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Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act

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The common law has never treated a post-employment noncompete agreement between employer and employee like an ordinary contract. Rather, a court will enforce a noncompete only if it is reasonably tailored in time, geography, and scope of business to further a legitimate employer interest. Suppressing competition is an understandable but not legitimate interest.

While the common-law approach works well enough for some occupations, it is problematic for both workers and employers in many cases. It is a challenge for workers who don't know about the noncompete until after starting work, for low-wage workers who are unlikely to have trade secrets or star power over customer relationships, and for workers who are uncertain whether the noncompete is enforceable. The vagueness and variation between jurisdictions is also challenging for employers trying to avoid litigation while writing an enforceable noncompete or hiring an experienced worker purportedly subject to a noncompete.

Adding to the complexity are related agreements such as nonsolicitation agreements, confidentiality agreements, payment-for-competition agreements, and training-reimbursement agreements. Some states subject the entire family of agreements to a single framework, but many states use different standards or are silent about these siblings.

In recent years, at least eighteen states have enacted statutes regulating noncompetes more or less comprehensively. This is leading to a cacophony of statutory commands around the hum of the common law. The frustration, complaints, variety, and confusion inspired the Uniform Law Commission in July 2021 to promulgate the Uniform Restrictive Employment Agreement Act to be pushed out to the states for adoption in the upcoming months and years.

The Uniform Restrictive Employment Agreement Act clarifies and codifies the common law by specifying four legitimate employer interests for a noncompete (sale of a business, creation of a business, trade secrets, and customer relationships) and articulating a narrowly tailored standard. The Act adds precision by giving an outer time limit of one year for most agreements. The Act makes four key moves beyond the common law: it prohibits as well as makes unenforceable improper agreements, with statutory damages; it sets maximum restrictive periods, usually one year; it bans noncompetes for low-wage workers; and it requires advance notice for an enforceable agreement.

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* This article builds on the William R. Stewart Lecture that I delivered at Indiana University Maurer School of Law on October 13, 2021. From 2018–2021 I served as the Reporter for the Uniform Law Commission Study Committee, and then Drafting Committee, on Covenants Not to Compete. The views expressed herein are my own and do not necessarily reflect those of the Uniform Law Commission or its commissioners. I am grateful to comments made on a prior draft by Russell Beck and Steven Willborn and by my colleagues at the Cornell Law School Internal Faculty Workshop.

This Article explains the motivation behind the Uniform Restrictive Employment Agreement Act and ways in which it codifies and clarifies the common law and ways it goes beyond.

INTRODUCTION

The common law has a long history of regulating employee noncompete agreements, stretching back to the Middle Ages and rules governing guilds and apprentices.[1] The law has never treated a noncompete, meaning a contract in which a worker agrees not to join or start a competing firm after leaving the employer, like an ordinary contract.[2] Three states—California, North Dakota, and Oklahoma—

1. The classic assessment comes from Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625 (1960). For good recent analyses, see Kenneth G. Dau-Schmidt, Xiaohan Sun & Phillip J. Jones, *The American Experience with Employee Noncompete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, COMPAR. LAB. L & POL'Y J. (forthcoming 2022); Rachel Arnow-Richman, *The New Enforcement Regime: Revisiting the Law of Employee Competition (and the Scholarship of Professor Charles Sullivan) with 2020 Vision*, 50 SETON HALL L. REV. 1223 (2020).

2. Judge Posner, in a well-known dissenting opinion, declared that, if writing on a blank slate, he would treat a noncompete like any other contract, determining its enforceability based on contract principles of offer, acceptance, and consideration and contract defenses like fraud, unconscionability, and duress. *See* Outsource Int'l, Inc. v. Barton, 192 F.3d 662, 670–71 (7th Cir. 1999) (Posner, C.J., dissenting). The additional reasonableness inquiry that makes noncompete law distinctive, thought Judge Posner, was an ancient relic arising in "a culture of poverty, restricted employment, and an exiguous social safety net . . . [that] has no basis in current American conditions" and should be abandoned. *Id.* at 669–70. Judge Posner recognized he was not writing on a blank slate, however, acknowledging that "[t]he English common law called such covenants 'restraints of trade' and refused to enforce them unless they were adjudged 'reasonable' in time and geographic scope." *Id.* at 669 (citing Mitchel V.

refuse to enforce a noncompete agreement in almost all situations. Most jurisdictions take an intermediate position, however, and enforce a noncompete if and only if it is reasonably tailored in time, geography, and scope of business to further a legitimate employer interest. Suppressing competition from a former employee is an understandable but not legitimate employer interest.

Noncompete law differs from the rest of employment law in a couple of intriguing ways. First, the plaintiff here is typically an employer and the defendant a worker, backward from most employment law. Second, and even more intriguing, noncompete law is not just about employer versus worker. A second employer or budding entrepreneur is also on the defendant's side. While employers want to retain their good workers by enforcing noncompete agreements, they also want to hire workers who have experience in the industry and may be subject to a noncompete. This puts employers on both sides of the debate on the extent to which noncompete agreements should be enforceable.

As a result, noncompete commentators and policymakers don't line up neatly as pro-worker or pro-employer, liberal or conservative. For example, while many worker advocates and the Obama[3] and Biden[4] administrations have urged greater restrictions on noncompete agreements, so too does a recent report from the American Enterprise Institute (AEI). This AEI report argues that noncompetes hinder worker mobility and reduce the overall dynamism of the economy and observes that "despite deep political divisions on many economic issues, there is growing bipartisan consensus on the benefits of reining in noncompetes."[5] The AEI report concludes that "[t]he challenge now is to evolve to a more coherent and comprehensive approach to reform that delivers stronger benefits to workers, entrepreneurs, and the broader economy."[6]

At least until recently, many thought the intermediate position of the common law works okay, especially when the agreements were limited to certain occupations. Everyone agrees (even in California, North Dakota, and Oklahoma) that a noncompete agreement connected with the sale of a business should be enforceable. Many thought reasonably narrow noncompetes were appropriate for a limited group of other employees such as CEOs and other top officers,[7] professionals like doctors

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Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711)). Thus, applying Illinois law, he would refuse to enforce the noncompete agreement. *See id.* at 671.

3. *See* WHITE HOUSE OFF. OF THE PRESS SEC'Y, STATE CALL TO ACTION ON NON-COMPETE AGREEMENTS (2016) (outlining best practices); WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATES RESPONSES (2016), https://obamawhitehouse.archives.gov/sites/default/files/non-competes_report_final2.pdf [https://perma.cc/Z7CE-E79T].

4. Exec. Order No. 14036, 86 Fed. Reg. 36,987, 36,991 (July 14, 2021) ("To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.").

5. JOHN W. LETTIERI, AM. ENTER. INST., A BETTER BARGAIN: HOW NONCOMPETE REFORM CAN BENEFIT WORKERS AND BOOST ECONOMIC DYNAMISM 2 (2020).

6. *Id.* at 11.

7. *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO*

and dentists, outside salespersons with significant customer relationships, and research engineers with trade secrets. Noncompetes help protect trade secrets and customer relationships and thus encourage the creation of new business methods and services.

Of course, being the common law, the exact formulation for a reasonable noncompete agreement is mushy—as is the very reasonableness standard. Some courts articulate a three-prong balancing test for enforceability: the interests of the employer, undue harm to the employee, and injury to the public.[8] That still seems mushy. The Restatement of Employment Law requires (1) a legitimate employer interest (and lists four examples) and (2) a reasonably tailored agreement in time, geography, and scope of business to serve that interest without more broadly restricting competition.[9]

More detailed issues arise in the common law as well. Can an employer enforce a noncompete agreement against a fired worker, as opposed to a worker who quit to join a rival? Do the rules apply (in the same way) to partners and independent contractors? Does a legitimate interest include the desire to keep an excellent, best, or uniquely skilled worker, perhaps one who became so good through the employer's on-the-job training and experience? May a court trim and enforce an unreasonably broad noncompete agreement?

Adding to the complexity are related agreements such as nonsolicitation agreements, confidentiality agreements, payment-for-competition agreements, and training-reimbursement agreements. Some states subject the entire family of agreements to a similar framework, but many states use different standards or are silent about these siblings.

Overall, the common law of noncompete agreements, while somewhat vague and fact-specific, seems coherent and appropriate enough for certain types of workers but has problems for many workers and employers. The common-law framework is challenging for workers who don't know about the noncompete until after starting work, for low-wage workers who are unlikely to have trade secrets or star power over customer relationships, and for workers who are uncertain whether the noncompete is enforceable. The vagueness and variation between jurisdictions are especially challenging for a multistate employer trying to write an enforceable

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Employment Contracts: What Do Top Executives Bargain For?, 63 WASH. & LEE L. REV. 231, 232, 254 (2006) (finding that about two-thirds of CEOs in the S&P 1500 have a do-not-compete clause); Norman D. Bishara, Kenneth J. Martin & Randall S. Thomas, *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 28–29, 33–34 (2015) (finding that 80% of CEO's in a sample of S&P 1500 firms had noncompete agreements and 62.4% of firms with primary location in California have noncompete for their CEO, compared to 84.0% in other states); Jonathan M. Barnett & Ted Sichelman, *The Case for Noncompetes*, 87 U. CHI. L. REV. 953, 980 (2020) (reporting on studies showing that 58–62% of firms headquartered in California have noncompetes in their executive employment contracts).

8. Blake, *supra* note 1, at 686–87 (1960) (noting that "almost never does a court proceed to consider possible injury to society as a separate matter," except when the restraint is used "to monopolize the business in a specific community").

9. *See* RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

noncompete or hire an experienced worker from a rival firm purportedly subject to a noncompete.

