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The Time Is Now: A Call for Federal Elimination of Non-Competes Against Low-Wage and Hourly Workers in the Wake of the Pandemic

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THE TIME IS NOW: A CALL FOR FEDERAL ELIMINATION OF NON-COMPETES AGAINST LOW-WAGE AND HOURLY WORKERS IN THE WAKE OF THE PANDEMIC

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ABSTRACT

The COVID-19 pandemic has greatly impacted the United States' labor market and has led to an economic recession. Millions of Americans lost their jobs as a result of the pandemic and were forced to apply for unemployment benefits. Consequently, many of these workers were confronted with the question of whether their existing non-compete agreements were enforceable. Not surprisingly, courts across the nation started seeing more pandemic-related litigation surfacing during the second part of 2020, related to employees seeking a declaration that these agreements were unenforceable.

Prior to the pandemic, there was a rise in the use of non-compete agreements at all levels, including management-level employees and low-wage employees. To combat this, the federal government and several states have become increasingly critical of the use of non-competes. In fact, in July 2021, President Biden issued an Executive Order urging the FTC to curtail employers' use of unreasonable noncompetition agreements.

This Article argues that it is even more critical in the wake of the pandemic for the federal government to ban non-compete agreements, particularly for low-wage and hourly workers. Many of the individuals who were terminated during the pandemic

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were lower-wage earners or hourly workers—individuals very likely in the most vulnerable financial positions—and enforcing non-compete agreements against them would unfairly restrain their ability to earn money.

Recent job market changes, beginning in 2021, indicate that workers who generally work in low-wage jobs have seen an influx of job opportunities, and employers have struggled with filling these positions. The United States is currently in need of workers to rejoin the job market in order to help the economy rebound and grow. Thus, forcing non-compete agreements on low-wage or hourly workers in this pandemic era would be a disincentive to those workers regaining employment, and negatively impact the recovery of the economy.

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INTRODUCTION

On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic disease.[1] Since that time, the pandemic has greatly impacted the "labor market metrics" for states and individuals across the United States and has led to an economic recession in the country.[2] Millions of Americans lost their jobs as a result of the pandemic and were forced to apply for unemployment benefits.[3] Consequently, many of these workers were confronted with the question of whether their existing non-compete agreements or restrictive covenant provisions were enforceable.[4] Studies show that 25–50% of private-sector workers are subject to non-competes or restrictive-covenant agreements.[5]

Not surprisingly, with such a large number of employees subjected to non-compete agreements and so many Americans being terminated as a result of the pandemic, the inquiry of whether these agreements could be enforced against employees who lost their jobs as a result of the pandemic and associated economic downturn became a concern.[6] In fact, courts across the nation started seeing more pandemic-related litigation surfacing during the second part of 2020, related to employees seeking a declaration that these agreements were unenforceable.[7] A review of a sampling of these cases reflects that they were not being instituted by those

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[1] Domenico Cucinotta & Maurizio Vanelli, *WHO Declares COVID-19 a Pandemic* (Mar. 19, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7569573/ [https://perma.cc/L3SQ-868Q].

[2] *See* GENE FALK ET AL., *Unemployment Rates During the COVID-19 Pandemic*, Abstract, CONG. RSCH. SERV., R46554 (Apr. 14, 2021).

[3] Kristopher Hill et al., *Non-competes in the Economic Wake of Covid-19* 2 (2020), https://www.bellnunnally.com/27F299/assets/files/Documents/Hill%20-%20Bloomberg%20Law%20-%206-15-20.pdf [https://perma.cc/5ND9-GXK3].

[4] *See id.* ("In the economic wake of the pandemic, employers and employees alike face critical decisions concerning the use, application, and enforceability of non-competes.").

[5] Crystal Woods & Micala Bernardo, *Restrictive Covenants and The Pandemic: An Altered Landscape for Employers*, THE LABOR DISH (June 2, 2021), https://www.labordish.com/2021/06/restrictive-covenants-and-the-pandemic-an-altered-landscape-for-employers/ [https://perma.cc/EZF2-RXNU].

[6] *See* Hill et al., *supra* note 3, at 3.

[7] Woods & Bernardo, *supra* note 5.

workers most financially vulnerable during the pandemic—low-wage or hourly workers.[8]

Before the pandemic emerged, there was a rise in the imposition of non-compete agreements on workers of all levels, from high-salaried workers to those being paid low wages.[9] In response, there has been a heightened level of critique and regulation, or attempted regulation, by many states and jurisdictions, as well as the federal government, against non-compete agreements, particularly those imposed on low-wage or hourly workers.[10]

In fact, in July 2021, President Biden reaffirmed his commitment to instituting federal regulation limiting the use of non-compete agreements and other types of restrictive covenants in his Executive Order.[11] Within his Order, the President acknowledged that non-compete agreements negatively impact a worker's mobility and urged the Federal Trade Commission to "curtail the unfair use of noncompete clauses . . . ."[12]

With this current social and legal landscape as a backdrop, this Article argues that the prohibition of non-compete agreements, particularly for low-wage or hourly workers, is even more critical in the wake of the pandemic.[13] Many of the terminated individuals were hourly workers or lower-wage earners, individuals very likely in the most "vulnerable financial situation[s]."[14] Enforcing

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[8] *See infra* Part IV (discussing state and federal COVID-related non-compete litigation).

[9] Elaine Dalrymple, *Would You Like Fries with That Non-compete? Why Restrictive Covenants Should Not be Enforced Against Low Wage Workers*, 3 WAYNE ST. U. J. OF BUS. L. 69, 75 (2020); *see also* THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSE 3 (2016) ("Non-compete clauses are found not only in the contracts of senior executives or other highly compensated employees, but also for comparatively low-skill occupations. Approximately fifteen percent of workers without a college degree are currently subject to non-compete agreements, and fourteen percent of individuals earning less than $40,000 are subject to them.").

[10] *See* Hill et al., *supra* note 3, at 2.

[11] Clifford Atlas et al., *President Biden Issues Executive Order Calling on FTC to "Curtail Unfair Use" of Non-competes and Other Restrictive Covenants*, JD SUPRA (July 12, 2021), https://www.jdsupra.com/legalnews/president-biden-issues-executive-order-5364410/ [https://perma.cc/QS85-X36M].

[12] *Id.*

[13] *See infra* Part VI.

[14] *See* Charles S. Gascon, *COVID-19: Which Workers Face the Highest Unemployment Risk,* FED. RSRV. BANK OF ST. LOUIS (Mar. 24, 2020), https://www

non-compete agreements against them would unfairly restrain their ability to earn money and be detrimental to their livelihoods.[15]

In June 2021, the Congressional Research Service reported that the pandemic led to a disparate economic impact on low-wage workers.[16] Moreover, research by the Cornell Law School's Job Quality Index Team in September 2021 indicated that low-wage jobs comprised the majority of "net jobs lost during the pandemic."[17] The labor shortage of low-wage workers, and workers in general, caused by the pandemic has hampered the U.S. economy.[18] Economists have suggested several factors as to why the latter portion of 2021 did not mark the turning point for the labor shortage as many had believed it would be.[19] Those factors include the ongoing COVID-19 health crisis, childcare needs, personal savings, and, most notably, increasing leveraging power of workers who are now able to demand higher wages, better benefits, and conditions for employment.[20]

Recent job market changes beginning in 2021 indicate that workers who generally work in low-wage jobs have seen an influx of job opportunities, and employers have struggled with filling these positions.[21] The United States is currently in need of workers to rejoin the job market in order to help the economy rebound and grow.[22] Forcing non-compete agreements on low-wage or hourly workers in this pandemic era would be a disincentive to those workers regaining employment in an area or industry that they

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.stlouisfed.org/on-the-economy/2020/march/covid-19-workers-highest-unemployment-risk?print=true [https://perma.cc/3824-CH2J].

[15] *See infra* Part VI.

[16] *See* FALK ET AL., *supra* note 2, at 2.

[17] CORNELL LAW SCHOOL'S JOB QUALITY INDEX TEAM, *The U.S. Private Sector Job Quality Index (JQI)—August 2021* 1 [hereinafter *JQI August 2021*].

[18] *See* Gad Levanon, *If the Labor Shortage Continues, the US Economy Won't Be Able to Recover,* CNN (Nov. 4, 2021), https://www.cnn.com/2021/11/04/perspectives/labor-shortage-us-economy/index.html [https://perma.cc/96XZ-JC4K].

[19] Ben Casselman, *The Economic Rebound Is Still Waiting for Workers*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/10/19/business/economy/us-economy.html [https://perma.cc/2L6H-R3LA].

[20] *Id.*

[21] Denitsa Tsekova, *Low-Wage Workers See 'Huge Reversal in Power' When It Comes to Wages*, YAHOO (Nov. 19, 2021), https://money.yahoo.com/low-wage-workers-see-huge-reversal-in-power-with-wages-172342009.html?guccounter=1 [https://perma.cc/GUY5-MLZ5].

[22] Casselman, *supra* note 19.

previously worked in or have expertise in and would negatively impact the recovery of the nation's economy.[23] Accordingly, it is now even more imperative in the wake of the pandemic that the federal government protects the rights of low-wage workers and institute a national ban on non-compete agreements for these workers.[24]

Part I of this Article provides an overview of the history of non-compete agreements in the United States, their enforceability, and how they differ from other restrictive covenants.[25] Part II examines the pandemic's impact on the U.S. job market and the loss of jobs for millions of Americans.[26] Part III proceeds with a discussion regarding the regulation of non-compete agreements on a federal and nonfederal level, highlighting jurisdictions that strictly prohibit non-compete agreements, those that significantly restrict the imposition of non-compete agreements, particularly against low-wage or hourly workers, and the general reasonableness rule that is applied by most states in the United States.[27] Part IV reviews a sampling of non-compete cases on both the state and federal levels that emerged during the early stages of the pandemic and the implications of that pandemic-related non-compete litigation.[28] Finally, Part V discusses possible regulation of non-competes by the Federal Trade Commission, and Part VI follows

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[23] *See* OFF. ECON. POL'Y, U.S. DEPT. TREAS., NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 3–4 (2016).

[24] *See* Press Release, Christopher Murphy, U.S. Senate, Murphy, Young Reintroduce Bill to Protect American Workers, Limit Non-compete Agreements (Feb. 25, 2020), https://www.murphy.senate.gov/newsroom/press-releases/murphy-young-reintroduce-bill-to-protect-american-workers-limit-non-compete-agreements [https://perma.cc/5RQH-JGS7]. In speaking about the negative impact that non-compete agreements have on all American workers, and their particular impact during the pandemic, U.S. Senator Chris Murphy stated:

> During this global pandemic, Americans need utmost flexibility to find and secure employment—this is clearly not the time for non-compete agreements that legally deny workers their "freedom to leave." The reforms in the *Workforce Mobility Act* will empower our workers and entrepreneurs so they can freely apply their talents where their skills are in greatest demand, especially given the dramatic shifts in the job market over the past year.

Id.

[25] *See infra* Part I.

[26] *See infra* Part II.

[27] *See infra* Part III.

[28] *See infra* Part IV.

this discussion, arguing why, in light of the pandemic, federal regulation eliminating non-compete agreements against low-wage and hourly workers is crucial.[29]

I. HISTORY OF NON-COMPETE AGREEMENTS IN THE UNITED STATES, THEIR ENFORCEABILITY, AND THE DIFFERENCES BETWEEN OTHER TYPES OF RESTRICTIVE COVENANTS

A. History of Non-competes and Their Enforceability

In general, non-compete agreements are contracts that impose restrictions on an employee's ability to join or start a business in competition with his or her prior employer or solicit a prior employer's employees or customers during a prescribed time period following the employee's departure.[30]

> Non-competes inherently restrain trade and competition. Yet they have long been an integral part of American commerce because—when valid and reasonably restricted—they promote efficiency by encouraging employers to entrust confidential information, trade secrets, and important client relationships to key employees and incentivize employers to develop goodwill by reducing the risk of valued employees turning around and using an employer's goodwill against it in a competing business.[31]

Restrictive covenants, which include employee non-compete agreements, are rooted in the common law and date back to the 1400s in England.[32] For example, *Dyer's Case*, a 1414 decision, reflects one of the first examples of large-scale prohibitions of non-compete agreements in the common law.[33] In this case, a worker agreed not to exercise his trade in the same locale as the plaintiff for a six-month period.[34] Reasoning that the agreement lacked consideration, the court ultimately held that it was unenforceable.[35]

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[29] *See infra* Part V; *infra* Part VI.

[30] Norman D. Bishara & Evan Starr, *The Incomplete Noncompete Picture*, 20 LEWIS & CLARK L. REV. 497, 504 (2016).

[31] *See* Hill et al., *supra* note 3, at 2–3.

