Noncompetes in Employment Contracts: Recent Legislative Trends

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Introduction

American workers are increasingly required to sign employment agreements containing noncompete provisions.[1] These provisions restrict employees from working for an employer's competitor following the employee's resignation or termination, typically within a specific window of time or geographic region.[2] Noncompete provisions may also prohibit employees from starting a competing business, courting clients, or courting other employees. For employers, noncompetes provide assurance that confidential or proprietary information will not fall into the hands of rival businesses. Noncompetes also protect investments in recruitment and training by establishing disincentives for employees to leave. Critics argue that noncompetes harm workers by discouraging workers from accepting attractive job offers or starting their own businesses.[3] By extension, noncompetes may stifle worker mobility and wages.[4] In Wisconsin, critics have blamed noncompetes for a "failing entrepreneurial climate"[5] and the "[loss] of a ton of tech talent that might otherwise stay and juice up the local economy."[6]

Across the country, lawmakers are considering how laws governing noncompete provisions of employment agreements enhance or diminish a state's business climate. Do startups flourish where state statutes place limits on noncompetes—and flounder where statutes support the enforcement of noncompetes? Can the success of Silicon Valley, for example, be attributed to California's strict prohibitions against noncompetes?[7] Lawmakers are also weighing whether laws relating to noncompetes affect a state's retention of skilled workers—a pressing concern in a tight labor market. Finally, lawmakers in some states are addressing problems of transparency; many businesses do not inform prospective hires about noncompete requirements, and many workers are unaware that these provisions of employment agreements are not always enforceable.

This publication provides an introduction to policy debates surrounding noncom-

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1. Noncompetes may also be used in independent contractor agreements, franchise agreements, and agency agreements.

2. James McNeilly and Jrdarla Krzoska, "Protecting Business Interests with Covenants Not to Compete," *Wisconsin Lawyer* 75, no. 5 (May 2006), https://wisbar.org.

3. Conor Dougherty, "How Noncompete Clauses Keep Workers Locked In," *New York Times*, May 13, 2017, https://nytimes.com; Natarajan Balasubramanian, Jin Woo Chang, and Mariko Sakakibara, "Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers," *Journal of Human Resources*, Ross School of Business Paper no. 1339 (May 12, 2020), 4, https://papers.ssrn.com.

4. Matt Marx, *Reforming Non-Competes to Support Workers* (Washington, D.C.: The Brookings Institute, February 2018), 10, https://brookings.edu.

5. These complaints are periodically aired in Wisconsin. See David D. Haynes, "Non-compete Agreements Are Squeezing Wisconsin's Entrepreneurial Economy," *Milwaukee Journal Sentinel*, March 1, 2017, https://jsonline.com.

6. Marc Eisen, "Epic Systems Backs Down on Noncompete Clause," *Isthmus*, December 2, 2014, https://isthmus.com.

7. In brief, some researchers suggest that California laws barring noncompetes contributed to the success of Silicon Valley, whereas other states' laws favoring noncompetes (e.g., in Massachusetts and Michigan) doomed tech districts and resulted in a "brain drain" from those states. See Ronald Gilson, "The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete," *New York University Law Review* 74 (1999), 575–629; Matt Marx, Jasjit Singh, Lee Fleming, "Regional Disadvantage? Employee Non-compete Agreements and Brain Drain," *Research Policy* 44 (2015), 394–404; and Balasubramanian et al., "Locked In? The Enforceability of Covenants Not to Compete."

petes and examines existing law in Wisconsin and other states. The publication also summarizes recently enacted legislation in other states that seeks to address the interests of both businesses and workers and enrich local and state economies in the process.

Background

Noncompete agreements date to the medieval and early modern periods, when teenage apprentices bound themselves to a master craftsman for several years before starting out on their own. Contracts protected masters' investments in apprentices—i.e., training, room, and board—by barring apprentices from departing early. As historian William Beik explains, "This was a socialization process designed to introduce the newcomer to the skills and secrets of the trade."[8] At the end of this process, the apprentice set out to practice the trade as a skilled journeyman and, eventually, a master craftsman.