Recent decades have seen a seeming explosion in the prevalence of noncompetes in occupations where they are problematic, especially as they are pushed upon low-skill, low-wage employees.[10] Notorious cases that have hit the media include noncompetes for Jimmy John's sandwich artists,[11] Amazon warehouse packers, and dog walkers. It is not just anecdotes. Comprehensive surveys suggest that noncompetes are a bigger issue than was traditionally thought. A seminal survey conducted by Professor Evan Starr in 2014 revealed that nearly twenty percent of all workers have a noncompete agreement, and nearly forty percent of workers will encounter a noncompete agreement during their working career.[12] That survey was

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10. My hesitation on whether the prevalence of noncompetes has exploded for low-wage workers is intentional. Our first comprehensive data set comes only from 2014. As Russell Beck has helpfully noted in an open letter to the Federal Trade Commission, we have no longitudinal surveys of the prevalence of noncompetes, and case law reveals noncompetes were at least occasionally used for low-wage and blue-collar workers in the early 20th century (and even back to the medieval guilds). Letter from Russell Beck et al. to Zach Butterworth, Dir. of Priv. Sector Engagement, Exec. Off. of the President, and to the Fed. Trade Comm'n 15 (July 14, 2021) (citing J. & J.G. Wallach Laundry Sys., Inc. v. Fortcher, 191 N.Y.S. 409 (N.Y. Sup. Ct. 1921) (noncompete enforced against laundry delivery driver); Eureka Laundry Co. v. Long, 131 N.W. 412 (Wis. 1911) (noncompete enforced against laundry delivery driver); Simms v. Patterson, 46 So. 91 (Fla. 1908) (noncompete used for a "salesman and shipping clerk")), https://faircompetitionlaw.com/wp-content/uploads/2021/07/White-House-and-FTC-20210714-Joint-Submission-of-Trade-Secret-Lawyers-Beck-et-al.pdf [https://perma.cc/NKA9-CATD].

11. Jimmy John's had its sandwich makers sign the following agreement:

> Non-Competition Covenant. Employee covenants and agrees that, during his or her employment with Employer and for a period of two (2) years after . . . termination, . . . he or she will not have any direct or indirect interest in or perform services for . . . any business which derives more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and which is located within three (3) miles of . . . any such other JIMMY JOHN'S Sandwich Shop . . . .

Complaint filed by Emily Brunner at Ex. A, Brunner v. Jimmy John's Enterprises (N.D. Ill. Apr. 8, 2015) (No. 1:14-cv-05509); *see also* Dave Jamieson, *Jimmy John's 'Oppressive' Noncompete Agreement Survives Court Challenge*, HUFFPOST, https://www.huffpost.com/entry/jimmy-johns-noncompete-agreement_n_7042112 [https://perma.cc/KQ4R-M787] (Apr. 10, 2015). Suffering adverse publicity and several lawsuits, Jimmy John's agreed not to enforce the agreements. Daniel Wiessner, *Jimmy John's Settles Illinois Lawsuit over Non-compete Agreements*, REUTERS (Dec. 7, 2016, 1:55 PM), https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA [https://perma.cc/YL5T-35Y4].

12. J.J. Prescott, Norman D. Bishara & Evan Starr, *Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project*, 2016 MICH. ST. L. REV. 369, 461 (finding "about 18% of labor force participants are bound by noncompetition agreements"); Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the US Labor Force*, 64 J. L. & ECON. 53, 53 (2020) (reporting from same survey that "[a]pproximately 18 percent of

administered by a survey and data collection firm who recruited online respondents who were paid nominal amounts to respond,[13] and so the results can be questioned.[14] But other surveys confirm the basic finding that noncompetes are commonplace. Alexander Colvin surveyed employers and found that at least twenty-eight percent report using noncompetes.[15] A Cornell survey using state-of-the-art phone survey techniques likewise found that about twenty percent of workers report having a noncompete agreement.[16]

Noncompete agreements are common even in states that will not enforce them: the incidence of noncompetes in California and North Dakota, for example, is nineteen percent.[17] While the incidence of noncompetes increases with income, more hourly workers have noncompetes than do salaried workers because there are many more hourly workers in the workforce.

Policymakers have a growing understanding of the benefits and harms of noncompetes. The positive benefits are that a noncompete allows employers to give their employees greater access to trade secrets and to customers and thereby encourages employers to invest in employee training and in developing commercially valuable information. Professor Blake sixty years ago recognized that noncompetes could lead to greater employee training.[18] Russell Beck emphasizes that trade-secret theft by ex-employees is a billions of dollars per year problem and that noncompetes help reduce this theft.[19] More recent studies suggest that some

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labor force participants are bound by noncompetes, with 38 percent having agreed to at least one in the past").

13. *See* Prescott, Bishara & Starr, *supra* note 12, at 404–05.

14. *See id.* at 402–03 (discussing the relative benefits and costs of online surveys and random-digit dialing, mail-in, or in-person surveys).

15. ALEXANDER J.S. COLVIN & HEIDI SHIERHOLZ, ECON. POL'Y INST., NONCOMPETE AGREEMENTS: UBIQUITOUS, HARMFUL TO WAGES AND TO COMPETITION, AND PART OF A GROWING TREND OF EMPLOYERS REQUIRING WORKERS TO SIGN AWAY THEIR RIGHTS (2019).

16. *See Cornell National Social Survey (CNSS), 2020*, SURV. RSCH. INST., CORNELL UNIV. (Mar. 19, 2021), https://doi.org/10.6077/9wdg-cf53 [https://perma.cc/YWT7-H753].

17. Prescott, Bishara & Starr, *supra* note 12, at 461 ("On average . . . about 18% of labor force participants are bound by noncompetition agreements. Non-enforcing states like California and North Dakota . . . have an estimated noncompete incidence of approximately 19.3%.").

18. Blake, *supra* note 1, at 652 ("The cost of the training represents an investment by the employer in the employee—one which he hopes to recapture, with appropriate return, from the enhanced productivity of the employee's future services. However, the employer cannot be sure that the employee will stay on so that the investment will be rewarded . . . . Thus the employer may feel justified in seeking to make it more difficult for the employee to leave—particularly to go into competitive employment—by any effective device at hand. A covenant against postemployment competition may have the desired effect. Furthermore, a plausible public-policy argument is available: Unless some enforceable commitment or effective deterrent is possible, employers will not be justified in making the optimum outlay on employee-training programs . . . .").

19. Beck, *supra* note 10, at 12.

groups of workers, such as CEOs[20] and physicians,[21] can benefit from enforceable noncompetes.

The downside is that noncompetes limit worker mobility and the ability for the labor market to place workers where they are most valuable. The growing prevalence of noncompetes comes at a time when worker mobility and entrepreneurial activity are declining, perhaps dangerously so. The American self-conception as a country of frequent internal migration is becoming a myth. One-half of all adults born in the United States live within fifty miles of their birthplace, a far higher figure than forty years ago.[22] A similar myth-buster is the fact of declining entrepreneurial activity in the United States over the past forty years as measured by the proportion of firms that are new.[23] Noncompetes can contribute to declining worker mobility and entrepreneurship.[24]

Some scholars suggest that a complete ban on noncompetes would be the best policy. They point to the spectacular growth and vitality of the Silicon Valley in California and suggest this growth came in part because California does not enforce noncompete agreements. This enables knowledge spillovers as workers swirl among jobs.[25]

Most states, however, have rejected a total ban on the theory that enforcing some noncompetes is net beneficial to society even while unreasonable noncompetes are net harmful. The question then becomes whether the good and bad noncompetes can

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20. *See* Omesh Kini, Ryan Williams & Sirui Yin, *CEO Non-Compete Agreements, Job Risk, and Compensation*, 34 REV. FIN. STUD. 4701, 4701 (2020) (finding that total compensation and incentive pay are higher if CEOs have more enforceable noncompetes).

21. *See* Kurt Lavetti, Carol Simon & William D. White, *The Impacts of Restricting Mobility of Skilled Service Workers: Evidence from Physicians*, 55 J. HUM. RES. 1025, 1025 (2020) (finding that NCAs increase physician compensation by allowing practices to "allocate clients to new physicians through intrafirm referrals, reducing a form of investment holdup").

22. *See, e.g.*, Mike Zabek, *Local Ties in Spatial Equilibrium* 7 (Bd. of Governors of the Fed. Reserve Sys., Finance & Economics Discussion Series 2019-080, 2019) ("[H]alf of U.S. born adults live within 50 miles of their birth place."); Patrick Coate & Kyle Mangum, *Fast Locations and Slowing Mobility* 2 (Fed. Reserve Bank of Phila., Working Paper 19–49, revised Apr. 2021) ("Internal migration rates in the U.S. have steadily trended downward in recent decades . . . [and] [w]hile the general notion that 'people are moving less these days' has entered the Zeitgeist in both the academic and popular social sciences, the causes of the decline remain poorly understood . . . .").

23. *See* Leigh Buchanan, *American Entrepreneurship is Actually Vanishing. Here's Why*, INC. (May 2015), https://www.inc.com/magazine/201505/leigh-buchanan/the-vanishing-startups-in-decline.html [https://perma.cc/T5JH-2T79]; CONG. BUDGET OFF., FEDERAL POLICIES IN RESPONSE TO DECLINING ENTREPRENEURSHIP 1–2 (2020).

24. Evan Starr, Natarajan Balasubramanian & Mariko Sakakibara, *Screening Spinouts? How Noncompete Enforceability Affects the Creation, Growth, and Survival of New Firms*, 64 MGMT. SCI. 552, 567–69 (2018).

25. Classic contributions to this literature include ALAN HYDE, WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET (2003); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999); ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING (2013).

be identified, and who should do the identifying. Usually, our market economy leaves the decision of whether a contractual arrangement is net beneficial to the parties themselves. But as already noted, no jurisdiction takes this liberty-of-contract approach with noncompetes.