[32] *See* Dalrymple, *supra* note 9, at 73–74.

[33] *Id.* at 73.

[34] *Id.*

[35] *Id.*

Since that time, restrictive covenants have been viewed as anticompetitive by design because enforcement of these agreements diminishes "what would otherwise be unfettered worker mobility."[36]

> The employer's goal for restrictive postemployment covenants is to control the activities of a former employee *after* the usual employee-employer relationship ends, effectively retaining exclusive use of the information and competitive advantage by contract. In this way, the company may temporarily maintain the status quo that existed prior to the employee's departure and avoid potentially serious losses.[37]

Some of the various contract mechanisms employers utilize in restricting postemployment competition include covenants not to compete, non-solicitation agreements related to the pursuit of clients and recruitment of employees, and non-disclosure agreements.[38]

Although the laws regarding non-compete agreements differ from state to state in the United States,[39] most jurisdictions allow them.[40] Jurisdictions that allow non-compete agreements commonly consider the following factors necessary to form a binding, enforceable non-compete agreement: (1) adequate consideration, e.g., confidential information, goodwill, trade secrets, specialized training; and (2) restrictions that are reasonable in terms of the time, geographic perimeters, and scope of the non-compete that do not impose a more expansive restraint than is necessary to safeguard an employer's legitimate business interest.[41]

Some states have considered additional factors in determining the legality of non-compete agreements, including whether the agreement interferes with public policy, whether it places an undue

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[36] *See* Bishara & Starr, *supra* note 30, at 504.

[37] Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 12 (2015).

[38] *Id.*

[39] *See* Dalrymple, *supra* note 9, at 74; Grant R. Garber, *Noncompete Clauses: Employee Mobility, Innovation Ecosystems, and Multinational R&D Offshoring*, 28 BERKLEY TECH. L.J. 1079, 1097 (2013).

[40] *See* Dalrymple, *supra* note 9, at 74; Aaron Larson, *How Do Non-compete Agreements Work*, EXPERT LAW (Apr. 7, 2018), https://www.expertlaw.com/library/employment-and-labor-law/how-do-non-compete-agreements-work [https://perma.cc/73BZ-WBEN].

[41] *See* Hill et al., *supra* note 3, at 3.

burden on an employee, and whether the employee was the only contact with the customer.[42]

B. Other Types of Restrictive Covenants

1. Non-disclosure Agreements

Non-disclosure agreements, also known as confidentiality agreements, are "secrecy" clauses that are common and used more often in a variety of employment contracts.[43] Non-disclosure agreements, as opposed to non-compete agreements, do not necessarily impose restrictions on an employee's movement to a competitor.[44] Rather, confidential business information remains solely with the prior employer, and disclosure or use is prohibited despite the employee having this information within her memory.[45]

Non-disclosure agreements are generally easier for employers to secure and enforce in comparison to non-compete agreements, which yield additional benefits for employers over non-competes.[46] Unlike non-competes, non-disclosure agreements are enforceable even in jurisdictions where anti-competition clauses are precluded.[47] "Concerns regarding restraint of trade are much less directly implicated [with non-disclosure agreements]; restrictions on access to information, rather than employee movement, are involved . . . [t]hus, the policy in favor of freedom of contract is given precedence."[48]

2. Non-solicitation Agreements

Non-solicitation agreements can be divided into two types: agreements against solicitation of clients and agreements against solicitation of employees.[49] They are considered to be less restrictive contracts, narrowly tailored to prevent a former employee's

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[42] *See* Dalrymple, *supra* note 9, at 75.

[43] *See* Bishara et al., *supra* note 37, at 20.

[44] *Id.*

[45] *Id.*

[46] *Id.* at 20–21.

[47] *Id.*

[48] *Id.* at 21 (citing Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 AM. BUS. L.J. 151, 156–57 (1998)).

[49] Mary L. Mikva, *Drafting Confidentiality, Non-compete and Non-solicitation Agreements: The Employee's Wish List,* 50 No. 3 PRACLAW 11, 13 (2004).

solicitation.[50] Quite often, companies will mandate that senior-level executives, including CEOs, managers, and accountants, sign these agreements.[51]

Non-solicitation agreements are generally viewed more favorably by courts because they do not place restrictions on a worker's right to employment.[52] Unlike non-compete agreements, non-solicitation agreements are commonly considered to impose reasonable conditions on former employees, as they are able to continue employment within their area of specialty or expertise.[53]

II. THE PANDEMIC'S IMPACT ON THE U.S. JOB MARKET: LOSS OF JOBS FOR MILLIONS

"The Coronavirus Disease 2019 (COVID-19) pandemic has had a significant effect on labor market metrics for every state, economic sector, and major demographic group in the United States."[54] The pandemic caused an "abrupt and exogenous shock to the economy," leading to a recession in the United States.[55] The World Health Organization declared COVID-19 a pandemic disease on March 11, 2020.[56] In response, measures, such as mandatory shutdown orders, were quickly taken to decrease contact between individuals.[57] February 2020 marked the start of an economic downturn, ending the longest period of economic expansion in the Nation since the Great Recession (a period that spanned from December 2007 to June 2009).[58]

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[50] John Kobus & Aaron Stanton, *Non-compete vs. Non-solicitation—Every Business Person Should Know the Difference*, BURKE, WARREN, MACKAY & SERRITELLA (Aug. 2, 2010), https://www.burkelaw.com/pressroom-news-Non-compete-vs-Non-solicitation-Every-Business-Person-Should-Know-the-Difference.html [https://perma.cc/PWV2-BWBS].

[51] Corporate Finance Institute Team, *Restrictive Covenant*, CORPORATE FINANCE INSTITUTE (Oct. 16, 2019), https://corporatefinanceinstitute.com/resources/knowledge/deals/restrictive-covenant/ [https://perma.cc/2227-FKQB].

[52] *See* Kobus & Stanton, *supra* note 50.

[53] *Id.*

[54] *See* FALK ET AL., *supra* note 2.

[55] *Id.* at 2.

[56] *Id.* at 1.

[57] *Id.*

[58] *Id.*

Indeed, as a result of the pandemic in the United States:

> [t]he unemployment rate rose quickly in March 2020, and by April 2020 it had greatly surpassed its previous peaks observed during and just after the Great Recession. This rise in unemployment was caused by an unprecedented loss of 22.1 million jobs between January 2020 and April 2020. Many individuals left the labor force over this period, and by April 2020 the labor force participation rate declined to a level not seen since the early 1970s.[59]

In fact, since March 2020, more than forty million Americans have applied for unemployment benefits.[60] Some employees who were laid off or downsized as a result of the pandemic were suddenly faced with the issue of enforceability of their non-compete agreements or restrictive covenant provisions.[61] Reports indicate that anywhere from one-fourth to one-half of private-sector employees are subject to non-compete agreements or restrictive covenant provisions.[62] According to the U.S. Treasury Department and the White House, in 2015 and 2016, nearly twenty percent of the United States workforce was bound by non-compete agreements.[63]

Quite naturally, with so many employees being bound by non-compete agreements and such a large number of individuals laid off as a result of the pandemic, the question arose as to whether these agreements would be enforced against employees terminated as a result of the pandemic and resulting economic downturn.[64] Prior to the pandemic, there was a rise in the use of non-compete agreements at all levels, including white-collar employees with high salaries and rank-and-file, lower-wage employees.[65] To combat this, the federal government and several states have become even more critical of the use of non-compete agreements.[66]

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[59] *Id.*
[60] *See* Hill et al., *supra* note 3.
[61] *See id.*
[62] *See* Woods & Bernardo, *supra* note 5.
[63] *See* Hill et al., *supra* note 3, at 2.
[64] *See id.*
[65] *See id.*; *see also* Dalrymple, *supra* note 9, at 75.
[66] *See* Hill et al., *supra* note 3, at 2.

III. REGULATION OF NON-COMPETE AGREEMENTS

A. Federal Legislative Attempts to Regulate Non-compete Agreements

Following President Biden's election, his "Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions" was released.[67] Within his plan, President Biden expressed that he would put an end to non-compete clauses and no-poaching agreements that "hinder the ability of employees to seek higher wages, better benefits, and working conditions by changing employers."[68] Biden's plan stressed the importance of both companies and workers being able to compete:

> In the American economy, companies compete. Workers should be able to compete, too. But at some point in their careers, 40% of American workers have been subject to non-compete clauses. If workers had the freedom to move to another job, they could expect to earn 5–10% more—that's an additional $2,000 to $4,000 for a worker earning $40,000 each year. These employer-driven barriers to competition are even imposed within the same company's franchisee networks. For example, large franchisors like Jiffy Lube have no-poaching policies preventing any of their franchisees from hiring workers from another franchisee. As President, Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements.[69]

The push for federal legislation to eliminate non-compete and no-poaching agreements did not just begin with President Biden but has been ongoing for several years.[70] Although there

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[67] Rachel Powitzsky Steely, *Bans on Employee Restrictive Covenants are Gaining Momentum*, FOLEY & LARDNER, LLP: LABOR AND EMPLOYMENT LAW PERSPECTIVES (Apr. 5, 2021), https://www.foley.com/en/insights/publications/2021/04/bans-employee-restrictive-covenants-momentum [https://perma.cc/4PE5-WMA4].

[68] *Id.*

[69] *Is a Federal Non-compete Ban on the Horizon*, HENDERSHOT COWART P.C. (Feb. 14, 2021), https://www.hchlawyers.com/blog/2021/february/is-a-federal-non-compete-ban-on-the-horizon-/ [https://perma.cc/BVQ6-KFJR].

[70] *See* Brooke Razor & Jill Zender, *Biden Proposes Nationwide Non-compete Ban*, FAEGRE DRINKER: LABORSPHERE (Dec. 16, 2020), https://laborsphere.com/biden-proposes-nationwide-non-compete-ban/ [https://perma.cc/3XCV-88AM].

are currently no federal laws regulating the enforceability and scope of non-compete agreements,[71] there have been many attempts to do so over the years.[72] For example, in 2016, President Obama's administration called on states to ban non-compete agreements.[73] The rationale behind the call was that it would increase competition in the labor market and lead to more rapid wage increases.[74]

Although Democrats have traditionally been strong proponents of restrictions being placed on restrictive covenants, bipartisan efforts to create legislation that would regulate these non-compete agreements have recently increased.[75] For example, in 2018, the Workplace Mobility Act included proposals to preclude non-compete clauses while maintaining an employer's right to protect a company's trade secrets.[76] The Act would have established that such agreements were in violation of antitrust laws and allowed employees a private right of action if an employer illegally required them to execute a non-compete agreement.[77]

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[71] *See* Woods & Bernardo, *supra* note 5.

[72] *See id.*

[73] *Id.*; *see also* Roy Maurer, *Biden Plans to Ban Noncompete, No-Poaching Clauses*, SHRM (Nov. 25, 2020), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/biden-plans-ban-noncompete-no-poaching-clauses.aspx [https://perma.cc/BUN3-XMLP].

[74] *See* Maurer, *supra* note 73; *see also* Woods & Bernardo, *supra* note 5 ("In 2016, the federal government pushed for state policymakers to rein in the use of non-competes after concluding that restrictions reduced the welfare of workers and hampered the efficiency of the economy as a whole by depressing wages, limiting mobility, and inhibiting motivation."). In October 2016, the Federal Trade Commission (FTC) and the Department of Justice's antitrust division also issued joint guidance for human resource professionals regarding the illegality of employers agreeing to set wages for employees or preclude a company from hiring the other's employees. *See* U.S. DEPT. OF JUST. & FTC, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4, 6 (Oct. 2016).

[75] *See* HENDERSHOT COWART P.C., *supra* note 69 ("Advocates and lawmakers from both sides of the political aisle have long been pushing for federal reform of non-compete agreements—a restrictive covenant that can limit where employees are able to work after leaving a former employer.").

[76] *See* Murphy, *supra* note 24; Press Release, Elizabeth Warren, U.S. Senate, Warren, Murphy, Wyden Introduce Bill to Ban Unnecessary & Harmful Non-compete Agreements (Apr. 26, 2018), https://www.warren.senate.gov/newsroom/press-releases/warren-murphy-wyden-introduce-bill-to-ban-unnecessary-and-harmful-non-compete-agreements [https://perma.cc/4CXZ-QQSZ].