Noncompetes operate similarly today, protecting businesses' investments in employees by establishing disincentives for the employees to leave. A noncompete is a provision or clause of an employment agreement that forms a restrictive covenant, i.e., an agreement that bars one of the parties from engaging in certain activities. Within employment, a restrictive covenant may prohibit an employee from doing the following while employed at or after leaving the company: sharing certain confidential information (confidentiality provision), poaching clients or customers (non-solicitation provision), courting the company's employees (anti-raiding provision), or working for or launching a competing business (noncompete provision).[9] A noncompete is the broadest form of restrictive covenant. As an example, a noncompete signed by an Amazon employee specifies that the employee must not "directly or indirectly . . . engage in or support the development, manufacture, marketing, or sale of any product or service that competes or is intended to compete with any product or service sold, offered, or otherwise provided by Amazon" for 18 months following separation.[10] Although laws and legal decisions across the United States employ a variety of terms to describe this kind of provision, this publication uses the term noncompete for the sake of simplicity.[11]

Employers include noncompete clauses in employment agreements for various reasons. For example, without these provisions in place, an employee's ability to quit at any

8. William Beik, *A Social and Cultural History of Early Modern France* (Cambridge: Cambridge University Press, 2009), 116. See also Isser Woloch, *Eighteenth-Century Europe: Tradition and Progress, 1715–1789* (New York: W.W. Norton, 1982), 98–102.

9. For a useful description of different types of restrictive covenants, see Stephen L. Brodsky, "Restrictive Covenants in Employment and Related Contracts: Key Considerations You Should Know," American Bar Association, February 8, 2019, http://www.americanbar.org.

10. Megan Rose Dickey, "Tech's Non-compete Agreements Hurt Workers and Anger Some Lawmakers," Protocol, May 13, 2021, http://www.protocol.com.

11. As discussed below, Wisconsin laws and legal decisions refer to these provisions in myriad ways, including covenants not to compete, non-compete clauses, non-compete provisions, non-compete agreements, noncompetes, and restrictive covenants. See Wis. Stat. § 103.465 and Star Direct, Inc. v. Dal Pra, 2009 WI 76 (Wis. 2009).

time may discourage a company from providing training. Noncompetes resolve this problem by establishing disincentives for employees to leave and consequently justifying greater investments in training.[12] Some research bolsters this argument, finding correlations between the prevalence of noncompetes and more expansive—and expensive—employee training.[13] Additionally, a noncompete provision may discourage an employee from using the company's intellectual property to enrich a competitor or launch a competing businesses. Federal laws protect various aspects of intellectual property, and state laws generally prohibit the disclosure of trade secrets—i.e., information with special economic value that is consequently subject to secrecy.[14] However, this kind of litigation is "protracted, costly, and difficult for employers to win."[15] By comparison, noncompetes provide preemptive assurance to an employer that an employee will not disclose trade secrets or other sensitive information to a competitor.[16] Finally, by encouraging longer tenures of employees, noncompetes may lower costs associated with recruitment and hiring by increasing retention rates.[17] In sum, the rationale for these provisions of employment contracts has not changed a great deal since the early modern period. By imposing limitations on employee mobility, an employer may expand access to training and knowledge that simultaneously enrich the employer and enhance the employee's earnings potential over the long term.

Though the rationale for noncompetes has remained consistent, the use of noncompete provisions has changed substantially over the past few decades. Most notably, noncompetes have become more prevalent among employees who do not necessarily possess sensitive information, specialized skills, or important customer contacts. One survey of private sector employers conducted in 2017 found that nearly one-third of respondents required all employees to sign noncompetes "regardless of pay or job duties."[18] In fact, the survey's authors estimated that these agreements applied to as many as 36 to 60 million

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12. John M. McAdams, Non-Compete Agreements: A Review of the Literature (Federal Trade Commission Bureau of Economics, December 31, 2019), 6, http://www.papers.ssrn.com; See also Ryan Nunn, "Non-compete Contracts: Potential Justifications and the Relevant Evidence," The Brookings Institution, February 4, 2020, http://www.brookings.edu.