Noncompete agreements come with an externality,[26] which is the basic reason the law won't enforce them like any other contract. It may be that an economy is more productive overall if noncompete agreements are unenforceable (at least for some classes of workers and some types of agreements), so that employers and workers are better off overall without noncompete agreements. Indeed, an individual firm may unilaterally reject the use of noncompetes by deciding that its own costs exceed its own benefits. Microsoft, for example, has recently announced it will no longer use noncompetes,[27] although in part Microsoft was reacting to recent statutory changes in Washington state. Still, a general practice against noncompetes is unlikely to happen through individual freedom of contract, even if overall that is the optimal policy. The best situation for any particular employer (and its employees) may be for every other firm to renounce noncompetes but for it to bind its employees with noncompetes. That way, the maverick employer can hire experienced workers from rivals while ensuring its own employees will not run off with trade secrets or customers to rivals, sharing the gain with its employees through compensating wages. It may take a law banning noncompete agreements, rather than individual assessment by private parties of their costs and benefits, to prevent their (over)use.

Reacting to the growing concerns, at least eighteen states in the last five years have enacted statutes regulating noncompetes in some fashion or other, and many other states have introduced bills. At the federal level, Congress and the Federal Trade Commission are muttering about action. This creates a cacophony of statutory commands around the hum of the common law.

The frustration, complaints, variety, and confusion inspired the Uniform Law Commission in July 2021 to promulgate a Uniform Restrictive Employment Agreement Act with the hope that a significant number of states will adopt the act over the next few years.

With this introduction, this Article now describes the process of the Uniform Law Commission and the major policy choices made in drafting the Uniform Restrictive Employment Agreement Act. In part, the new act codifies and clarifies existing common-law doctrine, while in a few specific areas deviates from the common law. This interaction between common law and statutory change will be the unifying theme of our discussion.

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26. *See* Evan Starr, Justin Frake & Rajshree Agarwal, *Mobility Constraint Externalities*, 29 ORG. SCI. 961, 961, 965–71 (2018) (theorizing that noncompetes generate externalities through labor-market frictions and finding that, in industries in states with "higher incidence and enforceability of noncompetes, workers—including those unconstrained by noncompetes—receive relatively fewer job offers, have reduced mobility, and experience lower wages").

27. Lauren Berg, *Microsoft Says It Won't Enforce US Workers' Noncompetes*, LAW360 (June 8, 2022, 10:42 PM), https://www.law360.com/articles/1501119/microsoft-says-it-won-t-enforce-us-workers-noncompetes [https://perma.cc/35JG-VV8V].

I. THE ULC PROCESS

A. The Uniform Law Commission

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws, was founded in 1892.[28] It is a non-profit, unincorporated association funded by the states.[29] Each state (plus the District of Columbia, Puerto Rico, and the Virgin Islands) has at least two commissioners, who must be members of the bar,[30] and in most states are appointed by the governor. Each jurisdiction gets one vote. Once the Commission officially adopts a Uniform Act, the commissioners attempt to persuade their individual state legislatures to enact it.[31] The Commission itself, however, has only its bully pulpit and reputation as a thoughtful and experienced drafter to push for enactments. It has no formal power over state legislatures.[32]

The ULC has promulgated more than 130 uniform laws over the years. Among the most prominent are the Uniform Commercial Code (a joint project with the American Law Institute), the Uniform Probate Code, and a suite of acts dealing with corporate organization.[33] Closer to the current project is the highly successful Uniform Trade Secrets Act, adopted by forty-nine states.[34]

The self-proclaimed purpose of the ULC is to "promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable" by "provid[ing] states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law."[35]

The ULC walks a tightrope in promoting uniformity. When a uniform nationwide policy is essential, a federal statute enacted by Congress is the most obvious way to obtain it. When uniformity is of limited importance, by contrast, each state can be its own policymaking laboratory. This vision of a federal system as containing fifty separate laboratories exploring appropriate public policy was romanticized by

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28. *About Us*, UNIF. L. COMM'N, https://uniformlaws.org/aboutulc/overview [https://perma.cc/F6L3-CPG9].

29. *Id.*

30. *Id.*

31. *Id.* (explaining the commissioners "work toward enactment of ULC acts in their home jurisdictions").

32. *Id.* ("It must be emphasized that the ULC can only propose—no uniform law is effective until a state legislature adopts it.").

33. *See, e.g.*, UNIF. P'SHIP ACT (UNIF. L. COMM'N 2006); UNIF. LTD. P'SHIP ACT (UNIF. L. COMM'N 2001); UNIF. LTD. LIAB. CO. ACT (UNIF. L. COMM'N 2006); UNIF. LTD. COOP. ASS'N ACT (UNIF. L. COMM'N 2007); UNIF. UNINCORPORATED NONPROFIT ASS'N ACT (UNIF. L. COMM'N 2008).

34. *See* UNIF. TRADE SECRETS ACT WITH 1985 AMENDS. (UNIF. L. COMM'N 1985).

35. *About Us*, UNIF. L. COMM'N, https://uniformlaws.org/aboutulc/overview [https://perma.cc/F6L3-CPG9].

Justice Brandeis[36] and is sometimes applauded by progressives[37] and conservatives.[38] A fear of such a system is that states will race to the bottom as competition forces states toward a pathological, suboptimal uniformity.[39]

A ULC statute works best in intermediate situations where uniformity is important but not essential. When the ULC promulgates a uniform act, it creates an impetus for enacting states to proceed in parallel fashion. The uniformity is not as rigid, however, as with a single federal statute. The ability of each state legislature to tweak a uniform act before adopting it provides some useful flexibility, and indeed the need for each state separately to adopt the statute creates a check that the chosen policies have widespread consensus. The ULC tends to operate in areas that traditionally are the province of the states rather than the federal government, and the ULC can help preserve state autonomy while creating common policies when needed. As the ULC declares, its "work supports the federal system [by] seek[ing] to maintain an appropriate balance between federal and state law" and "[by] facilitat[ing] social and economic relations with rules that are consistent from state to state."[40]

An additional role for the ULC is to provide drafting economies of scale. When many states have an interest in a topic, one approach is to have each one separately take a crack at it. But this is a challenge and sometimes wastefully duplicative, especially when the statute will be complex or technical. The ULC has the resources, procedures, and experience to draft a technically accomplished law. Each state legislature can tinker with the proposed act, but the ULC provides a good blueprint.

Noncompete law nicely fits these criteria for a uniform act. First, it is a traditional area of state rather than federal law. Second, greater uniformity would be highly desirable, especially for a multistate employer desiring consistent human-resources policies for its workforce and for national advocacy groups wanting to educate workers on their rights (the ignorance of workers about noncompete law being well documented). Third, it is acceptable to have some variation in laws, as is

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36. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

37. *See* Ralph Nader, *State Legislatures as "Laboratories of Democracy"*, COMMON DREAMS (May 31, 2004), https://www.commondreams.org/views/2004/05/31/state-legislatures-laboratories-democracy [https://perma.cc/KG44-PM5P].

38. *See* MICHAEL S. GREVE, AM. ENTER. INST., THE FEDERALIST OUTLOOK, LABORATORIES OF DEMOCRACY: ANATOMY OF A METAPHOR (2001) (applauding Brandeis's metaphor of multiple laboratories but criticizing Brandeis's view of "state governments as a vanguard for the national administrative state").

39. *See* Timothy P. Glynn, *Interjurisdictional Competition in Enforcing Noncompetition Agreements: Regulatory Risk Management and the Race to the Bottom*, 65 WASH. & LEE L. REV. 1381 (2008) (warning that choice-of-law provisions can lead firms to choose noncompete law of states most favorable to employers). For a thoughtful, skeptical assessment of the race to the bottom in labor law generally, see Steven L. Willborn, *Labor Law and the Race to the Bottom*, 65 MERCER L. REV. 369, 429 (2014) (concluding that "empirical support for the [race-to-the-bottom] claim is quite weak, and . . . implies a view of labor regulation that is outside the academic mainstream—that labor regulation always imposes net costs").

40. UNIF. L. COMM'N, ANNUAL REPORT 2020/2021 (2021).

contemplated in the ULC process, rather than have the complete uniformity of a federal statute. Indeed, at several points this uniform act invites some variation by states. The threshold amount for a low-wage worker differs by state, and states are invited to choose a multiple of the state mean wage if they wish; the act invites a couple of options on how a court can respond to an overbroad agreement, and the act invites states to vary the level of an appropriate penalty. Finally, if immodestly, the hope is that the act provides good legal craftsmanship.

B. Process of the Uniform Restrictive Employment Agreement Act

In 2018, the ULC created a Study Committee on Covenants Not to Compete to decide whether to recommend that the ULC draft a statute on the subject.[41] Professor Keith Rowley, Commissioner from Nevada, was named chair,[42] and this author was named the reporter. About ten commissioners were on the committee, as well as several observers. Later in the process, Professor Steve Willborn, Commissioner from Nebraska, was added as co-chair.[43] The Study Committee had phone meetings in 2018 and 2019 and ultimately issued a report recommending the formation of a drafting committee.[44]

A Drafting Committee was subsequently formed in the summer of 2020 with Richard Cassidy, Commissioner from Vermont, as Chair and Clay Walker, Commissioner from South Carolina, as Vice Chair.[45] This author was again appointed as reporter. Representatives from worker and employer groups and the academy were invited as observers. As the COVID-19 pandemic was rampant, the committee held meetings via Zoom beginning in November 2020, initially biweekly and later weekly.

The Drafting Committee did not work from a blank slate. The range of recent statutes provided many templates and illustrations of policy choices. In many cases, the reporter would draft certain sections by adapting or synthesizing language from various statutes. The draft would be presented at the weekly meeting, undergo a critique, and then be revised for the next meeting. Ultimately, a consensus draft came into being.

The Drafting Committee submitted its draft to the Executive Committee in May 2021 (with some prior consultation as well) for review and passage on to the ULC membership at its annual meeting in July 2021. The Executive Committee waived the usual two-annual-meeting reading rule because a flurry of legislative activity suggested that delay would make the project less useful for legislatures who might currently be considering noncompete legislation. The membership approved the Uniform Act by a vote of fifty-to-one (Wyoming dissenting). After technical

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41. UNIF. L. COMM'N, MINUTES: ANNUAL MEETING OF THE EXECUTIVE COMMITTEE (2018).