[77] Press Release, Linda Sanchez, House of Representatives, House Democrats Unveil Legislation to Protect American Workers Against Anti-Competitive

Most recently, in February 2021, the Workforce Mobility Act was reintroduced, with the goal again being to limit the use of non-compete agreements.[78] Some of the key proposals of the bill sought to limit the use of non-compete agreements even in cases where a business is sold, or a partnership is dissolved.[79] Additionally, the bill tasked the Department of Labor and Federal Trade Commission with enforcement duties, required employers to make sure employees were aware of the restrictions on non-compete agreements, and allowed individuals a private right of action.[80]

Further, in July 2021, U.S. Senators Marco Rubio and Maggie Hassan introduced federal legislation that would provide protections for low-wage employees against non-compete agreements that "limit their employment opportunities and restrict their ability to negotiate higher wages and benefits."[81] The bill, known as the Freedom to Compete Act,[82] would "amend the Fair Labor Standards Act of 1938 (FLSA) to prevent employers from using non-compete agreements in employment contracts for certain non-exempt employees."[83] In speaking about the bill, Senator Rubio has said, "[n]on-compete agreements that arbitrarily restrict entry-level, low-wage workers from pursuing better employment opportunities are egregious and outdated, especially in today's economy. . . . This bipartisan legislation would empower these American workers by preventing employers from using non-compete agreements in employment contracts."[84]

In explaining her reasons for joining with Senator Rubio in reintroducing the bill, Senator Hassan echoed Rubio's sentiments, stating, "[i]t makes zero sense that entry-level, low-wage

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Employment Practices (Apr. 26, 2018), https://lindasanchez.house.gov/media-center/press-releases/house-democrats-unveil-legislation-protect-american-workers-against-anti [https://perma.cc/6YDE-CBSY].

[78] *See* Woods & Bernardo, *supra* note 5.

[79] *Id.*

[80] *Id.*

[81] Press Release, Marco Rubio, U.S. Senate, Rubio, Hassan Introduce Bill to Protect Low-Wage Workers From Non-compete Agreements (July 15, 2021), https://www.rubio.senate.gov/public/index.cfm/press-releases?ID=3A4E3177-45D5-4490-B9A1-0AD68D6F24F6 [https://perma.cc/K3YU-U5Q3].

[82] *Id.* Senator Rubio originally introduced the bill in January 2019. *Id.*

[83] *Id.*

[84] *Id.*

workers are often limited by non-compete agreements from finding better employment opportunities and negotiating higher wages."[85]

The legislation would:

> [a]pply only to employees who do not qualify for the FLSA's minimum wage and overtime exemption for bona fide executive, administrative, professional, and outside sales employees; [p]rohibit an employer from enforcing, or threatening to enforce, a non-compete agreement with a non-exempt employee; [p]rohibit an employer from entering into, extending, or renewing a non-compete agreement with a non-exempt employee; and [b]e enforced by the Department of Labor under the existing FLSA framework for minimum wage and overtime violations.[86]

B. Biden's July 2021 Executive Order

President Biden also advanced his efforts to create federal regulations limiting non-compete agreements and other forms of restrictive covenants in July 2021.[87] Specifically, on July 9, 2021, he issued an executive order[88] urging the Federal Trade Commission to "curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."[89] The White House announced that the Order's intent was to "crack down on noncompete agreements used by employers to prevent their employees from moving to rival firms."[90] Shortly before President Biden signed the Order, the White House Press Secretary stated:

> Roughly half of private sector businesses require at least some employees to enter noncompete agreements, affecting over 30 million people. This affects construction workers, hotel workers,

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[85] *Id.*

[86] *Id.*

[87] *See* Atlas et al., *supra* note 11.

[88] Steven D. Gordon, *How Will President's New Executive Order on Non-compete Agreements Affect Employers?*, HOLLAND & KNIGHT: TRADE SECRETS BLOG (July 12, 2021), https://www.hklaw.com/en/insights/publications/2021/07/how-will-presidents-new-executive-order-on-noncompete-agreements [https://perma.cc/X5S7-G3E4].

[89] *See* Atlas et al., *supra* note 11.

[90] Alex Gangitano, *Biden to Issue Executive Order to Curtail Noncompete Clauses*, THE HILL (July 7, 2021, 5:07 PM), https://thehill.com/homenews/administration/561954-biden-to-issue-executive-order-to-curtail-non-compete-clauses [https://perma.cc/5X9F-JJA2].

> many blue-collar jobs, not just high-level executives. He believes that if someone offers you a better job, you should be able to take it. It makes sense.[91]

Although the Order specifically noted non-compete clauses, the additional "other . . . agreements that may unfairly limit worker mobility" phrase potentially opened the door for other types of restrictive covenants, such as non-solicitation provisions and no-hire provisions, to be subject to the Order.[92]

Biden's 2021 Executive Order does not alter the current legal landscape of restrictive covenant law; however, it does call for the Federal Trade Commission to use its statutory rule-making authority pursuant to the Federal Trade Commission Act to regulate these covenants.[93] The Order indicates that "[t]his process may require several steps, including publishing a detailed and specific notice of any proposed rulemaking, the draft text of the rule, and the reason for the proposed rule."[94] Thus, any rule-making process may take several years to complete.[95]

C. Nonfederal Attempts to Regulate Non-compete Agreements

Historically, regulation of non-compete agreements has been handled by states.[96] To that end, forty-seven states allow for non-compete agreements to be imposed to some degree by employers.[97] Additionally, various jurisdictions have pending legislation that would either ban or limit non-compete agreements.[98] For example, California does not allow employee non-competes.[99] Moreover, in March 2021, Washington, D.C., banned the use of non-compete agreements.[100]

California, Oklahoma, and North Dakota are three states that all have Field Code–based statutes that are interpreted to

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[91] *Id.* (quoting statement of White House Press Secretary Jennifer Psaki during a press briefing).

[92] *See* Atlas et al., *supra* note 11.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *See* Gordon, *supra* note 88.

[97] *Id.*

[98] *See* Steely, *supra* note 67.

[99] *Id.*

[100] *Id.*

ban employee non-compete agreements within those states.[101] David Field II, a New York attorney, created a systematic codification of all state law in the 1800s, fueled by a belief that the "common law would benefit from unification and simplification."[102] This model civil code became known as the Field Code.[103] Despite New York largely rejecting the Code, states such as North Dakota and California, amongst others, adopted the code and its provisions restricting non-compete agreements.[104]

The following is a discussion of a sampling of jurisdictions in the United States and their specific laws that currently either prohibit or restrict in some manner non-compete agreements.[105]

1. Jurisdictions That Strictly Prohibit Non-compete Agreements

a. California

California Business and Professions Code Section 16600 places prohibitions on non-compete and non-solicitation agreements.[106] In California, the general policy is that restrictive covenants are not enforceable because they prevent an individual from working in his chosen profession.[107] Section 16600 specifically

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[101] Russell Beck, *Montana Allows Noncompetes! (Only California, Oklahoma, and North Dakota Don't.)*, FAIR COMPETITION LAW (Jan. 30, 2021), https://faircompetitionlaw.com/2021/01/30/montana-allows-noncompetes-only-california-oklahoma-and-north-dakota-dont/ [https://perma.cc/6EGH-AF2G].

[102] *North Dakota Non-compete Law Shares History with California*, JACKSON-LEWIS: RESTRICTIVE COVENANT REPORT (Jan. 17, 2013), https://www.restrictivecovenantreport.com/2013/01/north-dakota-non-compete-law-shares-history-with-california/ [https://perma.cc/8FAD-XSAG].

[103] *Id.*

[104] *Id.*

[105] *See infra* Section III.C.1.

[106] *The Latest and Greatest Updates About Non-compete and Non-solicitation Agreements in California*, FOLEY & LARDNER, LLP: LABOR & EMPLOYMENT LAW PERSPECTIVES (Nov. 26, 2018), https://www.foley.com/en/insights/publications/2018/11/the-latest-and-greatest-updates-about-noncompete-a [https://perma.cc/EEV2-UMUE].

[107] Stephen L. Brodsky, *Restrictive Covenants & Confidentiality Agreements: What You Should Know*, A.B.A., https://www.americanbar.org/content/dam/aba/publications/litigation_committees/commercial/cases/restrictive-covenants-confidentiality-agreements.pdf [https://perma.cc/V8GC-ZA69] (last visited Nov. 4, 2022).

states: "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[108]

As previously noted, Section 16600's enactment relates to a movement in American law during the nineteenth century known as the "Field Code."[109] The Supreme Court of California held that the Code "prohibits employee noncompetition agreements unless the agreement falls within a statutory exception."[110] California courts maintain that the Code reflects established legislative intent promoting open competition and the ability for an employee to move from one place of employment to another.[111]

Some of California's statutory exceptions that allow noncompete agreements include circumstances involving the selling or dissolving of corporations, partnerships, or limited liability corporations.[112] The first exception deals with a scenario in which the owner of a company or fractional owner (shareholder) sells the business's goodwill or eliminates his ownership interest in the business in some other manner.[113] In this circumstance, California courts state that "the buyer's benefit of the bargain means that the seller can't then turn around and engage in the kind of competition that would diminish the value of the business and goodwill he just sold, thereby depriving the buyer of the benefit of his or her bargain."[114]

The second exception applies to partnerships and limited liability companies.[115] Like the first exception, California courts conclude that members of a limited liability company, as well as partners in a company, may agree to not engage in competition

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[108] CAL. BUS. & PROF. CODE § 16600 (West 2022).

[109] Robert W. Gomulkiewicz, *Leaky Covenants-Not-To-Compete as the Legal Infrastructure for Innovation*, 49 U. C. DAVIS L. REV. 251, 265 (2015).

[110] *Id.* (*quoting* Edwards v. Arthur Andersen LLP, 189 P.3d 285, 288 (Cal. 2008)).

[111] 44 CAL. JUR.3D MONOPOLIES AND RESTRAINTS OF TRADE § 4 (2022).

[112] Gomulkiewicz, *supra* note 109, at 265 n.53.

[113] Nina B. Ries, *Understanding California's Ban on Non-compete Agreements*, HUFFINGTON POST (Feb. 23, 2017, 12:12 PM), https://www.huffpost.com/entry/understanding-californias-ban-on-non-compete-agreements_b_58af1626e4b0e5fdf6196f04 [https://perma.cc/E5D9-CEHW].

[114] *Id.*

[115] *Id.*

within an established geographic location of the existing partnership for a period of time following the dissolution, sale, or disposition of the partnership.[116] These restrictions also are applicable when one of the partners leaves the partnership for any reason.[117] This exception prohibits employers from providing minimal ownership shares in a manner that would simply allow the employers to avoid the Code.[118] Accordingly, California courts carefully examine agreements to ensure that parties entering these agreements are legitimate business partners and members rather than employees the business is trying to prevent from working in a similar industry or geographic location.[119]

b. North Dakota

North Dakota Century Code Section 9-08-06 provides that "[every] contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void . . . ."[120] The statute lists two exceptions to this general prohibition.[121] One exception holds non-compete agreements unenforceable if one executes the agreement with the sale of the goodwill of a business.[122] Specifically, the statute provides that an individual selling the goodwill of a business, along with his or her partners, members, or shareholders, "may agree with the buyer to refrain from carrying on a similar business within a reasonable geographic area and for a reasonable length of time, if the buyer or any person deriving title to the goodwill from the buyer carries on a like business in that area."[123] The second exception relates to the dissolution of partnerships, limited liability companies, or corporations; the exception allows partners, members, or shareholders to "agree that all or any number of them will not carry on a similar business within a reasonable geographic area where [a similar entity] has been transacted, or within a specified part

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[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] N.D. CENT. CODE ANN. § 9-08-06 (West 2022).
[121] *Id.*
[122] *Id.*
[123] *Id.*

of the area."[124] Under this statutory prohibition, the North Dakota Supreme Court consistently finds covenants not to compete unenforceable.[125]

c. Oklahoma

Title 20 of Oklahoma Statute Section 219A provides that employees are "permitted to engage in the same business as conducted by the former employer or in a similar business . . . as long as the former employee does not directly solicit the sale of goods, services or a combination of goods and services from the established customers of the former employer."[126]

The statute further states that any agreement that conflicts with the statute is "void and unenforceable."[127] Before enacting Section 219A in 2001, Oklahoma courts applied a reasonableness standard when analyzing whether an employment covenant was valid.[128] The Oklahoma Supreme Court explains that a "reasonable restraint" is a restraint that: "(1) is no greater than is required for the employer's protection, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public."[129]

d. Washington, D.C.

In January 2021, the Ban on Non-compete Agreements Amendment Act of 2020 became law, and it reflects one of the most expansive bans on non-compete agreements in the United States.[130] The law essentially precludes almost all non-compete

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[124] *Id.*

[125] Michael S. Raum, *North Dakota Rejects Choice of Law/Forum Selection Provisions for Non-compete Agreements*, LEXOLOGY (Mar. 15, 2018), https://www.lexology.com/library/detail.aspx?g=9d12ccfe-15ee-416d-b024-75d34a60c734 [https://perma.cc/3ASL-X239].

[126] OKLA. STAT. ANN. tit. 15, § 219A (West 2022).