13. McAdams, *Non-Compete Agreements: A Review of the Literature*, 13–14. While researchers substantiate a relationship between noncompetes and increased employee training, they also found that this relationship did not necessarily yield any benefits (i.e., higher wages) for workers who received increased training. See Evan Starr, "Consider This: Training, Wages, and the Enforceability of Covenants Not to Compete," *Industrial & Labor Relations Review* 72, no. 4 (2019), https://papers.ssrn.com; Jessica S. Jeffers, "The Impact of Restricting Labor Mobility on Corporate Investment and Entrepreneurship," working paper (December 2019); Matthew S. Johnson and Michael Lipsitz, "Why are Low-Wage Workers Signing Noncompete Agreements?," working paper (December 14, 2017).

14. See Wis. Stat. § 134.90

15. Nunn, "Non-compete Contracts: Potential Justifications and the Relevant Evidence."

16. Noncompetes often apply to a broader range of information than trade secret laws. Nunn, "Non-compete Contracts: Potential Justifications and the Relevant Evidence."

17. McAdams, "Non-Compete Agreements: A Review of the Literature."

18. Alexander J.S. Colvin and Heidi Shierholz, Noncompete Agreements: Ubiquitous, Harmful to Wages and to Competition, and Part of a Growing Trend of Employers Requiring Workers to Sign Away their Rights (Washington, D.C.: Economic Policy Institute, December 10, 2019), 4, http://www.epi.org.

American workers at that time.[19] Moreover, noncompetes have proliferated among workers who earn less than $40,000 annually or do not possess a four-year college degree. By 2016, one-in-seven such workers reported themselves subject to a noncompete.[20] Until 2016, the fast food sandwich chain Jimmy John's required its workers to sign noncompete agreements preventing them from working at rival sandwich-makers within a certain geographic radius.[21]

Despite the pervasiveness of noncompetes, the inclusion of noncompete provisions in employment agreements often take workers by surprise. Many new hires are not informed that they will be required to sign one as a condition of employment until after accepting a job offer or reporting to work.[22] One survey of engineers noted that more than two-thirds of respondents learned of a noncompete provision *after* being offered the job, and one-fourth of respondents were presented with a noncompete only after reporting to work.[23] Without prior knowledge of such a requirement, workers are unlikely to bargain for better terms.[24]

Moreover, few workers understand the implications of a noncompete provision, including whether or not such a provision is even enforceable. According to Cornell University professor Matt Marx, only a tiny fraction of American workers—less than one-thousandth of a percentage point—are taken to court by an employer for running afoul of a noncompete.[25] But an employee who *believes* he or she can be sued for violating a noncompete may remain at his or her company rather than accept a competitor's job offer. Critics refer to this phenomenon as a "chilling effect."[26] As one critic explains it, even if an agreement is not legally enforceable, "many employees will . . . choose simply to honor the agreement due to their lack of legal knowledge and/or fear of lawsuits and accompanying expenses."[27] Research suggests that this rationale is widespread, preventing many American workers from accepting attractive job opportunities.[28]

In sum, noncompetes are pervasive but poorly understood. Compounding this prob-

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19. Colvin and Shierholz, *Noncompete Agreements*, 12.

20. Office of Economic Policy, U.S. Department of the Treasury, Non-compete Contracts: Economic Effects and Policy Implications (Washington, D.C.: Office of Economic Policy, U.S. Department of the Treasury, March 2016), 4, http://www.home.treasury.gov.

21. Daniel Wiessner, "Jimmy John's Settles Illinois Lawsuit over Non-compete Agreements," *Reuters*, December 7, 2016, https://reuters.com.

22. Colvin and Shierholz, *Noncompete Agreements*, 3.

23. Matt Marx, Science Policy Research Report: Employee Non-compete Agreements (Berkeley, CA: University of California, Berkeley, June 2018), http://www.sih.berkeley.edu.

24. Colvin and Shierholz, *Noncompete Agreements*, 3.

25. Marx, *Reforming Noncompetes*, 5.

26. Marx, *Reforming Noncompetes*, 5; Colvin and Shierholz, *Noncompete Agreements*, 5.

27. Kenneth R. Swift, "Void Agreements, Knocked-Out Terms, and Blue Pencils: Judicial and Legislative Handling of Unreasonable Terms in Noncompete Agreements," *Hoffstra Labor and Employment Law Journal* 24, no. 2 (2007), 255.