42. *See Elected Member: Professor Keith A. Rowley*, AM. L. INST., https://www.ali.org/members/member/321991/ [https://perma.cc/C3R6-JAYP].

43. *See* UNIF. L. COMM'N, STUDY COMMITTEE ON COVENANTS NOT TO COMPETE, FINAL REPORT AND RECOMMENDATION TO SCOPE & PROGRAM COMMITTEE (2020).

44. *See id.*

45. *See* UNIF. L. COMM'N, COVENANTS NOT TO COMPETE ACT, DRAFTING COMMITTEE VIDEO CONFERENCE (May 5, 2021).

consideration by the Style Committee, the Act was promulgated on the ULC website in December 2021.[46]

As of June 2022, three state legislatures (Oklahoma, Vermont, and West Virginia) have formally introduced the Act,[47] with several other legislatures considering it in committee. The Colorado legislature, which had in the last few years enacted several noncompete statutes, used several sections of the Uniform Act in its revised statute adopted in June 2022, although Colorado did not adopt the Uniform Act in its entirety.[48]

II. SUMMARY OF THE UNIFORM RESTRICTIVE EMPLOYMENT AGREEMENT ACT

Here, I give a bullet point sketch of the Uniform Act and then discuss the coverage or scope of the Act in a bit more detail. I won't explain the policy choices behind every section. That effort appears in the official comments that accompany the Act, available on the ULC website.[49] Rather, subsequent sections will highlight ways in which the Uniform Act follows and clarifies the common law and ways in which it goes beyond the common law.

A. Bullet Point Sketch of the Uniform Restrictive Employment Agreement Act

The Uniform Employment Agreement Act covers any agreement between an employer and worker that "prohibits, limits, or sets a condition on" working after the relationship ends.[50] This includes the entire family of restrictive agreements, including noncompetes, nonsolicitation agreements, no-business agreements, no-recruit agreements, confidentiality agreements, payment-for-competition agreements, and training-reimbursement agreements. These agreements are "prohibited and unenforceable"[51] unless:

- *High-Wage*: The employer pays the worker at or above the state's annual mean wage (for all but confidentiality and training-reimbursement agreements);

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46. *See* Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act* (July 2021, 10:55 AM), https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer [https://perma.cc/HGK6-PF59].

47. *See Restrictive Employment Agreement Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2 [https://perma.cc/6V4S-MH6U], reporting on H.B. 3435 (Okla. 2021) (sponsored by Osburn); H. 667 (Vt. 2021) (sponsored by Jerome); S.B. 453 (W. Va. 2022) (sponsored by Woodrum).

48. *See* H.B. 22-1317, 73rd Gen. Assemb., Reg. Sess. (Colo. 2022).

49. *See Restrictive Employment Agreement Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2 [https://perma.cc/RSW6-KYQY].

50. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(11) (UNIF. L. COMM'N 2021).

51. *Id.* § 2 cmt.

- *Notice*: The employer provides notice of the restraint at least fourteen days before the worker accepts the job;
- *Reasonableness:* The restraint is reasonable;
- For a *noncompete*, the agreement
    - protects one of four legitimate employer interests (sale of a business, creation of a business, trade secret, or customer relationship),
    - is narrowly tailored in time, geography, and scope to protect the interest, and
    - restricts competition not longer than
        - one year (when protecting a trade secret or customer relationship), or
        - five years (when protecting the sale or creation of a business);
- For a *confidentiality agreement*, it allows the worker to use information that
    - arises from the worker's general training, knowledge, skill, or experience,
    - is readily ascertainable to the relevant public, or
    - is irrelevant to the employer's business;
- For a *no-business agreement*, it
    - applies only to clients with whom the worker has worked personally, and
    - restricts business not longer than six months;
- For a *nonsolicitation agreement*, it
    - applies only to clients with whom the worker has worked personally, and
    - lasts not longer than a year;
- For a *non-recruit agreement*, it
    - applies only to another worker with whom the worker personally worked, and
    - lasts not longer than six months;
- For a *payment-of-competition agreement*, it
    - imposes a financial consequence no greater than the actual competitive harm to the employer, and
    - lasts not longer than a year;
- For a *training-repayment agreement*, it
    - requires repayment only of the cost of special training, as distinct from general on-the-job training,
    - lasts not longer than two years after the special training is completed, and
    - prorates the repayment for work done after the special training is completed.
- *Statutory damages*: The Act establishes statutory damages of $5000 per worker per agreement for an employer who knows or reasonably should know the agreement is prohibited by the Act and allows for an action by the state attorney general or a private right of action with attorney's fees if successful.
- *Choice of Law and Forum*: A choice-of-law provision must require that the dispute be governed by the law of the jurisdiction where the worker primarily works for the employer, and a choice-of-venue provision must

require that a dispute be decided in a jurisdiction where the worker primarily works or resides.

B. Coverage Issues

An obvious first question—but without an obvious answer—is what the Act should cover. Several choices had to be made.

1. Cover the Entire Family, Not Just Noncompetes

A noncompete agreement bans a worker from all competitive work (of a certain type in a certain location for a certain time). A noncompete is the greatest restriction and garners the most attention from policymakers. But other agreements also deter a worker from fully competing postemployment without preventing all competitive work.[52] Should the Act limit itself to regulating noncompete agreements, as several state statutes have done, or should it regulate the broader family of restrictive employment agreements, which includes nonsolicitation agreements and confidentiality agreements?

The Committee favored the broader approach of regulating all restrictive agreements because the policy concerns are similar. Regulating noncompetes appropriately but leaving nonsolicitation and confidentiality agreements and the others to the common law (which is even more sparse and erratic than the common law of noncompetes) would leave the job unfinished. Employers might react by stretching these other agreements, and overuse of these other agreements would still impair worker mobility and the efficiency of labor markets.

This led to debate about the best name for the Act. The original title was "Uniform Covenants Not to Compete Act." Most lawyers specializing in this field would recognize the term, but they might think the Act only covered noncompetes and ignored nonsolicitation agreements, confidentiality agreements, and the other restrictive agreements. Some committee members also thought the term "covenants" was old-fashioned and preferred the term "agreements." Some thought "Post-Employment" should be included in the title to emphasize that the Act covered agreements dealing with post-work activity and did not cover anything about the relationship between the worker and original employer. The ULC has a policy favoring shorter titles, ideally fewer than six words, and having the first word reflect the subject matter if possible.[53]

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52. In particular, the family of restrictive employment agreements includes the following: a *nonsolicitation agreement*, which prohibits a former worker after leaving the first employer from soliciting the employer's clients; a *no-business agreement*, which prevents a former worker from doing any work for the employer's clients; a *no-recruit agreement*, which prohibits a former worker from hiring or recruiting a former co-worker; a *confidentiality agreement*, which prevents a former worker from using or disclosing information; a *payment-for-competition agreement*, which imposes an adverse financial consequence on a former worker for working; and a *training-reimbursement agreement*, which requires a former worker to pay for training after leaving the first employer.

53. UNIF. L. COMM'N, DRAFTING RULES AND STYLE MANUAL Rule 102(d) (2021).

The final winner was "Uniform Restrictive Employment Agreement Act." The ULC also has a policy against referring to Acts by their acronyms[54] because acronyms quickly become confusing or even off-putting jargon to non-specialists. In this case, the decision to de-emphasize the acronym was especially wise.

Having decided to cover all restrictive employment agreements rather than just covenants not to compete—and having the title reflect that decision—a remaining question was what exactly is a restrictive employment agreement? As defined by the Act, a restrictive agreement limits what a worker can do after the work relationship ends with the first (or contracting) employer.[55] The Act says nothing about contracts that regulate what a worker can or cannot do during the work relationship. Thus, the Act says nothing about whether an employer can restrict moonlighting[56] or disclosing things that happen while the employer is working. Indeed, to emphasize this point, some favored the term "post-employment restrictive agreement" in the Act's title as being more accurate, following the lead of the Utah statute.[57]

While the Act limits its coverage to contracts regulating post-employment activity, the Act does not cover every post-employment restriction that limits or directs a worker's actions. The Act regulates only agreements that affect whether or how a worker can work elsewhere. For example, consider an agreement, perhaps from the company handbook, that requires the employee to return the company computer within one week after the work relationship ends.[58] This is not a restrictive employment agreement because the agreement is not one that "prohibits, limits, or sets a condition on working other than for the employer after the work relationship ends . . . ."[59]

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54. *See id.*

55. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(11) (UNIF. L. COMM'N 2021).

56. The Restatement of Employment Law, in its analysis of the duty of loyalty, declares that rank-and-file employees can generally moonlight. *See* RESTATEMENT OF EMP. L. § 8.04 cmt. b (AM. L. INST. 2015) ("employees not in a position of trust and confidence with the first employer . . . may work for a competitor as long as the work is not done during time committed to the first employer, does not involve the use or disclosure of the first employer's trade secrets, and does not injure the employer to any greater extent than would any other individual working for the competitor. An employer wishing to restrict moonlighting or similar forms of competition by such employees must, in the typical case, obtain an enforceable agreement . . . or promulgate a policy against such 'moonlighting.'").

57. UTAH CODE ANN. § 34-51-101 (West 1953) ("This chapter is known as the 'Post-Employment Restrictions Act.'").

58. During the annual meeting discussion, a commissioner posited this hypothetical employment agreement and asked whether the Act purported to regulate it. An earlier draft definition of "restrictive employment agreement" suggested this might be covered, so the wording was changed to clarify that such an agreement is not covered by the Act.

59. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(11) (UNIF. L. COMM'N 2021) ("'Restrictive employment agreement' means an agreement or part of another agreement between an employer and worker that prohibits, limits, or sets a condition on working other than for the employer after the work relationship ends or a sale of a business is consummated. The term includes a confidentiality agreement, no-business agreement, noncompete agreement, nonsolicitation agreement, no-recruit agreement, payment-for-competition agreement, and training-repayment agreement.").