[127] *Id.*

[128] M. Thomas Arnold & H. Wayne Cooper, *3C Vernon's Oklahoma Forms 2d*, § 14.33 (2021).

[129] *Id.*

[130] Garrett Buttrey & Henry A. Platt, *Washington D.C. Prepares to Implement Ban on Non-compete Agreements*, JD SUPRA (Mar. 21, 2021), https://www.jdsupra.com/legalnews/washington-d-c-prepares-to-implement-1766755 [https://perma.cc/Q3AH-4HJS].

agreements and requires employers to notify employees of the new law or face monetary and administrative fines.[131] Prospective in nature, the Act does not impact non-compete agreements in place prior to its effective date.[132]

Pursuant to the Act, it is illegal for any employer operating in the District of Columbia to "request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement . . . ."[133] The Act broadly defines non-competes as any provision that "prohibits the employee from being simultaneously or subsequently employed by another person, or operating the employee's own business."[134]

"Employees" are any person who works in the District of Columbia on behalf of an employer, as well as "any prospective employee who an employer reasonably anticipates will perform work on its behalf in D.C." [135] The Act does not cover volunteers, babysitters, medical specialists, and certain religious workers.[136] Additionally, the Act is inapplicable to the District of Columbia or federal governments.[137]

Employers are also able to protect their confidential information.[138] Under the Act, a non-compete agreement does not include an "otherwise lawful provision that restricts the employee from disclosing the employer's confidential, proprietary, or sensitive information, client list, customer list, or trade secret."[139] Further, the law does not apply to agreements "between the seller of a business and one or more buyers of that business."[140]

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[131] *Id.*

[132] *Id.*; *see also* Justin K. Beyer, *The Effective Date of DC's Non-compete Ban Delayed Yet Again,* SEYFARTH (Mar. 10, 2022), https://www.tradesecretslaw.com/2022/03/articles/restrictive-covenants/the-effective-date-of-dcs-non-compete-ban-delayed-yet-again/ [https://perma.cc/2T3R-WQCL] ("The DC Council passed a further amendment delaying the effective date of the Act from April 1, 2022, until October 1, 2022.").

[133] Buttrey & Platt, *supra* note 130.

[134] *Id.* (emphasis omitted).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

Under the Act, employers are required to make three notifications to employees:

> (1) within [ninety] days of the effective date, employers must provide existing employees in D.C. with written notice that "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the [Act]"; (2) within [seven] days of hire, employers must provide written notice of the Act to any new employees; and (3) employers must provide a copy of the written notice to any employee who requests it within [fourteen] days of the request.[141]

In terms of penalties for violation of the Act, employers may be fined administrative and civil penalties ranging from $350 to $3,000.[142] Additionally, the Attorney General and Mayor for the District of Columbia may impose penalties if an employer seeks to enforce a non-compete agreement, retaliates against an employee, or fails to give the proper notifications to an employee.[143] Individuals may also have a private right of action under the Act.[144]

2. Jurisdictions That Significantly Inhibit Imposition of Non-compete Agreements, Particularly Against Low-Wage Earners

In addition to jurisdictions that strictly prohibit the use of any non-compete agreements, as of June 2021, there are at least sixteen jurisdictions that have laws in place that restrict an employer's ability to impose non-compete agreements.[145] Additionally, there are over ten states that ban or impose steep limitations on the use of these agreements, particularly with low-wage earners.[146] Nevada and Illinois are two of the states that have taken this stance, and Connecticut has proposed legislation that would place it within the ranks of these other jurisdictions.[147]

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[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Woods & Bernardo, *supra* note 5 ("This includes California, Colorado, Florida, Idaho, Indiana, Maine, Maryland, Massachusetts, New Hampshire, New Mexico, Oregon, Rhode Island, Utah, Virginia, Washington, and Washington, D.C.").

[146] Gordon, *supra* note 88.

[147] *Id.*; Michael P. Lewis, *Non-compete News: The Future of Non-competes in Connecticut*, FORD HARRISON (Mar. 28, 2022), https://www.fordharrison

a. State Legislative Action

i. Connecticut

Connecticut has proposed a law that imposes limitations on non-compete agreements, Bill 5249.[148] The proposed law precludes employers from requiring certain employees to sign non-compete agreements that are unfair or unreasonable.[149] Specifically, the Bill prohibits non-compete clauses against any employee who does not earn more than three times the state's minimum wage.[150] Additionally, in order for a non-compete provision to be legal, the Bill provides that it cannot restrict an employee's competitive activities for longer than one year after the employee stops working for the employer.[151] It further provides that the non-compete agreement must be "no more restrictive than necessary to protect such business interest in terms of the covenant's duration, geographic scope, type of work and type of employer" and that any agreement or provision must be given to the employee no later than ten days before the employee's deadline to accept the employment offer.[152]

ii. Nevada

In June 2021, Governor Steve Sisolak enacted key amendments, effective as of October 2021, to Nevada's non-compete statute in Section 613.195 of the Nevada Revised Statutes.[153] Assembly Bill 47 prohibits non-compete covenants for workers

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.com/non-compete-news-the-future-of-non-competes-in-connecticut [https://perma.cc/28AS-H5P4].

[148] Lewis, *supra* note 147.

[149] *See* Emilia Otte, *Legislators Consider Bill to Restrict Non-compete Agreements, Disagree on Workplace Impacts*, CT EXAMINER (Mar. 2, 2022), https://ctexaminer.com/2022/03/02/legislators-consider-bill-to-restrict-non-compete-agreements-disagree-on-workplace-impacts/ [https://perma.cc/EE62-7W5Y].

[150] An Act Concerning Noncompete Agreements, H.B. 5249 (2022), https://legiscan.com/CT/text/HB05249/2022 [https://perma.cc/E6AR-Z3QT].

[151] *Id.*

[152] *Id.*

[153] Joshua Silker, *New Nevada Law Further Regulates Restrictive Covenants*, JDSUPRA (June 10, 2021), https://www.jdsupra.com/legalnews/new-nevada-law-further-regulates-6784927/ [https://perma.cc/YZ6E-XKHE].

"paid solely on an hourly wage basis, exclusive of any tips or gratuities" but does not appear to impact employees who are paid hourly but also receive profit sharing, bonuses, or commissions from their employer.[154] Assembly Bill 47 does not provide whether its provisions are retroactive and apply to non-compete agreements in existence prior to the date the Bill became effective.[155]

Prior to the recent amendments, Section 613.195 prohibited agreements that restricted former employees from providing services to former customers or clients if:

> (a) "the former employee did not solicit the former customer or client"; (b) "the customer or client voluntarily chose to leave and seek services from the former employee"; and (c) "the former employee [was] otherwise complying with the limitations in the covenant as to time, geographical area and scope of activity to be restrained[.]"[156]

Under the new amendments, if one files a suit challenging a non-compete agreement related to the solicitation of former clients or customers and a court determines the employer has restrained or attempted to restrain the employee's ability to provide services to customers or clients, the court must award the employee reasonable attorneys' fees and costs.[157]

iii. Illinois

The Illinois Freedom to Work Act (IFWA), originally enacted in 2016, prevents employers from entering into non-compete agreements with individuals deemed "low-wage" workers.[158] However, in May 2021, the Illinois legislature passed SB672, which became effective January 1, 2022; SB672 amends the 2016 Act.[159] There are several significant amendments to the IFWA, such as additional

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[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] James Witz et al., *The Trend Continues: Illinois Imposes Additional Prerequisites and Restrictions on Employers' Use of Restrictive Covenants*, LITTLER (Aug. 18, 2021), https://www.littler.com/publication-press/publication/trend-continues-illinois-imposes-additional-prerequisites-and [https://perma.cc/Q3FV-Q79M].

[159] *Id.*

protections for lower wage earners against non-compete agreements, notice requirements for employers, and protections against non-compete agreements for individuals who lost their job due to COVID-related circumstances.[160] Specifically, the law "prospectively voids non-compete agreements between employers and employees if the employees earn $75,000 per year or less."[161] Additionally, non-compete agreements will only be enforceable if an employer informs an employee in writing to consult counsel before signing the agreement and provides the agreement at least 14 days prior to the start of employment or allows the employee a 14-day review period to look over the agreement.[162] One of the most notable amendments specifically delineates that non-compete or non-solicitation agreements are void and unenforceable if they do not comply with the following mandates:

> The employee receives "adequate consideration," defined as (1) employment with the employer for at least two years after execution of the agreement; or (2) consideration otherwise "adequate to support an agreement to not compete or to not solicit, which consideration can consist of a period of employment plus additional professional or financial benefits or merely professional or financial benefits adequate by themselves." The covenant is ancillary to a valid employment relationship. The covenant is not greater than what is required to protect the employer's legitimate business interest. The covenant does not place unwarranted hardship on the employee. The covenant is not detrimental to the public.[163]

The legislation also established that covenants not to compete are invalid and unenforceable if an employee subject to the covenant was furloughed or terminated as a result of the pandemic or "circumstances [that are] similar to [the] COVID-19 [pandemic]."[164] Finally, the Act imposes potential liability or risk of investigation on companies that attempt to enforce non-compete agreements that would be unenforceable under the law.[165]

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[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*

b. State Attorneys General Action

Within the past several years, state attorneys general have filed legal actions or investigated several companies imposing non-compete agreements or no-poach agreements against low-wage workers.[166] For example, in 2016, following lawsuits initiated by the New York and Illinois State Attorneys General offices, Jimmy John's entered into settlements and agreed to end its practice of mandating its low-wage employees to sign non-compete agreements.[167] Jimmy John's non-compete provisions prohibited workers, including delivery drivers and sandwich preparers, who left the company from working for any other business that derived more than ten percent of its revenue from sandwich sales.[168] This restriction lasted for two years after an employee ended employment with Jimmy John's, and its geographic scope extended to an area of two to three miles from the Jimmy John's restaurant that the employee previously worked at or any other Jimmy John's restaurant.[169]

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[166] *See* Jacqueline A. Carosa, Note, *Employee Mobility and The Low Wage Worker: The Illegitimate Use of Non-compete Agreements*, 67 BUFF. L. REV. D1, D3 (2019); *see also* Press Release, New York Att'y Gen., Attorney General Letitia James Joins Multistate Settlement To Cease Fast Food Usage Of No-Poach Agreements (Mar. 12, 2019), https://ag.ny.gov/press-release/2019/attorney-general-letitia-james-joins-multistate-settlement-cease-fast-food-usage [https://perma.cc/RM4N-HHLR].

[167] Carosa, *supra* note 166, at D44; *see also* Sarah Whitten, *Jimmy John's Drops Noncompete Clauses Following Settlement*, CNBC (June 22, 2016, 1:08 PM), https://www.cnbc.com/2016/06/22/jimmy-johns-drops-non-compete-clauses-following-settlement.html [https://perma.cc/CE8N-7YAZ].

[168] Carosa, *supra* note 166.

[169] *Id.* Although not investigated by a state attorneys general office, multi-billion-dollar business conglomerate Amazon was heavily criticized by the media in 2015 for engaging in practices similar to Jimmy John's, whereby it made its low-wage workers execute non-competition agreements. *Id.* Amazon required its workers, including seasonal and warehouse workers, to sign agreements with overly broad restrictions prohibiting them from direct or indirect engagement or "support [of] the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided [or intended to be in the future] by Amazon . . . that employee worked on or supported . . . ." *Id.* at D3–D4. The agreement further had workers acknowledge that the geographic scope for its products and services were "extremely broad and in many cases

In July of 2018, a coalition of state attorneys general from fourteen states began an investigation of several well-known restaurants, including Arby's, Burger King, Dunkin' Brands, Five Guys Burgers and Fries, Little Caesars, Panera Bread, Popeyes Louisiana Kitchen, and Wendy's, "requesting documents, including copies of franchise agreements and communications related to no-poach provisions."[170] The coalition that led the investigations and reached an ultimate settlement was comprised of attorneys general offices from Massachusetts, California, the District of Columbia, Iowa, Illinois, Maryland, Massachusetts, Minnesota, North Carolina, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont.[171] "The attorneys general alleged that no-poach provisions make it difficult for workers to improve their earning potential by moving from one job to another or seeking a higher-paying job at another franchise location, and that many workers are unaware they are subject to these no-poach provisions."[172] As a result of the investigation, in early 2019, four of the fast-food franchisors, Dunkin', Arby's, Five Guys, and Little Caesars, stopped using the no-poach agreements, "which restrict[ed] the right of fast food workers to move from one franchise to another within the same restaurant chain."[173] Additionally, as part of the settlement agreement, the franchisors agreed to have its franchisees post notices for employees in all of its establishments informing them of the settlement.[174] Franchisors were also required to notify the attorneys general if a franchisee tried to impose any restrictions pursuant to an existing no-poach agreement.[175] Later in 2018, the New York and Illinois Attorneys General offices began separate investigations into We Work Companies, Inc., finding that the company's non-compete agreements "prohibited all of its employees from working for competitors regardless of

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worldwide." *Id.* at D4. "Given the breadth of Amazon's products and services, the scope of the limitation was potentially devastating to the livelihood of its employees." *Id.* Amid negative media attention, Amazon ended its practice of imposing these restrictions on its hourly workers. *Id.*

[170] New York Att'y Gen., *supra* note 166.