28. Researchers found that noncompetes discouraged 40 percent of respondents from accepting an opportunity to work for a competitor. Evan Starr, J.J. Prescott, and Norman Bishara, "The Behavioral Effects of (Unenforceable) Contracts," [pre-published manuscript posted online] *Journal of Law, Economics, and Organization* (September 18, 2020), 5.

lem is the fact that the enforceability of noncompetes varies from state to state, as explained in the next section.

Existing law in other states

When a company alleges a former employee has breached a noncompete, the dispute may land in court.[29] In these instances, state laws and legal precedents determine whether the noncompete is enforceable. Some states' statutes are silent on noncompetes, so courts in those states rely solely on precedential case decisions to determine enforceability.[30] Elsewhere, states' statutes regulate noncompetes, so courts in those states may rely on both statutes and precedential case decisions. In these states, regulation of noncompetes takes myriad forms. Some state laws codify or provide greater definition to standards established under prior case decisions. Other state laws partially or fully prohibit the enforcement of noncompetes. This section summarizes some of the most prevalent approaches to statutory regulation of noncompetes.

Consideration. A handful of states' laws specify that an employee must receive a certain kind of consideration for a noncompete to be enforceable. Consideration refers to a benefit that an individual or entity receives as inducement to enter into a contract. Although all contracts require consideration, these state laws establish a specific standard for noncompetes. For example, Alabama law states that a noncompete must be supported by "adequate consideration."[31] Although the statute does not define this term, Alabama courts have held that continued employment constitutes consideration.[32] By contrast, Washington law requires "independent consideration,"[33] a term also undefined under statute but used by Washington courts to mean something more than continued employment, such as "increased wages, a promotion, a bonus, a fixed term of employment, or perhaps access to protected information."[34] Likewise, Massachusetts law requires "fair and reasonable consideration *independent from the continuation of employment*" [emphasis added] if an existing employee signs a noncompete.[35]

Legitimate business interests. Courts in various jurisdictions hold a noncompete to be enforceable only if it protects a legitimate or protectable business interest—i.e., something a business may reasonably seek to prevent a former employee from using either as a

29. Note that disputes over noncompetes may also be settled in arbitration.

30. Examples include Ohio and Pennsylvania.

31. Ala. Code § 8-1-192.

32. Clark v. Liberty Nat. Life Ins. Co., 592 So. 2d 564 (Ala. 1992). Although this statute was enacted following the ruling in *Clark*, the statute appears to have codified rather than diverged from existing court precedent. Daniel J. Burnick, "Alabama's New and Improved Non-Compete Statute," Alabama.com, June 22, 2015, http://www.al.com. See, generally, the discussion of consideration in McGough v. Nalco Co., 496 F. Supp. 2d 729 (N.D.W. Va. 2007).

33. Wash. Rev. Code § 49.62.020.

34. Labriola v. Pollard Group, Inc., 152 Wash.2d 828 (2004).

35. Mass. Gen. Laws ch. 149 § 24L.

competitor or in the service of one of its competitors. Some states have defined legitimate business interests to provide greater definition to this standard. For example, Florida law defines legitimate business interests to include trade secrets, other valuable confidential pieces of information that do not qualify as trade secrets, substantial relationships with prospective or existing customers, certain kinds of customer goodwill, and extraordinary or specialized training.[36] Alabama law defines this term similarly, but clarifies that "[j]ob skills in and of themselves, without more, are not protectable interests."[37] By contrast, Illinois law does not define legitimate business interests but requires a court to consider "the totality of the facts and circumstances of the individual case," including the nature of the employee's customer relationships and use or knowledge of confidential information.[38]

Duration. In determining the enforceability of a noncompete, courts in many jurisdictions also consider whether any time limitation set forth—i.e., the number of months or years before the employee may work for a competitor—is reasonable and narrowly tailored to protect the employer's legitimate business interest. Rather than leave this determination entirely to the courts, some states establish standards of reasonableness. Arkansas law, for example, presumes a two-year restriction to be reasonable.[39] Another approach is to limit the duration of a noncompete to a specific number of months or years. As examples, Massachusetts and Utah laws generally prohibit any restriction longer than 12 months.[40]

