by bringing action against employers who use, or seek to use, noncompetes to restrict employee mobility in ways that interferes with competition.

Moreover, California's Section 16600 and Section 1 of the federal Sherman Act share the language of prohibiting contracts "in restraint of trade."⁵⁴ The California law has been consistently interpreted to ban employment noncompetes. Using this interpretation as precedent, the DOJ could leverage the language in Section 1 of the Sherman Act to ban employment noncompetes nationwide in appropriate circumstances, such as in concentrated markets.

Executive Order. The Biden-Harris administration can also issue executive orders that (1) restrict or eliminate government contracting with companies that employ noncompetes; (2) require employers in states that restrict noncompetes not to sign them with employees in those states, and/or to give prominent notice of the unenforceability of noncompetes in those states.

Legislation. Two recently proposed federal bills propose legislative solutions to the problem of noncompetes. The Workforce Mobility Act proposed in 2018 would prohibit and prevent

⁵¹ U.S. Department of Justice; U.S. Federal Trade Commission (2016). Antitrust Guidance for Human Resource Professionals. <https://www.justice.gov/atr/file/903511/download>.

⁵² 15 U.S.C. § 45. For more on this precedent, see: FTC v. Ind. Fed. of Dentists. (1986). 476 U.S. 447, 454; FTC v. Sperry & Hutchinson Co.. (1972). 405 U.S. 233, 244.

⁵³ Open Markets Institute. (2019). Re: Petition for Rulemaking.

⁵⁴ 15 U.S.C. § 1 (2004).

enforcement of noncompetes for employees who “engage in commerce or in the production of goods for commerce.”⁵⁵ Under the proposed bill, employers would be fined for each employee subject to a violation of this law, or for each week the employer was in violation. The House version of the bill goes further, specifically stating that noncompetes may violate antitrust laws.

The Mobility and Opportunity for Vulnerable Employees (MOVE) Act of 2015—proposes a full or partial ban on noncompetes, in addition to barring noncompete agreements entirely for low-wage workers. The bill would also require companies to notify job applicants ahead of time if they would be asked to sign a noncompete if hired.⁵⁶

The new administration could work with Congress to revive and pass one or both of these bills. Any federal bill governing noncompetes should also grant employees a private right of action for damages if they are asked to sign an overly broad noncompete agreement.

(2) Actively Support and Publicize Labor-Mobility Rights

Even in states that ban noncompetes, a significant number of employers still require employees to sign them. For example, employers in California—a state that bans noncompetes—insert noncompetes into their employment contracts at rates similar to non-California employers.^{57,58} Because employees in these states may not be aware that noncompetes are illegal, unlawful noncompetes can have a significant deterrent effect on employee mobility. The administration should act to educate the public about their labor-mobility rights, and to crack down on employers unlawfully promulgating noncompetes. The Biden-Harris administration should issue an executive order directing the Department of Labor, FTC, and the DOJ Antitrust Division to collaborate to actively enforce existing labor-mobility laws, and to pursue some or all of the actions below.

Require “right-to-leave” notice in employment contracts. The Biden-Harris Administration should require employment contracts to include a notice about employees’ right to leave their employer. The Defend Trade Secrets Act (DTSA), enacted by Congress in 2016, provides a model for this type of mandatory notice. The DTSA gives employees immunity from criminal or civil liability for reporting illegalities at a company even if reporting reveals trade secrets. The DTSA requires employers to include notice of this immunity in “in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.” Similarly, the Federal Government should require employment contracts to include a clause about the rights of an employee to compete with their previous employer after leaving a job. This clause should be required for all contracts in states that ban noncompetes post-employment. If a federal noncompete ban is enacted, it should apply nationwide. The Federal Government could further promote market competition by amending the DTSA to include a notice on the limits of trade

⁵⁵ Workforce Mobility Act of 2018.

⁵⁶ MOVE.

⁵⁷ Starr, E.; Prescott, J.J.; Bishara, N. (forthcoming). Noncompetes in the U.S. Labor Force. 4.

⁵⁸ Bishara, N.D.; Martin, K.J.; Thomas, R.S. (2015). An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants. *Vanderbilt Law Review*, 68(1): 30.

secrets explaining that general know-how and information that is readily ascertainable from public searches cannot be deemed secret and proprietary.