Additionally, the Act covers only an agreement between an employer and worker, not between employers. Thus, a no-poach agreement whereby employers agree not to hire each other's workers is not covered by the Act. It is a cousin but not in the immediate family of restrictive employment agreements between an employer and worker. No-poach agreements are increasingly scrutinized under federal and state antitrust laws but are outside this Act.[60]

2. Cover All Workers, Not Just Employees

In many areas of employment law, the classification between independent contractor and employee is hotly contested. Witness all the Uber litigation[61] and commentary.[62] But in noncompete doctrine, the application to independent contractors has rarely been examined extensively. Most common law restrictive-agreement cases deal with employees. Most noncompete statutes refer to employees: some statutes make no reference to independent contractors or other workers; other statutes explicitly exclude them from coverage. A few statutes include independent contractors, sometimes in an identical fashion as an employee and sometimes distinctively.[63]

The Uniform Act sidesteps the thorny issue of who is an employee by covering all workers (i.e., anyone who provides a service as distinct from selling a product).[64] Similarly, an investor is not covered by the Act because the investor provides money rather than services.[65] Somewhat less cleanly, the Act declares that a member of a board of directors is not a worker.[66] Thus, the Act gives no opinion on the enforceability of an agreement between a company and a board member that the member will not serve elsewhere after the relationship ends.

3. Preempt Common Law of Noncompetes, but Keep General Common Law and Compatible Statutes

Another scope question is what to do with common law and existing state statutes that regulate restrictive agreements. This is tricky because, in part, the Act codifies

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60. *See, e.g.*, Dan Papscun, *No-Poach Agreements Are Per Se Illegal, DOJ Says in Trucker Case*, https://news.bloomberglaw.com/antitrust/no-poach-agreements-are-per-se-illegal-doj-says-in-trucker-case [https://perma.cc/BLT8-2AVV] (July 18, 2022, 4:09 PM) ("Federal antitrust regulators—the DOJ's Antitrust Division and the Federal Trade Commission—have assailed no-poach agreements as illegal in recent years. Since 2016, they've said the agreements are prosecutable under criminal law.").

61. *E.g.*, O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

62. *See, e.g.*, Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors*?, 68 MERCER L. REV. 461 (2017); Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623 (2017).

63. Washington state, for example, declares unenforceable a noncompete with an employee paid less than $100,000 per year (indexed) or with an independent contractor paid less than $250,000 per year (indexed). WASH. REV. CODE §§ 49.62.020, 49.62.030 (2019).

64. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 2(20) (UNIF. L. COMM'N 2021).

65. *Id.* § 2(20)(B)(iii).

66. *Id.* § 2(20)(B)(i).

the existing common law of noncompetes, but in some respects, the Act alters existing law. The formal solution was to declare that the Act supersedes the common law of noncompetes but not the rest of contract or tort law. In particular, the Act keeps basic contract law on the validity of an agreement in terms of offer, acceptance, and consideration, as well as general contract defenses. Subsection 3(b) declares that the Act supersedes specific common-law doctrine regulating a restrictive employment agreement but does not alter more general common law.[67] Parts of the act clearly alter common-law doctrine on restrictive employment agreements, and the act takes priority. For example, Section 5(1) flatly prohibits noncompete agreements with low-wage workers.[68] The common law in practice rarely enforces a noncompete against a low-wage worker. For example, the infamous Jimmy John's noncompetes are probably unenforceable under the common law because the employer has no legitimate interest.[69] But the common law has no per se prohibition on a noncompete for a low-wage worker, and the lack of clarity itself creates a chilling effect on worker mobility. Other parts of the act codify, build upon, or clarify common-law doctrine. For example, subsection 8(2) requires a noncompete to be narrowly tailored in duration, geographical area, and scope of actual competition.[70] This requirement that noncompetes be narrowly tailored is a familiar part of the common law of noncompetes (although many states articulate the required tailoring as "reasonable" rather than "narrow").[71] While a court decision on whether a

67. *Id.* § 3(b) ("This [act] supersedes common law only to the extent that it applies to a restrictive employment agreement but otherwise does not affect principles of law and equity consistent with this [act].").

68. *Id.* § 5 ("A restrictive employment agreement, other than a confidentiality agreement or training-repayment agreement, is: (1) prohibited and unenforceable if, when the worker signs the agreement, the worker has a stated rate of pay less than the annual mean wage of employees in this state as determined by the [State Department of Labor] [United States Department of Labor, Bureau of Labor Statistics].").

69. I am unaware of a court judgment against Jimmy John's on this issue, but the Illinois Attorney General, among others, has sued Jimmy John's, alleging that its noncompete agreements were "unenforceable under Illinois law;" that there was "no legitimate business interest that can justify the use of a non-competition agreement;" and that "[t]he non-competition agreements are not narrowly tailored." *See* Complaint for Declaratory Judgment, Injunctive Relief, and Other Equitable Relief ¶¶ 52, 54, 57, People v. Jimmy John's Enterprises, LLC., No. 2016Ch07746 (Ill. Cir. Ct. June 8, 2016). The case settled in December 2016, in which Jimmy John's agreed not to enforce its noncompetes and to notify current and former employees that the agreements were not enforceable. *See* Daniel Wiessner, *Jimmy Johns Settles Illinois Lawsuit over Non-compete Agreements*, REUTERS (Dec. 7, 2016, 1:55 PM), https://www.reuters.com/article/us-jimmyjohns-settlement/jimmy-johns-settles-illinois-lawsuit-over-non-compete-agreements-idUSKBN13W2JA [https://perma.cc/JDZ6-26PX].

70. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8 (UNIF. L. COMM'N 2021) ("A noncompete agreement is prohibited and unenforceable unless . . . (2) when the worker signs the agreement and through the time of enforcement, the agreement is narrowly tailored in duration, geographical area, and scope of actual competition to protect an interest under paragraph (1), and the interest cannot be protected adequately by another restrictive employment agreement.").

71. *See* RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015) (a restrictive covenant is enforceable "only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer").

particular noncompete is narrowly tailored rendered prior to the act is no longer binding precedent after the effective date of the Act, a court construing the Act's "narrowly tailored" requirement can consider the persuasiveness of the prior case to the extent the case is consistent with the act.

III. CODIFYING OR MODIFYING THE COMMON LAW

Laws vary in their precision. Some laws establish a precise rule (e.g., the restrictive period cannot last more than one year); others present a more general standard (e.g., the restrictive period cannot be unreasonably long). Typically, the common law emphasizes standards while a statute emphasizes rules. But a statute can also use a standard. Moreover, the common law strives to become more precise or rule-like over time. This is indeed the famous prediction of Justice Holmes in *The Common Law*—as the common law gained experience, it would become more rule-like.[72]

Rules and standards both have their appropriate place in jurisprudence. Among the advantages of a rule is that it is easier to predict in advance how a court will apply it. Among the disadvantages is that a rule may treat unlike things alike. I will not weigh in on the voluminous literature on rules versus standards,[73] but rather will apply that framework in explaining some of the choices of the Uniform Act.[74]

In this Part, I first discuss areas in which the Uniform Act largely follows the common law. I then discuss a few areas where the Uniform Act clearly goes beyond the common law.

A. Codifying the Common Law

For the most part, the Uniform Restrictive Employment Agreement Act clarifies and codifies the common law rather than changes it. Like the common law, the Act upholds some restrictive agreements and prohibits others. The Act does not change the law for many highly compensated workers with access to trade secrets or substantial customer relationships.

Reasonableness: Perhaps the Act's most distinctive continuation of the common law is its embrace of the reasonableness standard. Section 7 prohibits any restrictive agreement unless it is reasonable.[75] What could sound more like the common law than this statutory command to be reasonable?

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72. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 111–13, 123–26 (1881).

73. I hesitate to single out a single article here, but I will say I have long been influenced by Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

74. In using the frame of specificity versus generality in commenting on the Uniform Restrictive Employment Agreement Act, I am inspired by an analogous article by my colleague Bob Hillman. Bob was the Reporter of the ALI Principles of the Law of Software Contracts, and in an insightful article used the frame of general versus specialized contract law to analyze various features of that project. *See* Robert A. Hillman, *Contract Law in Context: The Case of Software Contracts*, 45 WAKE FOREST L. REV. 669 (2010).

75. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 7 (UNIF. L. COMM'N 2021) ("A restrictive employment agreement is prohibited and unenforceable unless it is reasonable.").

Now, neither the common law nor the Uniform Act uses "reasonableness" as the primary test for a valid restrictive agreement. The common law's test for a valid noncompete is that the employer must have a legitimate interest and the agreement be reasonably tailored to that interest.[76] The Uniform Act codifies this result and lists four legitimate interests that can justify a noncompete and requires that the agreement be "narrowly tailored" to protect those interests.[77]

A fair question would be whether this reasonableness requirement adds anything to the Uniform Act. It does, in at least two ways. First, much of the Uniform Act gives precise outer boundaries to permissible restrictions: no more than a year, no less than the annual mean wage, and only customers with whom the worker worked personally. But the Act has no safe haven—even if the agreement meets all the specific outer requirements, a reviewing court must still decide whether the agreement is reasonable. One danger of putting outer boundaries in a statute is that the floor becomes the ceiling. The statute's command that a restriction last no more than a year might be improperly converted into an assumption that a year is okay. No! Not unless a full year is reasonable—in a particular situation, eight months or six months may be found to be unreasonably long.

A second function of the reasonableness command is as a catchall. As discussed, the Uniform Act covers all restrictive agreements and sets out specific requirements for each member of the family. But what if an agreement doesn't match the definition of any particular member? Does this mean that anything goes, and the Act does not speak to this agreement? Does this mean the general common law covers it? This seemed undesirable. One alternative would be to expand the definitions of a particular agreement. But the preferable approach seemed to be to abandon the ephemeral goal of having the Act define every permutation and variation of a restrictive agreement. Better to recognize the ingenuity of parties and their counsel in finding the lacunae and resorting to the backstop that any restrictive agreement must be reasonable, even if it doesn't meet the statutory definition of any particular sibling in the family.