Geographic region. Courts may also consider whether any geographic limitation set forth in a noncompete is reasonable, and some state laws establish standards in this respect, too. However, these standards are often imprecise. For example, under Idaho law, a geographic limitation is reasonable if it pertains only "to the geographic areas in which [the employee] provided services or had a significant presence or influence."[41] In some instances, state laws require noncompetes to be geographically specific. For example, Louisiana and South Dakota laws require noncompetes to name the specific municipalities, counties, or parishes in which an employee may not work.[42] Under Connecticut law, a noncompete involving a physician may not impose restrictions beyond a 15-mile radius of the primary site where the physician practices.[43]

Court action. If a court finds that a noncompete provision of an employment agreement is unenforceable, it may take one of several actions: void the agreement in its entirety ("red-penciling"), strike the unenforceable provision but enforce the others

36. Fla. Stat. § 542.335. See also, for example, Ark. Code Ann. § 4-75-101; Me. Stat. tit. 26, § 599-A; Mo. Rev. Stat. § 431.202.

37. Ala. Code § 8-1-191.

38. 820 Ill. Comp. Stat. 90/7.

39. Ark. Code Ann. § 4-75-101.

40. Mass. Gen. Laws ch. 149 § 24L; Utah Code Ann. § 34-51-201.

41. Idaho Code § 44-2704.

42. La. Stat. Ann. § 23:921; S.D. Codified Laws § 53-9-11.

43. Conn. Gen. Stat. § 20-14p.

("blue-pencilling"), or rewrite the unreasonable provision to render it reasonable and uphold the agreement in its entirety ("reformation").[44] In most states, court precedents dictate whether a court may red-pencil, blue-pencil, or reform.[45] However, in some states, statutes authorize or even require a court to take one of these actions. For example, Georgia law prohibits the enforcement of a restrictive covenant that does not comply with state law but authorizes a court to modify any noncomplying provision.[46] Washington courts may modify or partially enforce a noncompete; however, a company seeking enforcement of an unenforceable noncompete may be liable for damages or a statutory penalty of $5,000.[47] Under certain circumstances, Arkansas and Texas laws require a court to reform any unreasonable limitation of a noncompete so that it is reasonable, and in no greater amount than necessary to protect a legitimate business interest.[48]

Prohibitions. Some state laws render some or all noncompetes unenforceable. On the far end of the spectrum, California, North Dakota, and Oklahoma laws generally declare all noncompetes unenforceable.[49] More commonly, other states' laws prohibit noncompetes within certain industries or among certain types of employees. Some of these prohibitions target workers whose mobility lawmakers consider especially beneficial to society or the economy. For example, Hawaii law prohibits noncompete provisions among the employees of technology businesses.[50] Additionally, New Mexico and South Dakota prohibit or place restrictions on noncompetes among certain health care workers.[51] Other prohibitions target workers who are unlikely to possess training, knowledge, or customer contacts that could be used in unfair competition against their employer. To this end, New Hampshire, Oregon, and Rhode Island laws prohibit noncompetes among low-wage workers.[52]

Employer requirements. Some states impose additional requirements that employers must meet for noncompetes to be enforceable. Under Illinois, Maine, New Hampshire, and Washington laws, employers generally must provide advance notice of a noncompete requirement in writing before an employee accepts or begins employment.[53] In Oregon, certain noncompetes are unenforceable unless an employer expends the equivalent of at

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44. Note that the term blue-pencil increasingly encompasses reformation. Marx, *Reforming Non-competes*, 12; Office of Economic Policy, U.S. Department of the Treasury, *Non-compete Contracts*, 14.

45. See, generally, Angie Davis, Eric D. Reicin, and Marisa Warren, "Developing Trends in Non-Compete Agreements and Other Restrictive Covenants," *ABA Journal of Labor and Employment Law* 30, no. 2 (Winter 2015): 256; See also Swift, "Void Agreements, Knocked-Out Terms, and Blue Pencils."