Enforce mobility rights beyond formal noncompetes. In employment contracts, restrictive covenants do not simply appear as a formally labeled “noncompete clause”. Employment contracts regularly include other restrictive provisions such as requirements for non-solicitation of customers and coworkers, pre-innovation assignment agreements, nondisclosure agreements, and non-disparagement clauses. Restrictions like these impose harms similar to noncompete clauses: preventing employee mobility, slowing innovation, stifling start-ups, and concentrating industries.⁵⁹ Customer non-solicitation requirements in particular effectively function as noncompetes “because a business without clients is like a pool without water.”⁶⁰ Coworker non-solicitation clauses essentially reduce the job opportunities of every former co-worker that the employee in question knows, regardless of whether those coworkers agreed to be part of a restrictive regime. Nondisclosure agreements, theoretically designed to protect trade secrets, are often structured to include not just proprietary knowledge, but also readily ascertainable knowledge about customers and coworkers. The knowledge that a departed employee would use to solicit a former coworker—knowledge pertaining to a person’s skills, talent, personality, experience, and salary—is not an employer’s trade secret and should not be restricted by contract.^{61,62} California courts have recently recognized that employee non-solicitation clauses comprise unlawful restraints on trade under Section 16600.^{63–65} The new administration can build on precedent set in California to control proliferation of overly restrictive provisions in employment contracts nationwide.

Ban salary secrecy. The ability to reveal one’s salary to co-workers and others in the industry is protected by both federal and state law. The National Labor Relations Board (NLRB) holds that prohibiting any employee—unionized or not—from discussing salaries violates their rights under the National Labor Relations Act to engage in concerted activity for mutual aid.^{66–68} The NLRB has specifically ruled that confidentiality agreements are invalid when they contain provisions that “prohibit employees from disclosing certain personnel information unless authorized by the Company.”⁶⁹ Many state laws also make it illegal for any employer to prohibit pay discussions

⁵⁹ Lobel, O. (2017). *You Don’t Own Me: How Mattel v. MGA Entertainment Exposed Barbie’s Dark Side*. New York: W.W. Norton & Co.

⁶⁰ Lobel, O. (2020). Non-Competes, Human Capital Policy & Regional Competition. *Journal of Corporation Law*, 45(4): 944.

⁶¹ Lobel, O. (2020). Knowledge Pays.

⁶² *Metro Traffic Control v. Shadow Traffic Network*. (1994). 27 Cal. Rptr. 2d 573, 579 (Cal. Ct. App.).

⁶³ *AMN Healthcare, Inc. v. Aya Healthcare Serv. Inc.* (2018). 239 Cal. Rptr. 3d 577, 587 (Cal. Ct. App.).

⁶⁴ *Barker v. Insight Glob.* (2019). No. 16-cv-07186-BLF, 2019 U.S. Dist. LEXIS 6523, at *8–9 (N.D. Cal. Jan. 11).

⁶⁵ *WeRide Corp v. Huang*. (2019). 379 F. Supp. 3d 834, 851–52 (N.D. Cal. 2019).

⁶⁶ National Labor Relations Act. (1935). 29 U.S.C. §§ 151–169.

⁶⁷ National Labor Relations Board. (2013). Board Finds Houston Engineering Firm Unlawfully Fired Employee for Discussing Salaries with Coworkers. February 15. <https://www.nlr.gov/news-outreach/news-story/board-finds-houston-engineering-firm-unlawfully-fired-employee-for>.

⁶⁸ Executive Order 13665—Non-Retaliation for Disclosure of Compensation Information. (2014). 79 Fed. Reg. 20,749.

⁶⁹ Berman, D.; Vail, A.; Wong, L. (2017). Employment Agreements: Employers Need to Pay Attention to Growing Government Activism. IP Watchdog, January 22. <https://www.ipwatchdog.com/2017/01/22/employment-agreements-employers-government-activism/>.

among employees.⁷⁰ Digital platforms such as LinkedIn, Glassdoor, Salary.com, and SalaryExpert make compensation information easily searchable.⁷¹⁻⁷³ Yet employers have attempted to claim that use of salary knowledge in recruitment efforts by a former employee of a co-worker can amount to a breach of a nondisclosure agreement. The administration should extend the NLRB rule beyond the context of labor unions, banning salary secrecy.

(3) Ensure Compliance with Labor-Mobility Policy

As discussed above, litigation alone cannot address the widespread use of noncompete clauses. Employees often lack the money, time, expertise, or will needed to challenge a noncompete in court. The Federal Government must instead be proactive in understanding the effects that common employer practices and provisions have on labor mobility. Several state attorneys general have taken such a proactive stance. Illinois and New York in particular have recently investigated employers who required their employees to sign unenforceable contracts.⁷⁴ These states used consumer laws worded similarly to the federal FTC Act as bases for prosecution.⁷⁵⁻⁷⁷ For example, Illinois's Consumer Fraud and Deceptive Business Practices Act prohibits "unfair methods of competition and unfair or deceptive acts or practices."^{78,79} The state attorney general's office explains that: "An 'unfair practice' is one that (1) offends public policy as established by statute, common law or otherwise, (2) is immoral, unethical, oppressive, or unscrupulous, or (3) causes substantial injury to consumers. A non-compete that violates existing common law or statutory restrictions could satisfy each prong of this test, creating a cause of action in states with similar consumer protection statutes or strong unfair competition laws."⁸⁰ The Department of Labor and the FTC should collaborate on investigating employers who require their employees to sign unjustifiable noncompetes, using the FTC Act as grounds for investigation.