A single test for the family? The Restatement of Employment Law, summarizing the common law, articulates a single test for the entire family of restrictive agreements: (1) does the employer have a legitimate interest, and (2) is the agreement reasonably tailored to serve that interest?[78] The Restatement applies the same test to a noncompete agreement, a nonsolicitation agreement, and the others, although the Restatement warns that the same limitation might be appropriate for one type of restrictive agreement and not for another. The Restatement gives illustrations,[79] based on an actual case,[80] in which a salesperson agrees to a one-year noncompete and a one-year nonsolicitation agreement. The court strikes down the former but enforces the latter.

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76. RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

77. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8(1)–(2) (UNIF. L. COMM'N 2021).

78. RESTATEMENT OF EMP. L. § 8.06 (AM. L. INST. 2015).

79. *Id.* § 8.06 illus. 1, illus. 3.

80. McFarland v. Schneider, No. Civ. A. 96-7097, 1998 WL 136133 (Mass. Super. Ct. Feb. 17, 1998).

An early draft of the Uniform Act followed the Restatement approach and articulated the same two-part test for all restrictive agreements.[81] During discussions, however, it became clear that the legitimate-interest test was redundant for nonsolicitation agreements and others in the family. We know that the legitimate interest for a nonsolicitation agreement is always the protection of customer relationships, and the legitimate interest for a confidentiality agreement is the protection of trade secrets and other confidential information, and so on.

Thus, the Uniform Act closely tracks the Restatement in the requirements for a valid noncompete: there must be a legitimate interest (sale or creation of a business, trade secret, or customer relationship) and the agreement must be narrowly tailored in time, geography, and scope to protect that interest. [82]

But for the other restrictive agreements in the family, the Uniform Act articulates a separate test for each. For example, a nonsolicitation agreement is prohibited and unenforceable unless it applies only to customers with whom the worker personally worked. [83] If the agreement bans solicitation of all customers of the former employer, it is overbroad. If the agreement is limited to customers with whom the worker personally worked, the agreement will be narrowly tailored and the only other question for enforceability is whether the restrictive period is appropriately short (and in all cases, says the Act, no more than one year).[84]

For the most part, these changes from the Restatement formulation do not alter the substantive results the Restatement would reach—they merely change the terminology. By doing so, the Uniform Act focuses on the key issue for each type of restrictive agreement, hopefully making the rule clearer and more precise.

B. Modifying the Common Law

The common law has at least four big challenges in regulating restrictive agreements. First, the common law rarely creates penalties or fines for entering an unenforceable contract. Only a statute can do this. Second, the common law hesitates at drawing bright-line rules that seem arbitrary, such as a specific maximum time restriction for a reasonable noncompete. Third, the common-law hesitation is particularly evident for a rule based on income or wealth. Fourth, the common law rarely requires detailed notice or other procedures for an enforceable contract.

The Uniform Act goes beyond the common law in all these ways. First, in addition to making certain restrictive agreements unenforceable, the Act prohibits agreements and establishes penalties for their use. Second, it sets specific time limits for the restrictions. Third, it prohibits noncompetes and some of the other restrictive

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81. *See* COVENANTS NOT TO COMPETE ACT (Draft), § 3 (UNIF. L. COMM'N 2020).

82. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8 (UNIF. L. COMM'N 2021).

83. *Id.* § 11. This personal-client requirement is consistent with the common law. *See, e.g.*, BDO Seidman v. Hirshberg, 712 N.E.2d 1220, 1225 (N.Y. 1999) ("Extending the anti-competitive covenant to BDO's clients with whom a relationship with [the employee] did not develop through assignments to perform direct, substantive accounting services would, therefore, violate . . . the common-law rule: it would constitute a restraint 'greater than is needed to protect' these legitimate interests . . . .") (quoting Restatement (Second) of Contracts § 188(1)(a)).

84. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8(3)(B) (UNIF. L. COMM'N 2021).

agreements for low-wage workers. Fourth, it requires advance notice for an enforceable agreement.

Several recent state statutes have adopted some or all of these policies,[85] but it is nearly unimaginable for a common-law court to do so. For example, while in practice courts rarely uphold a noncompete against a low-wage worker, the common law would never come up with a bright-line rule about low-wage workers. Nor does the common law penalize an employer with an unreasonable noncompete; it merely refuses to enforce the agreement. By going beyond the common law, the Uniform Act adds predictability.

1. Prohibit Invalid Agreements, with Statutory Damages

The common law refuses to enforce an unreasonable restrictive employment agreement, which means that a worker can ignore the agreement by competing and not be successfully sued for breach of contract. But the unenforceable agreement still sits there in the contract. Its presence is not benign, for it creates uncertainty, deters the mobility of workers, and reduces the efficiency of labor markets.

Contract law scholars have shown in other contexts that unenforceable terms affect the behavior of promisors.[86] Often this occurs because parties do not know a term is unenforceable. Additionally, even when told the term is unenforceable, the

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85. *See, e.g.*, H.B. 22-1317, 73d Gen. Assemb., Reg. Sess. (Colo. 2022) (requiring notice; voiding noncompetes for workers making less than highly compensated employee and voiding nonsolicitation agreements for workers making less than sixty percent of highly compensated employee; establishing penalty of $5000); Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90 (2022) (prohibiting noncompete for employee making less than $75,000 and nonsolicitation agreement for employee making less than $45,000; requiring fourteen days' notice); ME. REV. STAT. ANN. tit. 26, § 599-A(3)–(4) (West 2019) (prohibiting noncompete for employee earning wages at or below 400% of the federal poverty level; requiring notice prior to offer of employment); MD. CODE ANN., LAB. & EMPL. § 3-716 (West 2019) (prohibiting noncompete for employee earning equal to or less than $15 per hour or $31,200 annually); Massachusetts Noncompetition Agreement Act, MASS. GEN. LAWS ANN. ch. 149, § 24L (West 2021) (requiring notice by a formal employment offer or ten days before beginning of employment, whichever is earlier; limiting noncompete to twelve months; making noncompetes unenforceable against nonexempt employees under the Fair Labor Standards Act); N.H. REV. STAT. ANN. § 275:70 (2014) (requiring employers to provide a copy of noncompete agreement before employee accepts offer of employment); N.H. REV. STAT. ANN. § 275:70-a (2019) (prohibiting noncompete for low-wage employee making less than or equal to 200% of the federal minimum wage); OR. REV. STAT. § 653.295 (2022) (requiring two weeks' notice; requiring employee's salary for enforceable noncompete to exceed $103,533; restricting noncompete period to twelve months); VA. CODE ANN. § 40.1-28.7:7 (2021) (prohibiting noncompete for low-wage worker earning less than state's average weekly wage; establishing civil penalty of $10,000; requiring employers to post summary of law); WASH. REV. CODE § 49.62 (2019) (requiring notice no later than time of acceptance of offer; requiring employee annualized earnings to exceed $100,000 and independent-contractor earnings to exceed $250,000; presuming noncompetes exceeding eighteen months to be void).

86. *See* Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1053 (2019) ("[I]nformed tenants encountering an unenforceable term were not significantly more likely to bear the repair expenses themselves than were tenants reading an enforceable term or a silent lease.").

moral force of the promise sometimes lingers: if someone makes a promise, they feel obliged to keep it even when the law says the promise is unenforceable.[87]

Unenforceable restrictive agreements harm workers in similar ways. Surveys reveal that workers are generally unaware of the laws regulating noncompetes and tend to believe they are enforceable even when they are not.[88] One study shows that noncompetes deter worker mobility even in states that do not enforce noncompetes.[89]

The persistence of unenforceable agreements presents a major challenge for the common law.[90] For example, the Jimmy John's noncompetes were probably unenforceable[91] because there was no protectable trade secret or customer relationship at issue. But the contracts still may deter a worker from jumping to Subway, and Subway may hesitate hiring the worker for fear of a court battle over unclear rules. Presumably, a court would entertain a declaratory-judgment action by the worker or second employer that the agreement is indeed unenforceable (although a declaratory judgment arises by statute rather than common law). But the common law is powerless to do much else.

The Uniform Restrictive Employment Agreement Act takes this head-on in a few ways. First, the statutory language declares not only that an improper restrictive agreement is "unenforceable," but also that it is "prohibited."[92] This prohibition communicates to employers, workers, and other readers of the Act that the agreement is improper and banned. Second, the Act establishes statutory damages for prohibited agreements of a recommended $5000 per worker per violation, although the Act invites states to tailor the statutory amount.[93] These statutory damages are not fines that go to the state treasury but rather go to the affected worker in addition to any actual damages the worker can prove. The Act calls for possible enforcement by the state Attorney General and a private right of action, with attorney fees available.[94] The goal is to get overbroad, unenforceable agreements out of employment contracts. Third, the Act attempts to inform workers of their rights by mandating disclosure, as discussed further below.[95] All of this is beyond what common-law courts can do.

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87. *See* Tess Wilkinson-Ryan & Jonathon Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 406 (2009) (finding that "people are quite sensitive to the moral dimensions of a breach of contract").

88. *See* J.J. Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability*, J. LEGAL STUD. (forthcoming).

89. Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633 (2020).

90. An analogous problem arises with racially discriminatory restrictive covenants in land deeds. These covenants have been unenforceable for seventy years but still sit in many deeds with few methods of removal. The Uniform Law Commission in 2021 appointed a Restrictive Covenants in Deeds Committee, with Professor Richard Brooks as Reporter, charged with drafting legislation enabling a landowner to expunge the restrictive covenant. *See Restrictive Covenants in Deeds Committee*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=f263def2-f766-4c76-af56-016f6878034f [https://perma.cc/CX3Z-DJ8U].