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.*

any particular employee's job duties or knowledge of confidential information."[176] The company's business involved "provid[ing] shared workspaces and services to customers" within the U.S. and internationally.[177] Under the joint settlement coordinated by both attorneys general offices, the company released almost half of its employees from non-compete agreements.[178] The employees who would no longer be bound by these non-compete agreements included lower-wage workers such as "mail associates, cleaners, and baristas."[179] Among other things, the company also agreed to regularly submit a report to the attorneys general detailing any future changes to its non-compete provisions.[180]

c. Reasonableness Standard Applied by Most State Courts

Other than the jurisdictions discussed above that expressly prohibit non-compete agreements, namely California, Oklahoma, North Dakota, and the District of Columbia, the remaining jurisdictions that do permit these agreements generally follow a reasonableness approach within their respective judicial systems to determine whether an agreement is enforceable.[181]

Although the majority of states apply a reasonableness rule, the evaluation differs from state to state.[182] In applying a heightened level of scrutiny to non-competes, as compared to normal commercial contracts, states generally "requir[e] slightly different standards of assent, appl[y] a balancing test, requir[e] the employer to prove that it has a 'protectable interest,' or require more than a 'peppercorn' of consideration."[183]

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[176] Matthew T. McLaughlin & Lisa C. Sullivan, *New York and Illinois AGs Crack Down on Use of Non-competes in Settlement with WeWork and Release Guidance on Use of Non-competes*, NIXON PEABODY: EMPLOYMENT LAW ALERT (Sept. 19, 2018), https://www.nixonpeabody.com/-/media/Files/Alerts/2018-September/new-york-and-illinois-ags-release-guidance-on-use-of-non-competes.ashx?la=en [https://perma.cc/E4HR-XVJ3].

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *See* Viva R. Moffat, *Making Non-competes Unenforceable*, 54 ARIZ. L. REV. 939, 946–47 (2012); *see also* Gordon, *supra* note 88.

[182] *See* Moffat, *supra* note 181, at 946.

[183] *Id.* at 947.

The general common law rule-of-reason approach is embodied in the Restatement of Contracts and its non-compete enforcement test.[184] Under this test, courts must analyze: "(1) whether 'the restraint is greater than is needed to protect the employer's legitimate interest'; (2) the hardship to the employee; and (3) 'the likely injury to the public.'"[185] The Restatement (Third) of Employment Law also delineates provisions related to non-compete agreements and establishes a balancing approach akin to that established in the Restatement of Contracts.[186]

This reasonableness approach is reflected in state court decisions as well as state statutory provisions.[187] For example, the New York Court of Appeals has held that:

> A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public. A non-compete agreement must also be reasonably limited temporally and geographically.[188]

Texas has essentially codified the common law rule-of-reason in its statutory provision:

> [A] covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.[189]

In applying a reasonableness standard, state courts generally take one of three approaches in attempting to rectify overly broad non-compete agreements.[190] One approach involves courts modifying or revising the non-compete to a permissible scope.[191]

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[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *See id.* at 947–48.
[188] *Id.* at 948.
[189] *Id.; see also* TEX. BUS. & COM. CODE ANN. § 15.50(a) (West 2009).
[190] Gordon, *supra* note 88.
[191] *Id.*

A second approach entails the "blue pencil" method, which allows courts to cross out unreasonable provisions and enforce the remaining, reasonable terms or language.[192] Finally, a third approach involves the "red pencil" method, which enables a judge to completely void an agreement if it is determined that any provision is unreasonable.[193] At least 41 states permit judges to impose some level of "after-the-fact judicial modification" of non-compete agreements.[194]

Most recently, in the wake of the COVID-19 pandemic, judges' assessments of the reasonableness and ultimate enforceability of non-compete agreements has been further challenged because the pandemic has "added to an already-tangled web of legislative and judicial uncertainty" across the nation.[195]

IV. THE COVID-19 PANDEMIC AND ITS IMPACT ON NON-COMPETE LITIGATION

During the second half of 2020, more pandemic-related litigation emerged where employees sought courts to declare their non-compete agreements unenforceable.[196] A review of a sampling of these cases below reflects that "[t]he pandemic impacted courts' willingness to enforce non-competition agreements, particularly

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[192] *Id.*

[193] Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports,* 74 WASH. & LEE L. REV. 1567, 1591 (2017); *see also* THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 11 (2016). The report notes that the red pencil doctrine "provide[s] disincentives for employers to write non-compete contracts that are unenforceable by refusing to enforce and making void a non-compete contract that contains any unenforceable provisions. This practice . . . can have the effect of increasing employers incentive to write a contract that is fully enforceable." *Id.*

[194] Ryan Nunn & Matt Marx, *The Chilling Effect of Non-compete Agreements*, ECONOFACT (May 20, 2018), https://econofact.org/the-chilling-effect-of-non-compete-agreements [https://perma.cc/2RVE-7R4K].

[195] *See* Woods & Bernardo, *supra* note 5.

[196] *See Employees Laid Off As A Result of COVID-19 Ask Courts To Find Their Non-compete Agreements Unenforceable,* FISHER PHILLIPS (Sept. 11, 2020) [hereinafter *COVID-19 Non-compete Cases*], https://www.fisherphillips.com/news-insights/employees-laid-off-as-a-result-of-covid-19-ask-courts-to-find-their-non-compete-agreements-unenforceable.html [https://perma.cc/R3N4-U7WC].

whether to issue injunctive relief limiting an employee's ability to earn a living" during the pandemic.[197]

A. State Court Litigation

1. Blessinger v. Wipfli, LLP[198]

In *Blessinger*, the plaintiff, Blessinger, a certified public accountant, filed an action against his former employer, a financial accounting firm.[199] Blessinger had initially worked at a firm that merged with Wipfli as a staff accountant and then moved up to a management position before the firms merged.[200] When the firms merged, Blessinger executed a Confidentiality and Restrictive Covenant Agreement and alleged in the complaint that his execution of the agreement was done without any promotion, increased salary, or bonus being given to him.[201] Wipfli terminated him in May 2020, explaining in the termination letter that:

> The COVID-19 pandemic has resulted in unprecedented impacts on lives and businesses throughout the world. During recent weeks, Firm leaders evaluated current business conditions and staffing levels with a focus on resource utilization and operational effectiveness. Unfortunately, the result of the evaluation indicated that current business demand and expectations for future needs no longer allow us to continue your ongoing employment with the Firm.[202]

Subsequent to his departure, Blessinger started his own firm and alleged in his filings that many of his former clients at Wipfli expressed that they wanted to continue with him as their accountant and desired Wipfli to transfer their files to Blessinger's firm.[203] Blessinger alleged that Wipfli threatened litigation based on the Confidentiality and Restrictive Covenant Agreement if he moved forward in servicing those clients.[204]

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[197] *See* Woods & Bernardo, *supra* note 5.
[198] *See COVID-19 Non-compete Cases*, *supra* note 196.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*

Blessinger asserted in the complaint that he was let go from the firm without cause as a result of the pandemic and, consequently, that Wipfli's enforcement efforts contravened Montana's law which strongly opposes non-compete agreements.[205] He averred that this policy of disfavoring non-compete agreements is particularly applicable when "an employer chooses to end the employment relationship and yet seeks to enforce the covenant not to compete."[206] Blessinger requested that the court find the agreement invalid and unenforceable and award him attorneys' fees and costs.[207]

2. Grissinger v. Cross Keys Management Inc.[208]

Similar litigation was filed in Pennsylvania in August 2020.[209] In *Grissinger,* the plaintiff, a real estate recruiter, asserted in her complaint that she was furloughed and ultimately terminated from her position in March 2020 as a result of the pandemic.[210] At the beginning of her employment three years prior with the realty company, the plaintiff signed an employment agreement that included restrictive covenants prohibiting her from working as a real estate recruiter with another company within three Pennsylvania counties.[211] The agreement also prohibited her from soliciting employees or customers from her former employer for a period of two years following her termination.[212]

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[205] *Id.*;

> The language in Montana's noncompete statute (Mont. Code Ann. § 28-2-703) is very similar to California's well-known Business and Professions code, § 16600—both originating with the Field Code. Specifically, Montana's statute (originally enacted in 1895) provides: "Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided for by 28-2-704 or 28-2-705, is to that extent void."

Beck, *supra* note 101.

[206] *See COVID-19 Non-compete Cases*, *supra* note 196.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.*

In her complaint, Grissinger alleged that following her furlough and termination, she received many job offers from prospective employers but that each employer requested that she obtain a release from her prior employer before she could be employed with them.[213] Grissinger further alleged that her former employer would not agree to release her from any of the restrictions set out in the non-compete agreement, which ultimately caused her to lose valuable employment opportunities and likely other future employment opportunities.[214]

Grissinger sought declaratory relief and requested the court find the non-compete agreement unenforceable.[215] She also sought a permanent injunction to prohibit her former employer from enforcing the restrictive covenants, as well as monetary damages for tortious interference with a prospective employer.[216]

3. Monaldi v. Silverwell Technology, Inc.[217]

One of the first COVID-19 non-compete cases filed in Texas was *Monaldi v. Silverwell Technology, Inc.*[218] In that case, which was filed in August of 2020, the plaintiff was a sales manager for the defendant employer and alleged that he was told that he would no longer be employed in July of 2020 due to "extraordinary circumstances."[219] The plaintiff interpreted the stated rationale, "extraordinary circumstances," to be associated with the economic challenges that the company was facing as a result of the pandemic.[220] He subsequently began looking for another job and was hired by another company, but alleged that his former employer began trying to "retreat from its termination

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[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.* (She also sought relief for punitive damages for alleged willful and outrageous conduct by her former employer aimed at "destroy[ing] her career and eliminat[ing] fair competition.").

[217] Plaintiff's Original Petition for Declaratory Judgment, Monaldi v. Silverwell Technology, Inc., 2020-51902 (Harris Cty. Ct. Aug. 28, 2020); *see also COVID-19 Non-compete Cases*, *supra* note 196.

[218] *Id.*

[219] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 2; *see also COVID-19 Non-compete Cases*, *supra* note 196.

[220] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 2; *COVID-19 Non-compete Cases*, *supra* note 196.

notice."[221] However, the plaintiff refused and advised that he had accepted employment elsewhere and was not willing to return to his former employment.[222]

Following his notice to his former employer, he was reminded by the company's counsel of his "restrictive covenant obligations."[223] Subsequently, the plaintiff filed an action for injunctive relief requesting the court find the non-compete restrictions unreasonable in terms of the scope, time, and geographic area and, thus, unenforceable.[224] The plaintiff's suit was premised on the argument that any enforcement of the provisions would be inappropriate because he was terminated without cause (as a result of the pandemic), and the provisions were more restrictive than were necessary to protect the company's legitimate goodwill.[225]

4. Garcia v. USA Industries, Inc.[226]

Garcia v. USA Industries, Inc. was another early COVID-19-related non-compete case filed in Harris County, Texas, in February of 2021.[227] The case involved an employee, Robert Garcia, who was an outside salesperson who had been terminated by USA Industries (USAI) during the pandemic in April 2020 as a result of the company's pandemic-related economic hardship.[228]

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[221] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 2; *COVID-19 Non-compete Cases*, *supra* note 196.

[222] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 2; *COVID-19 Non-compete Cases*, *supra* note 196.

[223] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 3; *COVID-19 Non-compete Cases*, *supra* note 196.

[224] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 5–6; *COVID-19 Non-compete Cases*, *supra* note 196.

[225] Plaintiff's Original Petition for Declaratory Judgment, *supra* note 217, at 2, 4; *COVID-19 Non-compete Cas*es, *supra* note 196.

[226] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, Garcia v. USA Industries, Inc., 2021-09178 (Harris Cty. Ct. Feb. 12, 2021).

[227] Meghan McBerry & Dawn Mertineit, *Texas Decision Highlights Concerns Regarding Limiting Enforceability of Non-compete Agreements During COVID-19 Pandemic*, SEYFARTH (June 14, 2021), https://www.tradesecretslaw.com/2021/06/articles/noncompete-enforceability/texas-decision-highlights-concerns-regarding-limiting-enforceability-of-non-compete-agreements-during-covid-19-pandemic/#page=1 [https://perma.cc/76CU-CHLW].

[228] *Id.*; Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 2.