⁷⁰ Cal. Lab. Code § 1197.5(k)(1).

⁷¹ Arendt, B. (2018). Glassdoor? Google? LinkedIn? Any Which Way, the Future of Recruiting Is Transparency. Talent Daily, June 6. <https://www.gartner.com/smarterwithgartner/category/human-resources/>.

⁷² Wong, Q. (2016). Are You Getting Paid Enough? LinkedIn Launches Salary Tool. Mercury News, November 3. <https://www.mercurynews.com/2016/11/02/are-you-getting-paid-enough-linkedin-launches-salary-tool/>.

⁷³ Adams, S. (2016). How Companies Are Coping With The Rise of Employee-Review Site Glassdoor. Forbes, February 24. <https://www.forbes.com/sites/susanadams/2016/02/24/how-companies-are-coping-with-the-rise-of-employee-review-site-glassdoor/>.

⁷⁴ Office of the Attorney General State of Illinois. (2018). Overuse of Non-Competition Agreements: Understanding How They Are Used, Who They Harm, and What State Attorneys General Can Do To Protect the Public Interest. https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_madigan_flanagan_june_13_2018.pdf.

⁷⁵ N.Y. State Office of the Attorney General. (2016). A.G. Schneiderman Proposes Nation's Most Comprehensive Bill to Curb Widespread Misuse of Non-Compete Agreements. October 25. <https://ag.ny.gov/press-release/2016/ag-schneiderman-proposes-nations-most-comprehensive-bill-curb-widespread-misuse>.

⁷⁶ Illinois v. Check Into Cash, LLC. (2017). No. 2017-CH-14224 (Ill. Cir. Ct. Oct. 25).

⁷⁷ Illinois v. Jimmy John's Enters. (2016). No. 2016-CH-07746 (Ill. Cir. Ct. June 8).

⁷⁸ 815 Ill. Comp. Stat. 505/2 (1973).

⁷⁹ Office of the Attorney General State of Illinois. (2018). Overuse of Non-Competition Agreements.

⁸⁰ Ibid. 8.

Conclusion

The modern economy depends on employee mobility. Our workforce needs to be able to respond to sudden disruptions like COVID-19, which radically shifted demand for workers, and to longer-term geographic and economic trends. Employees should have the freedom to take the jobs that are best for them, or to start new companies if they have innovative ideas that otherwise will never see the light of day.

Unfortunately, companies are too often able to prevent employees from leaving, either because the law permits it in many states or because employees don't know their rights. This control depresses wages and employee initiative. It reduces innovation and the adoption of new technologies. And it keeps people stuck in dead-end jobs when they have better alternatives available to them. The current hodgepodge of state laws and the threat of enforcement of a noncompete means that even states that ban noncompetes can't get the full benefit of the protections they provide to their workers and innovators. It is time for the Federal Government to step in.

Frequently Asked Questions

1. What agencies would be involved in a federal crackdown on noncompetes?

The approach described herein would be a White House-led, multi-agency effort. Supporting a competitive job market is a goal shared by several government agencies. The Department of Labor oversees employee rights and the Equal Employment Opportunity Commission (EEOC) collects data and enforces federal anti-discrimination laws. The Federal Trade Commission and the Department of Justice Antitrust Division regulate competition policy. The General Services Administration and individual departments have their own contracts with private suppliers. Because no one agency has clear authority over all the effects of non-competes, the White House should take the lead in developing and implementing a multi-agency approach to eliminating or minimizing noncompetes nationwide. Harnessing the regulatory and enforcement powers of multiple agencies under White House leadership will have significant national impact on wages, innovation, and economic growth.

2. Didn't President Obama already take action on noncompetes in 2016?

In 2016, President Obama convened a White House working group that resulted in a Presidential Call for Action to curtail the expansion of noncompetes. The Call for Action asked states that do enforce noncompetes to reject reformation and blue penciling and to take strong action against misleading contracts. That Call for Action was an important step. But it has not resulted in uniform state action to restrict noncompetes. Noncompetes remain pervasive, even in states that do not enforce them. Additional federal leadership is needed.