91. *See* Wiessner, *supra* note 11.

92. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4(a) (UNIF. L. COMM'N 2021).

93. *Id.* § 16.

94. *Id.* § 16(e).

95. *Id.* § 4.

2. Explicit Time Limits

Justice Holmes predicted the common law would create ever more precise rules over time,[96] as courts gained experience with repeated fact patterns. This prediction has rarely borne out, however, as the common law famously resists precise rules that do not consider the myriad facts of a particular case.

The common law of noncompetes is one example among many that challenges Holmes's prediction. The common law has never set a precise, maximum time for which a noncompete can restrict competition. Attorney advice memos often assert that a noncompete applies for somewhere between six months to two years, with one year being a common length.[97] But immediately the memo will say the precise enforceable maximum depends on all the circumstances, and that a client would be wise to consult an attorney (which some have suggested to me is why lawyers love the common law).

Even some statutes hesitate to create a definitive rule on time limits for a restrictive agreement, preferring presumptions that can be overridden by evidence to the contrary in a particular situation. For example, Washington's statute declares that a noncompete restricting competition more than eighteen months is presumptively unreasonable,[98] while Idaho's statute declares that less than eighteen months is

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96. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 102 (1881) ("[T]he featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances."). This led to a famous pair of Supreme Court cases involving auto and train collisions. In the first case, Justice Holmes established the rule that the car driver would be contributorily negligent unless he stopped, looked, and listened for the train, and, if necessary, got out of the car. Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927). Five years later, in Pokora v. Wabash Ry. Co., 292 U.S. 98, 98 (1934), Justice Cardozo criticized the rigidity of the *Goodman* rule, declaring "the need for caution in framing standards of behavior that amount to rules of law [especially when they are] rules artificially developed, and imposed from without."

97. *See, e.g.*, *5 Things You Need to Know About Non-compete Agreements*, THOMAS REUTERS (Mar. 11, 2022), https://legal.thomsonreuters.com/en/insights/articles/the-basics-of-non-compete-agreements [https://perma.cc/BGW3-TN4Z] ("[M]ost employers see between six months and two years as a reasonable non-compete time frame, with one year being quite common."); *Non-Competition Agreements: Overview*, FINDLAW (Dec. 17, 2021), https://www.findlaw.com/employment/hiring-process/non-competition-agreements-overview.html [https://perma.cc/9NCB-9TU9] ("The reasonableness of the duration of the agreement will depend on the specific facts of each case, but is often a period between six months and two years.").

98. WASH. REV. CODE § 49.62.020(2) (2019) ("A court or arbitrator must presume that any noncompetition covenant with a duration exceeding eighteen months after termination of employment is unreasonable and unenforceable. A party seeking enforcement may rebut the presumption by proving by clear and convincing evidence that a duration longer than eighteen months is necessary to protect the party's business or goodwill.").

rebuttably reasonable,[99] and Alabama and Arkansas say that less than two years is presumptively reasonable.[100]

Several recent statutes have become more precise, abandoning presumptions for strict maximums. These include Massachusetts,[101] Oregon,[102] and Utah,[103] all of which have recent statutes banning noncompetes of over one year. Other statutes have longer maximum periods up to two years.[104]

The Uniform Act follows the lead of these recent statutes and chooses a precise rule of one year as the maximum for most restrictive agreements. The only deviations from the one-year rule are five years for a noncompete in connection with the sale or creation of a business,[105] six months for a no-business agreement,[106] and two years

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99. IDAHO CODE § 44-2704(2) (2018) ("It shall be a rebuttable presumption that an agreement or covenant with a postemployment term of eighteen (18) months or less is reasonable as to duration."). Note that Idaho has a firm requirement that a noncompete not exceed eighteen months unless extra consideration is given. *See* IDAHO CODE § 44-2704(1) (2018) ("Under no circumstances shall a provision of such agreement or covenant, as set forth herein, establish a postemployment restriction of direct competition that exceeds a period of eighteen (18) months from the time of the key employee's or key independent contractor's termination unless consideration, in addition to employment or continued employment, is given to a key employee or key independent contractor.").

100. ALA. CODE § 8-1-190(b)(4) (2016) ("Restraints of two years or less are presumed to be reasonable."); ARK. CODE ANN. § 4-75-101(d) (2015) ("A post-termination restriction of two (2) years is presumptively reasonable . . . unless the facts and circumstances of a particular case clearly demonstrate that two (2) years is unreasonable compared to the employer's protectable business interest.").

101. MASS. GEN. LAWS ch. 149, § 24L(b)(iv) (2018) ("In no event may the stated restricted period exceed 12 months from the date of cessation of employment, unless the employee has breached his or her fiduciary duty to the employer or the employee has unlawfully taken, physically or electronically, property belonging to the employer, in which case the duration may not exceed 2 years from the date of cessation of employment.").

102. OR. REV. STAT. § 653.295(3) (2021) ("The term of a noncompetition agreement may not exceed 12 months from the date of the employee's termination. The remainder of a term of a noncompetition agreement in excess of 12 months is void and may not be enforced by a court of this state.").

103. UTAH CODE ANN. § 34-51-201(1) (West 2019) ("[A]n employer and an employee may not enter into a post-employment restrictive covenant for a period of more than one year from the day on which the employee is no longer employed by the employer. A post-employment restrictive covenant that violates this subsection is void.").

104. *E.g.*, LA. STAT. ANN. § 23:921(C) (2020) ("Any person . . . may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer . . . not to exceed a period of two years from termination of employment."); S.D. CODIFIED LAWS § 53-9-11 (2021) ("[A]n employee may agree with an employer at the time of employment or at any time during employment not to engage directly or indirectly in the same business or profession as that of the employer for any period not exceeding two years from the date of termination of the agreement and not to solicit existing customers of the employer . . . for any period not exceeding two years from the date of termination of the agreement, if the employer continues to carry on a like business therein.").

105. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 8(3)(A) (UNIF. L. COMM'N 2021).

106. *Id.* § 10(2).

for a training-reimbursement agreement.[107] These precise time limits go beyond the common law's general standard requiring a reasonable time. The gains in clarity outweigh whatever is lost in not matching some platonic standard of the reasonable time in a particular case.

3. Low-Wage Workers

While the common law rarely creates a precise or rigid rule on any grounds, this is especially so for a rule based explicitly on income or wealth. The hesitation is wise. If redistributing wealth to the poor is the goal, it is usually more effective to do so directly through the tax system than indirectly through substantive common-law rules.[108] This is particularly so in a contractual setting like the law of noncompetes, where compensating price adjustments can eliminate whatever distributive goals the common-law judge had in mind.

Now, the common-law noncompete framework can indirectly or obliquely differentiate between high- and low-income workers. As already mentioned, the common law's balancing test sometimes considers whether enforcement of a noncompete would impose an undue hardship on the worker.[109] Presumably a noncompete might impose a greater hardship on a low-income worker who does not have much of a financial cushion to ride out the noncompete period. Perhaps more importantly, low-income workers typically have less access to trade secrets and long-lasting customer relationships, and thus the employer is less likely to have a legitimate interest in a noncompete constraining a low-income worker. In general, then, the common law is less likely to enforce a noncompete against a low-income worker. But the outcome is always a bit vague.

In contrast to the common law's hesitation to make noncompete rules based directly on income, state statutes are now doing so. Increasingly, statutes declare that a noncompete or other restrictive agreement is unenforceable against a low-income worker. The goal of these low-income statutes is not to redistribute income to low-wage workers. Rather, the policy occurs in recognition that a legitimate interest is rarely present for a low-wage worker and the harm to worker mobility and efficient labor markets almost always outweighs whatever legitimate interest exists. It is clearer and more efficient to bar all noncompetes for low-income workers than continue to engage in an individualized analysis in every case.

Of course, much depends on where the low-income line falls. State statutes vary considerably here. Illinois's former statute, for example, declared only that workers earning $13.00 or less than the minimum wage were low-wage.[110] As of 2022,

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107. *Id.* § 14(2).

108. *See* Louis Kaplow & Steve Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000).

109. By statute, Florida explicitly prohibits a court from considering the undue hardship a noncompete might impose on a worker. FLA. STAT. § 542.335(g) (2022) ("In determining the enforceability of a restrictive covenant, a court: 1. Shall not consider any individualized economic or other hardship that might be caused to the person against whom enforcement is sought.").

110. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/5(2) (superseded 2022)

Illinois quintupled its threshold and now prohibits a noncompete for any employee making less than $75,000 per year[111] and prohibits a nonsolicitation agreement for anyone making less than $45,000 per year.[112] Colorado's 2022 statute allows a noncompete only to protect a trade secret with a highly compensated employee,[113] currently defined as $101,250,[114] and a nonsolicitation agreement for someone making at least sixty percent of the highly compensated figure.[115] Other state statutes use different formulae, some defining low-wage as some multiple of the poverty level[116] or the minimum wage.[117]

Taking its cue from these recent state statutes, the Uniform Act declares a noncompete prohibited and unenforceable against a low-wage worker and defines a low-wage worker as anyone making less than the annual mean wage of the state. Under the Act, a state can determine the annual mean wage itself or can rely on the Federal Bureau of Labor Statistics (BLS).[118] In 2021, the BLS statistics showed that

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("'Low-wage employee' means an employee whose earnings do not exceed the greater of (1) the hourly rate equal to the minimum wage required by the applicable federal, State, or local minimum wage law or (2) $13.00 per hour.").

111. *Id.* § 10(a) ("No employer shall enter into a covenant not to compete with any employee unless the employee's actual or expected annualized rate of earnings exceeds $75,000 per year. This amount shall increase to $80,000 per year beginning on January 1, 2027, $85,000 per year beginning on January 1, 2032, and $90,000 per year beginning on January 1, 2037.").