The employee sold oil field equipment and had been employed with the company for twelve years at the time of termination.[229] He had previously executed an employment agreement containing non-compete restrictions, and upon termination, he also signed a severance agreement that included additional non-compete provisions.[230]

The severance agreement provided, "No Future Association[:] Employee waives any future association, employment, contractual relationship, or any other relationship of any kind with any Released Party and agrees not to apply to any Released Party for employment or a contractual relationship."[231] The severance agreement also included provisions related to prior non-compete agreements, namely the executed employment agreement, and provided that those agreements remained intact.[232]

Upon his departure, Garcia gained employment with a competitor that sold similar product lines.[233] Garcia alleged that his new employer fired him after receiving a cease-and-desist letter that was sent to him and the new employer alerting the employer to his contractual obligations.[234] Garcia further alleged that his termination was likely due to his new employer's desire to prevent a lawsuit from being filed for tortious interference with a contract.[235] Garcia filed a lawsuit seeking the court to find the non-compete provisions unenforceable for lack of consideration.[236] He also asked the court to grant injunctive relief precluding USAI from enforcing the non-compete restrictions, which included any future contact with new employers.[237]

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[229] McBerry & Mertineit, *supra* note 227.

[230] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 2; McBerry & Mertineit, *supra* note 227.

[231] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 2; McBerry & Mertineit, *supra* note 227.

[232] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 2; McBerry & Mertineit, *supra* note 227.

[233] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 2; McBerry & Mertineit, *supra* note 227.

[234] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 3; McBerry & Mertineit, *supra* note 227.

[235] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 3; McBerry & Mertineit, *supra* note 227.

[236] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 3; McBerry & Mertineit, *supra* note 227.

[237] Plaintiff's Original Petition for Declaratory Judgment and Injunctive Relief, *supra* note 226, at 4–5; McBerry & Mertineit, *supra* note 227.

Garcia's request for a temporary restraining order was granted.[238] In particular, the court found that the severance agreement's non-compete restrictions lacked adequate consideration and thus were unenforceable.[239] Additionally, the court held that USAI's restrictions in the agreement were unreasonable and more expansive than needed in order to protect its legitimate goodwill expectations.[240] Finally, the court also reasoned that Garcia would likely be unable to secure employment in his area of expertise if USAI was able to continue contacting his future employers.[241]

B. Federal Court Litigation

1. Schuylkill Valley Sports, Inc. v. Corporate Images Co.[242]

Federal courts have also experienced an increase in non-compete pandemic-related litigation.[243] In June of 2020, a sporting goods company and athletic team supplier asked a Pennsylvania federal court to grant a preliminary injunction to enforce its non-compete agreement.[244] In *Schuylkill Valley Sports,* the company argued that one of the named defendants, Snyder, who was a manager with the company, was still an employee on an "open-ended furlough" during the COVID-19 pandemic because the company continued to pay for the defendant's health care.[245]

Snyder, along with other employees, had signed an agreement containing non-compete and non-solicitation clauses that lasted for a period of one year after an employee's departure from the company.[246] The final paragraph of the agreement defined "no longer employed by the Company" as a circumstance in

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[238] McBerry & Mertineit, *supra* note 227.

[239] *Id.*

[240] *Id.*

[241] *Id.* Another hearing will be held at a later date to address the merits of Garcia's claim. *See id.*

[242] Schuylkill Valley Sports, Inc. v. Corp. Images Co., No. 5:20-CV-02332, at 1 (E.D. Pa. June 15, 2020).

[243] *See* Woods & Bernardo, *supra* note 5.

[244] *Schuylkill,* No. 5:20-CV-02332 at 1–4; Woods & Bernardo, *supra* note 5.

[245] *Schuylkill,* No. 5:20-CV-02332 at 6–7, 28; Woods & Bernardo, *supra* note 5.

[246] *Schuylkill,* No. 5:20-CV-02332 at 5.

which the employee chooses to resign or is terminated for "just cause" and specifically states that "[t]his agreement would not apply in situations where, through no fault of the [e]mployee, the position is eliminated, or the location and/or the Company ceased to do business."[247]

In March 2020, the company sent a letter to several employees, including Snyder, explaining that "as of March 30th, SV Sports will be implementing a company-wide layoff. With the everyday uncertainty of COVID-19 and state employment restrictions, we feel it necessary to reduce our operating staff to a minimal SWAT team."[248] The letter went on to state that while the employees were laid off, those employees who were enrolled in the company's health insurance would continue to have coverage until the month of April without having to enroll in COBRA.[249]

At the end of March, Snyder sent an email to customers he had serviced and explained that he had been laid off.[250] He, along with other sales employees, filed for unemployment.[251] After his departure from Plaintiff SV Sports, he began employment with a competitor company in April 2020 as a sales director.[252] Upon becoming a sales director, he sent an email to former SV Sports team members who had also been laid off, asking them to join Corporate Images Company (CI).[253] Subsequent to this, and upon becoming aware that Snyder was employed with the competitor, SV Sports' payroll manager completed the unemployment applications previously submitted by Snyder and other sales members on May 8, 2020, and listed "COVID19" as the reason for separation, noted that the separation was temporary, and stated that the return date was not known.[254]

On May 7, 2020, SV Sports sent Snyder a letter terminating his employment, along with a COBRA notice.[255] SV Sports

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[247] *Id.* Snyder had also signed a non-solicitation and confidentiality provision in the company handbook. *Id.*

[248] *Id.* at 6.

[249] *Id.* at 6–7.

[250] *Id.* at 8.

[251] *Id.*

[252] *Id.* at 9.

[253] *Id.*

[254] *Id.*

[255] *Id.* at 10.

filed its complaint and motions shortly after Snyder's termination.[256] After CI received the pleadings and motions, an email was sent to Snyder and the other former SV Sports employees ordering them not to take any actions or make any communications on behalf of CI.[257]

In its June 2020 order, the court disagreed with SV Sports' argument that Snyder remained an employee after being laid off due to the pandemic because the company continued to pay for his health care.[258] The court explained that SV Sports did not show sufficient evidence to support its motion for preliminary injunction because Snyder and the other team members' non-compete agreements did not apply since they were laid off, and any contractual obligations to SV Sports had ceased upon their termination.[259] In refusing to grant injunctive relief, the court concluded that the defendant employees would incur greater harm than the company if the injunction were granted.[260]

The court reasoned that SV Sports failed to show that the non-compete agreements were enforceable.[261] In so concluding, the court noted that the agreements provided that they only apply if an employee resigns or is terminated for "just cause" but do not apply in situations where an employee's position is eliminated due to no fault of his own.[262] The court further stated that since "non-competition agreements restrain an employee's ability to practice his or her chosen trade, they are 'strictly construed against the employer.'"[263] Accordingly, the court found that the noncompetition and non-solicitation clauses did not restrict the former employees' future activities since they did not resign, nor were they terminated for cause.[264]

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[256] *Id.*

[257] *Id.*

[258] *Id.* at 16, 18. (The court found that the company's letter to the employees stating, "as of March 30th, SV Sports will be implementing a company-wide layoff" ended the at-will employment relationships with the employees. "The clear language of the letter: 'lay-off' contradicts SV Sports' allegation that it furloughed Snyder and members of SV Sports Sales Team.").

[259] *Id.*

[260] *Id.* at 34.

[261] *Id.*

[262] *Id.* at 14–15.

[263] *Id.*

[264] *Id.*

Additionally, the court found that, other than stating conclusory statements, SV Sports did not provide evidence that it would lose customers or employees, that confidential information had been or would be disclosed, or that it would incur reputational loss if the court denied injunctive relief.[265] Moreover, the court noted that even if it were to find the non-compete agreements enforceable, Snyder and the other former employees' belief that the agreements were inapplicable was reasonable.[266] The court stated:

> Here, it was SV Sports' decision to lay-off Snyder without any guarantee that he would be rehired, that caused Snyder to seek outside employment. Having worked as a sales manager for a sporting goods retailer for more than thirty years, it is understandable why Snyder, who did not believe his non-compete agreement applied, would seek employment in a field in which he was knowledgeable. In light of the coronavirus pandemic and closing of non-essential businesses, employment opportunities were limited. The harm to Snyder if an injunction is granted is great as he will once again be without a job and income. Although the stay-at-home orders issued by the Governor of the Commonwealth of Pennsylvania ended on June 4, 2020, not all businesses are open. . . . The likelihood of Snyder finding employment at this time is therefore reduced, especially if Snyder is enjoined from working with a competing company, which is the area in which he has the most experience. According to the Bureau of Labor Statistics, the unemployment rates over the past few months are the highest in more than seventy years. The harm to SV Sports, on the other hand, is much less given that it had laid Snyder off and he was not making any sales for SV Sports.[267]

Finally, the court weighed the competing public interests present in the case and found that the public interest did not favor injunctive relief.[268] In noting that the public as a whole benefits from free competition amongst companies, the court discussed how the public interest in Pennsylvania values "employers being free to hire whom they please and in employees being free to work for whom they please."[269] The court also acknowledged that,

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[265] *Id.* at 34.
[266] *Id.* at 35.
[267] *Id.* at 35–36.
[268] *Id.* at 37–38.
[269] *Id.* at 38 (quoting Bimbo Bakeries USA , Inc . v . Botticella , 613 F.3d 102, 119 (3d Cir. 2010)).

although non-competes are disfavored in the state, Pennsylvania courts recognize that these agreements "have developed into important business tools to "allow employers to prevent their employees and agents from learning their trade secrets, befriending their customers and then moving into competition with them.'"[270] With these competing interests in mind, the court nevertheless found that SV Sports failed to show that the non-compete agreements were enforceable, and thus there was no proof of unfair competition.[271] Additionally, because SV Sports was unable to show any improper use or disclosure of confidential information, "the public interest in preserving competition weighs in favor of denying the injunction that would significantly limit [their competitor's] ability to compete."[272] Finally, the court reasoned that because SV Sports laid off Snyder and the other team members "when the country [was] facing the highest unemployment rates in more than seven decades," the public interest did not favor granting injunctive relief that would prevent the defendants from working for SV Sports' competitor.[273]

2. Adecco USA, Inc. v. Staffworks, Inc.[274]

In *Adecco USA,* a New York federal district court case, the defendants, former employees of Adecco, were hired by the company at different times from 1996 to 2019.[275] Prior to their official start with Adecco, each of the former employees[276] executed an employment agreement that included non-compete, non-solicitation, and non-disclosure agreements.[277] Two of the former employees

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[270] *Id.*

[271] *Id.* at 38.

[272] *Id.* at 39.

[273] *Id.*

[274] Adecco USA, Inc. v. Staffworks, Inc., No. 6:20-CV-744 (MAD/TWD), 2020 WL 7028872, *1 (N.D.N.Y. Sept. 15, 2020).

[275] *Id.*

[276] The former employees are comprised of eight individuals who were not "low wage" workers while working for Adecco but rather employees who held management or supervisory roles, including positions such as Senior Regional Vice President, Branch Manager, Area Director, Lead Recruiter, Recruiter, Office Supervisor, and Client Delivery Manager. *See* Plaintiff's Amended Complaint, Adecco USA, Inc. v. Staffworks, No. 6:20-CV-744 (MAD/TWD), 2020 WL 11629290, at ¶¶ 28–36 (N.D.N.Y. Nov. 10, 2020).

[277] Adecco USA, Inc., 2020 WL 7028872, at *1.

were informed that their positions were being eliminated "as a result of a corporate reorganization and that they were being terminated" in early May 2020, shortly after the COVID-19 crisis surfaced.[278] A day after being notified, one of the former employees drilled a hole into filing cabinets in her office and allegedly took personnel files and additional confidential information.[279] Additionally, on the last date of employment, the other former employee forwarded to personal email accounts numerous documents with Adecco's business and client information.[280]

In late May, a third former employee was furloughed.[281] By June 2020, all of these former employees, in addition to three other former Adecco employees, began working for Staffworks.[282] Adecco filed an action against Defendant Staffworks and the former employees for numerous causes of action, including breach of contract and tortious interference with contract, as well as a motion for temporary restraining order or preliminary injunction.[283] The court denied Adecco's motion for a temporary restraining order but held a hearing on the request for a preliminary injunction.[284]

Following the hearing, the court found in its September 2020 order that:

> [E]nforcing the non-compete agreements would cause Defendant [employees] to lose their jobs in a time when the COVID-19 pandemic has wreaked havoc on the economy. Enforcing the non-compete agreements would be greater than necessary to protect Adecco's legitimate business interest, which would be protected through the enforcement of the non-solicitation agreements. Enforcement of the non-solicitation clauses protects the needs of the employer without resulting in a loss of livelihood for Defendants.[285]

In refusing to issue a preliminary injunction as to the non-compete agreements, the court acknowledged that it must

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[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] *Id.* at *12.