3. Is legislation required to curb noncompetes?

Legislation is not required to implement most of the proposals described herein. Executive orders can accomplish things like making notice of labor-mobility rights a mandatory component of employment contracts and giving preference for government contracts to companies that do not use noncompetes. Even a federal ban on noncompetes may not require legislation. Such a ban could be achieved by an FTC rule barring noncompetes under Section 5 of the FTC Act's prohibition on "unfair methods of competition". The FTC could enforce this rule by bringing action against employers who use, or seek to use, noncompetes with their employees. Section 1 of the federal Sherman Act prohibiting contracts "in restraint of trade" could similarly be used to prohibit noncompetes that restrain competition in the talent market, particularly in concentrated industries.

4. Won't eliminating noncompetes interfere with trade secrets?

In 2016, the Defend Trade Secrets Act (DTSA) created a federal civil cause of action for trade-secret misappropriation. The DTSA complements state trade-secrecy laws, which follow the

Uniform Trade Secrecy Act. In states like California that ban noncompetes, trade-secrecy laws continue to project employers against the misappropriation of proprietary information. Trade-secrecy laws give employers potent protections. Even without noncompetes, employers can continue to protect their confidential information through trade-secrecy law and (reasonable) non-disclosure agreements. Indeed, the effectiveness of trade-secrecy laws highlights the problematic nature of noncompetes. Companies already have strong tools to prevent departing employees from taking their trade secrets. If there's little risk of a departing employee taking their former employer's trade secrets with them, the employer's justification for banning them from taking a new job is much weaker.

5. Isn't banning noncompetes at odds with antitrust law's distinction between horizontal and vertical agreements?

Horizontal collusions among companies agreeing not to hire each other's employees have only recently drawn the attention of the Department of Justice, which now concludes that these practices are violations of American antitrust law. Similar vertical agreements—i.e., between an employer and their employees—are not normally treated as illegal. But they are still subject to antitrust scrutiny under the rule of reason, and certain categories of vertical restriction are illegal per se. Noncompetes seek to accomplish the same goal that no-poach agreements do: preventing an employee from moving from one competitor to another. In fact, noncompetes are often broader than do-not-hire agreements as they seek to prevent competition within an entire industry, not merely among several firms. Noncompete clauses can hence be interpreted under the Sherman Act as unreasonable non-price vertical restraints.

6. Wouldn't federal action on noncompetes interfere with states' rights?

Competitive labor markets, like competitive consumer markets, are a national issue. Federal law regulates numerous aspects of the labor market, including wage and hour laws, health and safety, discrimination, and family and medical leave. Federal law supplements state law in protecting trade secrets in a global market as well. It makes sense for the Federal Government to also support workers' ability to leave their employers and to remain active in the national talent pool. Noncompetes contribute to national wage stagnation, continuous racial and gender pay gaps, and market concentration. When they are enforced, employees are either forced to stay with the same company or take an unpaid leave from their industry, risking unemployment and overall reduction in innovation and economic growth. These are issues of key national importance. Moreover, misinformation about noncompete laws is rampant in part because of the great uncertainty created by interstate differences in these laws. Federal leadership will help replace this patchwork with consistency. Finally, employers regularly attempt to include a "choice of law" clause in employment contracts. These contracts allow the employers to adopt the law of the jurisdiction most likely to enforce noncompete clauses. As a result, employees regularly sign noncompetes even in states where they are unenforceable. A national policy is needed to address these linked issues of widespread misinformation and "forum shopping".

About the Author



Mark Lemley is the William H. Neukom Professor of Law at Stanford Law School and the Director of the Stanford Program in Law, Science and Technology. He is also a Senior Fellow at the Stanford Institute for Economic Policy Research and is affiliated faculty in the Symbolic Systems program. He teaches intellectual property, patent law, trademark law, antitrust, the law of robotics and artificial intelligence (AI), video-game law, and remedies. He is the author of eight books and 181 articles, including the two-volume treatise IP and Antitrust. His works have been cited 290 times by courts, including 15 times by the United States Supreme Court, and more than 18,000 times in books and law-review articles, making him the most-cited scholar in IP law and one of the four most cited legal scholars of all time. He has taught IP law to federal and state judges at numerous Federal Judicial Center and ABA programs, has testified eight times before Congress, and has filed more than 50 amicus briefs in the U.S. Supreme Court, the California Supreme Court, and the federal circuit courts. Mark is a founding partner of Durie Tangri LLP. He litigates and counsels clients in all areas of intellectual property, antitrust, and internet law. He has argued 27 federal appellate cases and numerous district court cases as well as before the California Supreme Court. He has participated in more than three dozen cases in the United States Supreme Court as counsel or amici. His client base is diverse, including Genentech, Dykes on Bikes, artists, and nearly every significant Internet company.



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