112. *Id.* § 10(b) ("No employer shall enter into a covenant not to solicit with any employee unless the employee's actual or expected annualized rate of earnings exceeds $45,000 per year. This amount shall increase to $47,500 per year beginning on January 1, 2027, $50,000 per year beginning on January 1, 2032, and $52,500 per year beginning on January 1, 2037.").

113. H.B. 22-1317, 73rd Gen. Assemb., Reg. Sess. (Colo. 2022) ("This subsection [voiding a noncompete] does not apply to a covenant not to compete governing a person who, at the time the covenant not to compete is entered into and at the time it is enforced, earns an amount of annualized cash compensation equivalent to or greater than the threshold amount for highly compensated workers, if the covenant not to compete is for the protection of trade secrets and is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.").

114. COLO. CODE REGS. § 1103-14:1 (2022).

115. COLO. REV. STAT. § 8-2-113(2)(d) (2022) ("[The subsection voiding a nonsolicitation agreement] does not apply to a covenant not to solicit customers governing a person who, at the time the covenant not to compete is entered into and at the time it is enforced, earns an amount of annualized cash compensation equivalent to or greater than sixty percent of the threshold amount for highly compensated workers if the nonsolicitation covenant is no broader than is reasonably necessary to protect the employer's legitimate interest in protecting trade secrets.").

116. *E.g.*, Rhode Island Noncompetition Agreement Act, 28 R.I. GEN. LAWS § 28-59-2(7) (2020) ("'Low-wage employee' means an employee whose average annual earnings, as defined in subsection (2), are not more than two hundred fifty percent (250%) of the federal poverty level for individuals as established by the United States Department of Health and Human Services federal poverty guidelines.").

117. N.H. REV. STAT. ANN. § 275:70-a(I)(b) (2019) ("'Low-wage employee' means an employee who earns an hourly rate less than or equal to 200 percent of the federal minimum wage.").

118. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 5(1) (UNIF. L. COMM'N 2021).

the annual mean wage nationwide was $58,260, ranging from $42,700 in Mississippi to $72,940 in Massachusetts (with greater ranges in U.S. districts and territories, ranging from Puerto Rico's $30,480 to D.C.'s $98,370).[119] In a legislative note, the Uniform Act invites state legislatures to "set the requirement at more than the annual mean wage of employees in the state, such as one and one half times or twice the annual mean wage, either for all workers or for certain categories of workers."[120]

A major feature of the annual mean wage threshold is that it roughly corresponds to workers whose restrictive agreements would typically be unenforceable on common-law trade-secrets criteria anyway. Few workers making less than the annual mean wage have meaningful access to trade secrets. Workers making more than the annual mean wage typically have a college degree, while those making less than the annual mean wage have less education. Having a college degree, in turn, makes it twice as likely the worker has access to a trade secret. This threshold thus adds clarity and certainty to the question of enforceability without greatly altering the validity of a restrictive agreement for which the employer has a legitimate interest. Another feature is that the threshold adjusts automatically as wages rise, unlike the minimum wage, which adjusts sporadically based on political issues having nothing to do with noncompete agreements.

The Act does not have a low-wage threshold for a confidentiality agreement or training-reimbursement agreement, unlike all other restrictive agreements. This allows an otherwise appropriate confidentiality agreement to be enforced against a low-wage worker. Confidentiality remains a major requirement for any worker, and an appropriate confidentiality agreement does not greatly restrict mobility. Without an enforceable confidentiality agreement, an employer may hesitate to hire even a low-paid worker. On similar grounds, public policy should encourage employers to provide special training to low-wage workers to improve their skills and enable them to earn more.

4. Notice Requirements

Considerable empirical evidence supports the common-sense notion that a worker may receive compensating benefits for taking a job with a restrictive agreement that the worker knows about but is less likely to receive a benefit if the worker was unaware of the restriction until after the job began.

In other areas of employment law, the common law has wrestled with whether the employer has provided sufficient notice of a contractual term. For example, often in distributing a handbook to employees, the employer wants to reserve the right to modify the handbook or ensure that the handbook is not legally binding on the employer. When it does so with an obscure notice buried deep within the handbook ("this handbook is not legally binding and the employer can change it at any time"), the question arises whether this obscure notice is effective. Courts have varied on this issue. Some have insisted that the font size be sufficiently large or in bold to put

119. *Occupational Employment and Wage Statistics*, U.S. BUREAU OF LAB. STAT. (May 2021), https://www.bls.gov/oes/current/oessrcst.htm [https://perma.cc/S8BE-U8HJ]. The U.S. Department of Labor Bureau of Labor Statistics tracks the annual mean wage on a state-by-state basis and updates its database yearly.

120. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 5 Legis. Note (UNIF. L. COMM'N 2021).

employees on actual notice.[121] Other courts have found this font-size exercise to be futile.[122] In any event, a common-law court will rarely insist on a particular form of notice.

So, while the common law of employment has some experience with notice requirements, rarely are the requirements clear and specific. On the specific question of notice for a noncompete agreement, a court will never strike one down on notice grounds if the employee can be said to have accepted it before work began. When an employer insists on a noncompete agreement after the employee starts work, some courts examine whether there has been additional consideration. But the doctrine of additional consideration is a doubtful one in general contract law, and many courts say the continued willingness of an employer to provide a job for an at-will employee is sufficient consideration.[123] All this is to say that the common law has a hard time with explicit notice requirements for a valid restrictive agreement.

Given the importance of notice both theoretically and empirically, the Uniform Act goes beyond the common law by declaring that a restrictive agreement is prohibited and unenforceable if the employer does not give statutorily prescribed notice within specific time frames. The required notice takes two forms. First, the employer must give the worker a form notice from the state department of labor describing the worker's rights under the Act.[124] Second, the employer must give bespoke notice tailored to the specific job.[125] The agreement must clearly specify the information that is being called confidential, the type of work activity that is being restricted, which customers the worker cannot solicit, which coworkers cannot be recruited, or the extent of competition that the worker cannot engage in.[126] Vague statements prohibiting "any competition" or "any solicitation of customers" will not do.[127]

For a new worker, the employer must give the worker a copy of the proposed restrictive agreement at least fourteen calendar days before the worker accepts the job or work begins, whichever is earlier.[128] The policy goal is that the worker knows

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121. *See, e.g.*, McDonald v. Mobil Coal Producing, Inc., 820 P.2d 986, 989 (Wyo. 1991) (striking down a handbook disclaimer, emphasizing it "was not set off by a border or larger print, was not capitalized, and was contained in a general welcoming section of the handbook"); Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783, 788 (Alaska 1989) (finding a one-sentence disclaimer in 85-page policy manual to be ineffective because it did not unambiguously and conspicuously inform employees that the manual was not part of their employment contract).

122. *See* Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 288 (Iowa 1995) (enforcing a disclaimer on last page of a 53-page handbook and refusing to consider argument that the disclaimer was not displayed prominently enough, declaring it should be considered like any other language in the handbook).

123. RESTATEMENT OF EMP. L. § 8.06 cmt. e (AM. L. INST. 2015) ("The majority rule is that continuing employment of an at-will employee is sufficient consideration to support the enforcement of an otherwise valid restrictive covenant. However, a significant minority of jurisdictions require 'new' or 'additional' consideration.").

124. UNIF. RESTRICTIVE EMP. AGREEMENT ACT § 4(2) (UNIF. L. COMM'N 2021).

125. *Id.* § 4(a)(3).

126. *Id.* § 4.

127. *Id.*

128. *Id.* § 4(a)(1)(A).

of the restriction before the worker is locked into acceptance as a practical matter. For example, suppose a worker accepts a position in another town six months before the start date, gives notice to the current employer, sells the old house and buys one in the new town, and then three weeks before beginning the new job is told the job comes with a noncompete. This is insufficient notice because the worker is already locked in and will suffer significant costs from now turning down the job.

Some have worried that even this notice may be insufficient to enable a true evaluation of options by the worker. For some job searches, two weeks before acceptance is far down the road of the job search. Perhaps even more effective would be a requirement that an initial job posting contain the statement that the job may require the worker's agreement to a restrictive covenant. Some states and localities have recently regulated job postings, for example by requiring salary ranges.[129]

More generally, scholars have debated whether mandated disclosure is a satisfactory remedy for the problems of inadequate notice, particularly in consumer contracts.[130] Perhaps readers are simply overwhelmed with too much information. While a major concern for consumer contracts, which are often accepted online with lots of fine print, a restrictive covenant between an employer and a particular employee has somewhat less chance of being literally buried in fine print, particularly when it arrives two weeks before the worker accepts the job. At least that is the hope of the Uniform Act.

CONCLUSION

The Uniform Restrictive Employment Agreement Act recognizes that some restrictive agreements are useful and appropriate, particularly when applied to high-level workers with knowledge of a company's trade secrets or who have significant, longstanding relationships with the company's clients. With appropriate notice and subject to the Act's requirements, the Act follows the common law and makes these agreements valid and enforceable.

Other restrictive agreements do society more harm than good. The common law attempts to weed out these agreements by making them unenforceable, but the common law uses general standards that create uncertainty in application. The common law cannot do more than refuse to enforce them.

The Uniform Act prohibits as well as makes unenforceable improper restrictive agreements. These include those given without notice or imposed upon low-wage workers. In general, the outer time limit of a valid restriction is no more than one year.

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129. For example, a New York City ordinance requires an employer with four or more employees to include minimum and maximum salary information in job postings. N.Y.C., N.Y., Law No. 2022/059 (May 12, 2022).

130. *Compare* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 79–195 (2014) (recounting that consumers rarely read fine print and arguing that regulations mandating greater disclosure are useless), *with* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020) (reporting experiments that find that fine print is not white noise but adversely affects consumers who learn of the clauses after the time of signing, most of whom erroneously believe the clause is enforceable).

As the Uniform Restrictive Employment Agreement Act becomes adopted by the states, it will provide clarity and uniformity to this important area of law and provide an appropriate balance between protecting trade secrets and customer relationships and promoting worker mobility and efficient labor markets.