"consider the balance of hardships" between the parties and grant the injunctive relief only if the balance weighs in favor of the plaintiff.[286] The court noted that Adecco had suffered a loss of business and goodwill as a result of the employees' failure to comply with the restrictive covenants, and thus under normal circumstances, the equity balance might tip in favor of Adecco.[287] However, in referencing the *Schuylkill Valley Sports*[288] decision previously discussed, the court again emphasized that enforcing the non-compete agreements would force the Defendant employees out of jobs during "a time when the COVID-19 pandemic has made employment opportunities scarce."[289] Accordingly, it held that it would not issue an injunction to enforce the non-compete agreements, which was "consistent with New York court's practice of enforcing restrictive covenants only to the extent necessary to protect the employer's legitimate interests[.]"[290]

3. Veterinary Orthopedic Implants, Inc. v. Haas[291]

In September 2020, a Florida federal district court granted in part Plaintiff's, Veterinary Orthopedic Implants, Inc. (VOI), motion for temporary restraining order and for preliminary injunction in *Veterinary Orthopedic*, rejecting the prior employee's argument that the enforcement of the restrictive covenant would "force him into unemployment in a job market made all the more

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[286] *Id.* at *21.

[287] *Id.*

[288] *See supra* note 228 and accompanying text.

[289] Adecco USA, Inc., 2020 WL 7028872, at *21.

[290] *Id.* (citing Johnson Controls, Inc. v. A.P.T. Critical Systems, Inc., 323 F.Supp.2d 525, 540 (S.D.N.Y. 2004) (citing BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1226 (N.Y. 1999)). The *Adecco USA* court noted the *Schuylkill Valley Sports* court's reasoning that "in light of the coronavirus pandemic and closing of non-essential businesses, employment opportunities were limited." 2020 WL 3167636 at *21. Additionally, the court referenced *Centimark Corp. v. Tech. Am. Corp.*, where the court found that the harm that a business would suffer if "contracts were not enforced [was] 'drastically outweighed' by the harm to the defendant because he would be left without a job and unable to support his family." *Id.* (citing No. 1:08-CV-7323, 200 WL 11606646, *8 (N.D. Ill. Apr. 6, 2010)).

[291] Veterinary Orthopedic Implants, Inc. v. Haas, No. 3:20-cv-868-J-34MCR, 2020 WL 5369087, *1 (M.D. Fla. Sept. 8, 2020).

challenging by the ongoing global [COVID-19] pandemic."[292] In this matter, the former employee, Haas, was not terminated as a result of the pandemic but rather for performance-related reasons per VOI,[293] a company in the business of manufacturing, distributing, marketing, and selling veterinary orthopedic products.[294] Haas worked at the company for five years prior to his termination selling orthopedic products to veterinarians.[295] Preceding his termination, he was a senior-level business development manager.[296] When Haas initially began his employment with VOI, he signed an employment agreement that prohibited him for a period of 24 months following termination, regardless of the reason for termination, from: soliciting VOI clients; disclosing confidential business information to persons not affiliated with VOI or VOI competitors; engaging in business or activity within the country or international market related to veterinary orthopedic implants in which VOI was engaged in at the time of termination, 24 months prior to termination, or exploring entering into as of the termination date; working with any VOI competitors or working or engaging in business similar to VOI or a business "supplying, manufacturing, distributing or selling orthopedic implants for animals. . . ."[297] Upon separation in April 2020, Haas signed a separation agreement acknowledging that:

> the Confidentiality, nondisclosure, non-compete, and non-solicitation portion of any agreements made in regards to [VOI] that impose confidentiality, nondisclosure, non-competition, non-solicitation portions of the employment agreements [sic] upon him shall remain in force.
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> * * *
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> From and after [March 30, 2020], [Haas] agrees not to divulge or use to the detriment of [VOI], his benefit, or the benefit of any other person, any proprietary or confidential information or trade secrets related to [VOI] including, without limitation, [VOI's] trade secrets or other intellectual property rights, personnel information, know-how, customer lists, pricing information or

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[292] *Id.* at *15.
[293] *See id.* at *6.
[294] *Id.* at *2.
[295] *Id.* at *3.
[296] *Id.* at *3.
[297] *Id.* at *3–4.

> other confidential or proprietary data, including information acquired in connection with his employment by [VOI].[298]

On July 6, 2020, Haas began employment for Arthrex.[299] Although the facts were disputed as to whether Arthrex was a direct competitor of VOI, the court acknowledged that both companies sold similar product lines, and a particular product line that was Haas's main line at VOI, as well as other overlapping veterinary surgical products.[300]

The court ultimately held that VOI had "sufficiently established the existence of confidential business information justifying a restrictive covenant."[301] The court further stated that, "VOI . . . established a substantial likelihood of success in proving that the following items constitute protectible confidential business information to which Haas had access while at VOI: referral sources, patterns of customer preferences and needs, specific customer purchasing information, VOI's costs and margins, and VOI's marketing and sales strategy."[302] The court went on to conclude that, based on the record, there was a presumption of irreparable harm because "once VOI's confidential business information [was] revealed, this harm [could not] be undone."[303]

Following this determination, the court addressed the question of whether the harm that an injunction may cause Haas outweighed the threatened injury to VOI.[304] The court reasoned that the company was threatened with the potential loss of its confidential business information that it had spent a large amount of time and resources creating.[305] Haas, on the other hand, argued that enforcing the restrictive covenant would cause him to be unemployed in a market already plagued with difficulties ushered in by the coronavirus pandemic.[306] The court was not persuaded by Haas's argument and explained:

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[298] *Id.* at *6.
[299] *Id.*
[300] *Id.* at *7.
[301] *Id.* at *9.
[302] *Id.* at *10.
[303] *Id.* at *15.
[304] *Id.*
[305] *Id.*
[306] *Id.* at *15.

> Here, on the limited record before the Court, it appears that Haas "entered into valid agreements prohibiting the conduct [VOI] seeks to enjoin," but nonetheless wishes to violate those agreements. . . . *Although the Court is concerned with Haas' ability to support his family during this extraordinarily difficult moment in world history, the Court has endeavored to limit the scope of the injunction in a manner which allows Haas to continue his employment with Arthrex in some capacity*. Thus, the Court finds that the balance of harms analysis weighs in favor of VOI.[307]

Accordingly, the court granted VOI's motion for temporary injunctive relief in part, enjoining Haas from working for Arthrex, Inc., or any business that sells or distributes veterinary orthopedic implant products.[308] The court specifically stated that Haas could work for Arthrex if he did not sell the proscribed products nor solicit customers who sought to purchase those products.[309] The geographic region covered by the injunction included the United States and Australia and would remain in effect until March 30, 2021.[310]

C. Implications of Pandemic-Related Non-compete Litigation

Evaluating the above litigation, it is apparent that early-pandemic litigation involved plaintiffs who were management-level employees, not those who would be considered low-wage earners.[311] Thus, it appears, at least anecdotally, that low-wage workers—those who were most impacted by the pandemic and the resulting job terminations and furloughs—did not seek their day in court to challenge the enforceability of unreasonable non-compete agreements.[312] This is most likely because they were concerned about their day-to-day livelihood, and the money that they did perhaps possess could not be sacrificed on litigation.[313]

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[307] *Id.* (emphasis added) (citations omitted).

[308] *Id.* at *16.

[309] *Id.*

[310] *Id.*

[311] *See supra* notes 200, 211, 219, 228, 245, 296 and accompanying text; *see also supra* note 276.

[312] *See supra* notes 200, 211, 219, 228, 245, 296 and accompanying text; *see also supra* note 276.

[313] Jacqueline A. Carosa, *Employee Mobility and the Low Wage Worker: The Illegitimate Use of Non-compete Agreements*, 67 BUFF. L. REV. D1, D37 (2019).

It has been noted that, in challenging the legality of a non-compete agreement, an

> employee will have to retain an attorney and absorb the expense of fees and costs related to such legal action. An employee lacking the financial resources to commence an action or defend against one . . . may likely be forced to cease and desist and forfeit her legal remedy. Even [non-compete agreements] that are clearly overreaching and unenforceable can cause a chilling effect because employees simply lack the resources to obtain a declaratory judgment either striking the agreement entirely or modifying the unreasonable terms. . . . [Thus,] low wage workers who are the most likely workers to lack the financial means, support, or motivation obtain no benefit from available legal remedies because they lack the funds to consult and retain with counsel or because they do not know there is a legal remedy available to them.[314]

Hence, it is reasonable to conclude that, throughout the pandemic, low-wage earners have not had an adequate avenue through the court system to fight against non-compete agreements that could impair their mobility and ability to earn a living.[315] Therefore, it is even more imperative that regulation be made at the federal level to eliminate non-compete agreements against low-wage and hourly earners.[316]

V. CONTINUED EVALUATION OF FEDERAL REGULATION OF NON-COMPETES: THE POSSIBILITY OF FTC ACTION

Interestingly, in January 2020, roughly two months before the global pandemic was declared and courts began to see pandemic-related non-compete litigation, the Federal Trade Commission held a public workshop (hereinafter "2020 FTC workshop") to

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[314] *Id.* at D36–D37. The author further notes that:

> [T]aking offensive legal action against a former employer is risky for the employee because prospective employers may be discouraged from hiring the applicant for lack of references, for fear of future litigation, or due to a reputation damaged through rumors. Employees need to consider the public nature of a lawsuit and must weigh the risks against the benefits.

Id. at 37 (internal citations omitted).

[315] *See id.* at D34.

[316] *See supra* note 24 and accompanying text.

determine if there was "a sufficient legal basis and empirical economic support" to create a federal rule that would limit the use of non-compete agreements.[317] In connection with the public workshop, the FTC delineated for discussion a number of legal issues related to non-compete agreements and requested interested parties to submit public comments.[318] While asserting that

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[317] Press Release, FTC, FTC to Hold Workshop on Non-compete Clauses Used in Employment Contracts (Dec. 5, 2019) [hereinafter FTC Press Release], https://bit.ly/2THYgPE [https://perma.cc/T3FB-P2PX].

[318] *See id.*; *see also Non-competes in the Workplace: Examining Antitrust and Consumer Protection Issues*, FEDERAL TRADE COMMISSION (Jan. 9, 2020, 8:30 AM), https://bit.ly/2ug5FL9 [https://perma.cc/87GZ-6N83]. The FTC asked for interested parties to submit public comments on the following eight questions (as well as any other related topics):

- What impact do non-compete clauses have on labor market participants?
- What are the business justifications for non-compete clauses?
- Is state law insufficient to address harms associated with non-compete clauses?
- Do employers enforce non-compete agreements contained in standard employment contracts? How routine is such enforcement?
- Are there situations in which non-compete clauses constitute an unfair method of competition (UMC) or an unfair or deceptive act or practice (UDAP)? How prevalent are these situations?
- Should the FTC consider using its rulemaking authority to address the potential harms of non-compete clauses, applying either UMC or UDAP principles? What "gap" in existing state or federal law or regulation might such a rule fill? What should be the scope and terms of such a rule? What is the statutory authority for the Commission to promulgate a rule?
- Should the FTC consider using other tools besides rulemaking to address the potential harms of non-compete clauses, such as law enforcement, advocacy, or consumer/industry guidance?
- What additional economic research should be undertaken to evaluate the net effect of non-compete agreements? Should additional economic research on the empirical effects of non-compete agreements focus on a subset of the employee population? If so, which subset?

Id.

regulation of non-compete agreements should remain within the states' purview, some parties' comments also strongly advocated that in the event the FTC assumed regulation, that regulation should ban or restrict non-compete agreements against low-wage or hourly workers.[319]

The 2020 FTC workshop was designed to allow legal scholars and policy and economic experts a forum to evaluate the current lay of the land and economic data regarding non-compete agreements, analyze the effects of non-compete provisions on "labor market participants and their efficiency rationales (if any)," as well as evaluate any possible harms to workers in the labor market that the FTC could address through its authority.[320] Many interested parties submitted comments to the questions the FTC posed in conjunction with the workshop.[321]

Among the numerous parties that submitted comments, the Antitrust Law Section of the American Bar Association submitted a response questioning the FTC's legal authority and whether it could restrict non-compete agreements.[322] It also expressed that "'the question of non-compete clauses is likely to be ill-suited' to rulemaking."[323] The Antitrust Law Section further indicated that "more research on the effect of non-compete clauses on low-wage labor would be helpful, given the general belief and anecdotal evidence that this is a relatively vulnerable population and that non-compete clauses restricting low-wage workers are more likely to be exploitative rather than protective of bona fide firm intangibles."[324]

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[319] *See* Gordon, *supra* note 88; *see also supra* note 77 and accompanying text.

[320] *See* FTC Press Release, *supra* note 317.

[321] *See* Comment to *Workshop on Non-compete Clauses Used in Employment Contracts*, FEDERAL TRADE COMMISSION (Dec 5, 2019), https://www.regulations.gov/document/FTC-2019-0093-0001/comment [https://perma.cc/2KE6-977J] (click "Workshop on Non-compete Clauses Used in Employment Contracts"; then click "Browsed Posted Comments") (displaying over 300 comments submitted to the FTC).

[322] *See* Gordon, *supra* note 88.

[323] *Id.*

[324] Letter from Brian R. Henry, Antitrust L. Section Chari, ABA, to Bilal Sayyed, Director Off. Pol'y Planning, on Fed. Trade Comm'n Workshop on "*Non-competes in the Workplace: Examining Antitrust and Consumer Prot. Issues*" 66 (Apr. 24, 2020) (on file with author) [hereinafter Henry].

Additionally, a group of attorneys and paralegals from around the Nation with specific expertise related to restrictive covenants and trade secret law also submitted extensive comments, with a particular focus on the harm of non-competes to low-wage or hourly workers.[325] While offering no opinion on the issue of whether the FTC has the legal authority to promulgate rules regarding non-competes, the comments highlighted policy and practical issues that might arise if the FTC does so.[326] The group's ultimate recommendation was that regulation should continue to be left to the states.[327] However, if the FTC deemed regulation of non-competes within its purview, then the regulations should be narrow and address the following: "a ban on non-compete agreements for low-wage" or hourly workers "(defined as employees who are not exempt under the Fair Labor Standards Act)"; a mandate "that employers provide advance notice" to the employee "that a noncompete agreement will be required";[328] a mandate that courts strike an overly broad non-compete agreement "in its entirety unless the language reflects a clear (good faith) intent to draft a narrow restriction, in which case the court may" revise it to a permissible scope.[329]

These requested reforms were also previously raised by the Obama administration and its proposals on non-compete regulation.[330]

In recognizing the need for a ban on non-compete agreements for low-wage or hourly workers, the group advanced that such changes would level the "playing field" and engender greater fairness to those workers.[331] The group reasoned that

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[325] Memorandum from Russell Beck on Written Testimony of Practicing Att'ys for the Fed. Trade Comm'n Workshop on "*Non-compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues*" 15 (March 11, 2011) (on file with author) [hereinafter Beck].

[326] *Id.* at 13.

[327] *Id.*

[328] *Id.* In support of its recommendation that the FTC require employers provide workers advance notice that they will have to sign a non-compete, the group noted that non-compete agreements could perhaps be beneficial for both employer and employee "[i]f it were the case that workers made fully informed decisions about signing a non-compete and could negotiate higher compensation in exchange for doing so . . . ." Nunn & Marx, *supra* note 194.

[329] *Id.*

[330] *See* Gordon, *supra* note 88.

[331] *See* Beck, *supra* note 325.

there is seldom a rationale for low-wage workers to be subject to non-compete agreements and that, even in the rare circumstances that a need arises, "the potential detriment to such workers will typically outweigh that risk," unless a worker has taken trade secrets.[332]

VI. Eliminating Non-competes Against Low-Wage Workers in the Wake of the Pandemic

In the wake of the current pandemic era, it is imperative that America's low-wage or hourly workers, who are very likely "in the most vulnerable financial situation[s],"[333] are not faced with any disincentives in returning to the workforce[334] and gaining jobs to provide for their families and livelihoods.[335] In fact, it is this sector of workers, low-wage or hourly workers, that have been impacted the most financially by the pandemic.[336]

A. Impact of the Pandemic on Employment for Low-Wage and Hourly Workers

Employment for low-wage workers or hourly workers was greatly impacted by the pandemic.[337] As early as March 2020, during the early stages of the pandemic, reports were made warning of the types of workers that were most at risk for unemployment as a result of the pandemic.[338] One study, based on the Bureau of Labor Statistics Occupational Employment Statistics (2018), found that a large portion of the occupations that were at "high risk" of unemployment as a result of the pandemic was comprised of "food preparation or serving-related occupations."[339] The report also noted that the occupations with the greatest risk of unemployment also tended to be lower-paying

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[332] *Id.*

[333] *See* Gascon, *supra* note 14.

[334] Carosa, *supra* note 166, at D33 (noting that requiring non-competition agreements can cause some of the best qualified applicants to not interview with a company).

[335] *Id.* at D32.

[336] *See* Gascon, *supra* note 14.

[337] *Id.*

[338] *Id.*

[339] *Id.*

jobs, indicating that "the economic burden from [the coronavirus] health crisis [would] most directly affect those workers who are likely [in the greatest financially challenged positions]."[340]

Other studies also predicted that many "front-line, customer-facing jobs" that pay low hourly wages and offer limited work hours per week were most vulnerable to the COVID-19 economic shutdown.[341] Cornell Law School's Job Quality Index Team labels these occupations as "Production and Non-supervisory (P&NS) jobs," which include industries such as general merchandise/retail stores, leisure, and restaurants.[342] Within a month of the declaration of the pandemic, a little over 22 million jobs had been lost in the United States, the vast majority of them being jobs with low hourly wages.[343]

These early predictions made at the onset of the pandemic rang true, and in June 2021, the Congressional Research Service acknowledged the disparate economic impact for low-wage workers that resulted from the pandemic.[344] The report noted that "some studies from early in the pandemic suggest[ed] that low-wage workers in the leisure and hospitality sector and other services sectors experienced disproportionately large employment losses."[345] In particular, the "leisure and hospitality sector lost the largest number of jobs since January 2020, and persons last employed in this sector [had] consistently exhibited some of the highest unemployment rates throughout the pandemic."[346]

In September 2021, the Cornell Law School's Job Quality Index Team also affirmed that "Low Quality Job sectors" or low-wage jobs made up "the bulk of the net jobs lost during the pandemic" and that there had been an "extraordinary disruption in

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[340] *See* Gascon, *supra* note 14.

[341] *Second Statement From the U.S. Private Sector Job Quality Index ("JQI") Team on Vulnerabilities of Jobs to the COVID-19 Economic Shutdown*, MKT. INSIDER (Apr. 17, 2020, 9:00 AM), https://markets.businessinsider.com/news/stocks/second-statement-from-the-u-s-private-sector-job-quality-index-jqi-team-on-vulnerabilities-of-jobs-to-the-covid-19-economic-shutdown-1029102370 [https://perma.cc/WB8S-UQSN].

[342] *JQI August 2021*, *supra* note 17.

[343] MKT. INSIDER, *supra* note 341.

[344] *See* FALK ET AL., *supra* note 2, at 7.

[345] *Id.*

[346] *See* FALK ET AL., *supra* note 2.

the number and composition" of these jobs since the beginning of the pandemic.[347]

B. Impact of the Labor Shortage During the Pandemic on the Nation's Economic Recovery

The resulting labor shortage of low-wage workers, and workers in general, caused by the pandemic has held back the Nation's economic recovery.[348] "[E]conomists point to a complex, overlapping web of factors" to explain possibly why the latter portion of 2021 did not "mark the beginning of the end of the labor shortage."[349] One economist has opined that:

> The health crisis is still making it hard or dangerous for some people to work, while savings built up during the pandemic have made it easier for others to turn down jobs they do not want. Psychology may also play a role: Surveys suggest that the pandemic led many to rethink their priorities, while the glut of open jobs—more than 10 million in August [2021]—may be motivating some to hold out for a better offer. The net result is that, arguably for the first time in decades, workers up and down the income ladder have leverage. And they are using it to demand not just higher pay but also flexible hours, more generous benefits and better working conditions.[350]

Conversely, pre-pandemic workers did not possess this same high leveraging power that is currently being seen.[351]

1. Pre-pandemic: Low Bargaining Power of Employees

Prior to the pandemic, low-wage workers, in particular, were typically forced to accept lower pay, less flexible hours, and little to no benefits and were required to sign non-competes as a result of this very lack of leverage or bargaining power.[352]

In the Antitrust Law Section of the American Bar Association's comments to the 2020 FTC workshop,[353] the Section indicated

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[347] *See JQI August 2021*, *supra* note 17.
[348] *See* Casselman, *supra* note 19.
[349] *Id.*
[350] *Id.*
[351] *See id.*; *see also* Tsekova, *supra* note 21.
[352] *See* Henry, *supra* note 324, at 17.
[353] *See* Henry, *supra* note 324, at 1.

that "[c]urrent studies suggest that, in the vast majority of cases, employees have little or no bargaining power to accept, reject, or negotiate non-compete agreements."[354] These studies reflect that employees often do not even see these non-compete agreements before accepting employment:[355]

> [E]mployees often report that their employer presented them with a non-compete agreement only after they had accepted employment, and as a routine, non-negotiable part of the onboarding process. In one survey, nearly 70[%] of employees reported that their employer provided the non-compete agreement after they had accepted the job offer, and nearly half of them were presented with the non-compete only after starting work.[356]

Furthermore, research shows that most individuals presented with a non-compete agreement and asked to sign it will sign the agreement,[357] and only one in ten workers who are faced with signing a non-compete agreement actually seek legal counsel to review the agreement before executing it.[358]

Moreover, in the context of low-wage workers, studies advocating a ban or at least major restrictions on non-compete agreements identify one of the bases for such restrictions as low-wage workers generally being "less sophisticated regarding bargaining over or understanding their rights under non-compete clauses, and . . . less likely or able to hire an attorney [to] ensure their rights are protected."[359] This data presents an unfortunate reality, particularly in light of the fact that non-compete agreements can "forfeit an employee's bargaining power" and lead to an employee being paid lower wages.[360]

> This is because an employee who is bound by [a non-compete agreement] may have limited prospective employment opportunities and the agreement may effectively tie him or her to a current position for which the employee is overqualified. Having no good employment options in his or her field of expertise, an

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[354] *Id.* at 23.
[355] *Id.* at 41.
[356] *Id.*
[357] *See* Nunn & Marx, *supra* note 194.
[358] *Id.*
[359] *See* Henry, *supra* note 324, at 65.
[360] *See* Carosa, *supra* note 166, at D31.

> employee lacks the leverage necessary to negotiate better employment terms with the employer, such as a wage increase or a better benefit package.[361]

2. The Pandemic Era: Increased Bargaining Power of Employees

With recent job market changes beginning in 2021, however, where workers who generally work in low-wage or hourly jobs have seen an influx of job opportunities and employers have struggled with filling these positions, the bargaining power of low-wage workers is on the rise, particularly in their ability to negotiate for and be offered higher wages.[362] In the current labor market, there is a "huge reversal in power" where low-wage workers are seeing higher wages than they were pre-pandemic.[363]

> The only way that low-wage workers in the [United States] have any sort of leverage is if there are way more job openings than there are people who are searching. That's what's happening now, as various factors from health concerns to childcare needs keep low-wage workers from filling the nearly record-number of job openings in the economy. As a result, their wages are climbing.[364]

In October 2021, the lower 25% of earners in the United States experienced a 5.1% increase in their wages, according to a report by the Federal Reserve Bank of Atlanta.[365] According to the U.S. Department of Labor, workers in the leisure and hospitality industry, an industry, as previously discussed, impacted particularly hard by the pandemic,[366] have seen a 13% growth in wages.[367] This increase in wages is the highest level of growth across all industries.[368] The leisure and hospitality industry, as well as the retail sector, have also experienced the highest levels of job openings and employees quitting jobs since the millions of

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[361] *Id.*

[362] *See* Casselman, *supra* note 19.

[363] *See* Tsekova, *supra* note 21.

[364] *Id.*

[365] *Id.*

[366] *Id.* ("[L]eisure and hospitality lost nearly half—8.2 million—of its 16.9 million pre-pandemic jobs . . . ."); *see supra* Section VI.A.

[367] *See* Tsekova, *supra* note 21.

[368] *Id.*

furloughs and layoffs that were commonplace during the early days of the pandemic.[369] The increased number of job openings and employees quitting their jobs reflect a "sign of workers' confidence" with the reopening of the economy.[370]

CONCLUSION

With this surge of worker confidence and increased bargaining power, employers may see low-wage workers being less inclined or refusing to sign non-compete agreements as a condition of employment.[371] However, the federal government should not leave low-wage or hourly workers in a position where they face the risk of not receiving an employment offer because they resort to these measures.[372] The current state of affairs in the job market, resulting from the pandemic, thus presents an even greater reason and opportunity for the federal government to protect the rights of low-wage and hourly workers and institute a national ban on non-compete agreements, as these agreements will likely serve as another disincentive to workers returning back to the workforce and further hamper the recovery of the U.S. economy.[373]

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[369] *Id.*
[370] *Id.*
[371] *See supra* Section VI.B.2.
[372] *See supra* Part V.
[373] *See supra* Section VI.B.1.