46. Ga. Code Ann. § 13-8-54.

47. Wash. Rev. Code § 49.62.080.

48. Ark. Code Ann. § 4-75-101; Tex. Bus. & Com. Code Ann. § 15.51.

49. Cal. Bus. & Prof. Code § 16600 et seq; N.D. Cent. Code § 9-08-06; Okla. Stat. tit. 15, § 217 to 219B (2019).

50. Haw. Rev. Stat. § 480-4 (d) et seq.

51. N.M. Stat. Ann. § 24-1I-2; S.D. Codified Laws § 53-9-11.1.

52. N.H. Rev. Stat. Ann. § 275:70-a; Or. Rev. Stat. § 653.295; R.I. Gen. Laws § 28-59-3.

53. 820 Ill. Comp. Stat. 90; Me. Stat. tit. 26 § 599-A; N.H. Rev. Stat. Ann. § 275:70; and Wash. Rev. Code § 49.62.020.

least 10 percent of an employee's annual salary for the purposes of training or promoting the employee in the year preceding the employee's termination.[54] Other states require an employer to provide compensation to an employee during the enforcement period of a noncompete, sometimes referred to as "garden leave." For example, Washington and Nevada render noncompetes unenforceable among employees who are laid off unless those employees are compensated.[55] Under Massachusetts law, all noncompetes must be supported by either garden leave or another form of mutually agreed upon consideration.[56]

Taken together, a state's statutes and case law relating to noncompete provisions determine whether the state is considered a high enforceability state (i.e., one in which a court is more likely to uphold a noncompete) or a low enforceability state (i.e., one in which a court is more likely to strike a noncompete in its entirety). Most states fall on a broad spectrum between the extremes of high enforceability states, such as Florida and Michigan, and low enforceability states, such as California and North Dakota.[57]

Current Wisconsin law

Wis. Stat. § 103.465 regulates restrictive covenants in Wisconsin. This provision is brief, reading in its entirety as follows:

> A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

In short, the provision specifies that an employee's covenant not to compete with his or her employer within a specified territory and specified time—i.e., a noncompete—is enforceable *only* if the limitations it establishes with respect to time and territory are "reasonably necessary" to protect the employer. Additionally, a covenant that poses an unreasonable restraint is unenforceable in its entirety.

This statutory provision was created in direct response to a Wisconsin Supreme Court ruling. In *Fullerton Lumber Co. v. Torborg* (1955), the court found that the terms imposed on an employee of a lumber company—which prevented the employee from engaging in the lumber industry for a 10-year period anywhere within 15 miles of Clintonville,

54. Or. Rev. Stat. § 653.295.

55. Wash. Rev. Code § 49.62.020; Nev. Rev. Stat. § 613.195.

56. Mass. Gen. Laws ch. 149 § 24L.

57. Fla. Stat. Ann. §§ 542.33 to 542.36; Mich. Comp. Laws § 445.774a.

Wisconsin—were "unreasonably" strict. Rather than void the restrictive covenant in its entirety, the court revised, or "blue-penciled," the covenant to change the time restriction to a three-year period.[58] From the point of view of the representative who introduced 1957 Assembly Bill 523, the court's blue-penciling in this case would invite employers to include flagrantly unreasonable limitations in covenants not to compete, confident that such provisions could not jeopardize the enforceability of a covenant as a whole.[59] By contrast, the legislator supposed, an all-or-nothing approach might encourage employers to craft agreements more carefully, out of fear that a single unreasonable limitation would render the entire agreement unenforceable. The Wisconsin Legislature adopted this rationale in enacting Chapter 444, Laws of 1957, which codified the Wisconsin Supreme Court's standard of reasonableness but declared unenforceable any covenant that included an unreasonable provision.[60]

Although the text of Wis. Stat. § 103.465 has remained mostly unchanged since the 1950s, court decisions have shaped the enforceability of noncompetes in Wisconsin. Most importantly, court decisions clarified how courts should determine the reasonableness of limitations set forth under the statute in a covenant not to compete.[61] Today, Wisconsin courts generally use a five-factor test to determine whether such a covenant is enforceable.[62] Under this test, a covenant must satisfy the following:

1. Be necessary for the protection of the employer;
2. Provide a reasonable time restriction;
3. Provide a reasonable territorial limit;
4. Not be harsh or oppressive to the employee; and
5. Not be contrary to public policy.[63]

Additionally, Wisconsin courts have considered whether and how courts may blue-pencil covenants not to compete. In *Streiff v. American Family Mut. Ins. Co.* (1984), the Wisconsin Supreme Court considered whether individual terms of a covenant not to compete could be considered separate and divisible covenants—and thus selectively enforced. The court held that the terms in question were indivisible, making the covenant unenforceable in its entirety, as one of the interrelated terms was unreasonable.[64] This holding seemed to reaffirm the all-or-nothing practice of red-penciling until *Star Direct*

58. Fullerton Lumber Co. v. Torborg, 270 Wis. 133 (1955).

59. Streiff v. American Family Mut. Ins. Co., 118 Wis. 2d 602, 609 (1984).

60. Bradden C. Backer, "*Star Direct* Takes Restrictive Covenant Law in a New Direction," *Wisconsin Lawyer* 82, no. 11 (November 5, 2009), https://wisbar.org.

61. Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157 (1959); Chuck Wagon Catering, Inc. v. Raduege, 88 Wis. 2d 740 (1979); Fields Found., Ltd. v. Christensen, 103 Wis. 2d 465 (Ct. App. 1981).

62. Backer, "Star Direct Takes Restrictive Covenant Law in a New Direction."

63. *Fields* citing *Chuck Wagon Catering* at 751. These five requirements were initially set forth in *Lakeside Oil*.

64. *Streiff* at 613.

v. Dal Pra (2009). In that case, the Wisconsin Supreme Court clarified that neither the relevant statute nor the *Streiff* case required courts to strike down an entire covenant not to compete that contained a single unenforceable clause.[65] Instead, the court held that enforceable clauses within a noncompete may be divisible from the unenforceable clauses if, after striking any unreasonable provision, the remaining provisions of the noncompete may be "understood and independently enforced."[66] On this basis, the court enforced two covenant not to compete clauses despite the unenforceability of a third clause.[67] The court also affirmed the five-factor test summarized above.

According to some commentators, *Star Direct* seemed to presage "a new era of tolerance for restrictions against competition."[68] In addition to permitting selective enforcement of covenants not to compete, the Wisconsin Supreme Court affirmed employers' broad interest in limiting competition by curtailing the activities of former employees with "special knowledge" of the business in question.[69] In a subsequent Wisconsin Supreme Court case, *Runzheimer Int'l, Ltd. v. Friedlen* (2015), the court found that continued employment was sufficient consideration to require an at-will employee to sign a noncompete.

Although the *Star Direct* and *Runzheimer* decisions seemed to favor enforcement of noncompetes, the Wisconsin Supreme Court pivoted slightly in *Manitowoc Co. v. Lanning* (2018). In this case, the court invalidated an overbroad restrictive covenant that prevented a former employee from hiring his former colleagues.[70]

For their part, some Wisconsin legislators have demonstrated interest in revisiting and revising Wis. Stat. § 103.465 over the past 25 years. In the early 2000s, several bills proposed changes to the statute to limit the enforceability of noncompetes generally (2001 Assembly Bill 408), among physicians (2005 Senate Bill 686), and among on-air broadcasters (2007 Assembly Bill 705). More recently, companion bills 2015 Wisconsin Senate Bill 69 and 2015 Assembly Bill 91 would have repealed and recreated Wis. Stat. § 103.465 to define legitimate business interests, establish standards for determining consideration, and establish standards for determining enforceability, among other things. Both bills died in committee, and until recently, no bill to amend Wis. Stat. § 103.465 had been introduced since 2015. In December 2021, legislators introduced companion bills 2021 Assembly Bill 725 and 2021 Senate Bill 708, which would limit the enforceability of noncompetes among employees terminated for choosing not to receive the COVID-19 vaccine or refusing to provide information about their COVID-19 vaccination status.

65. Star Direct Inc. v. Dal Pra, 2009 Wis. 76, 310 (Wis. 2009).

66. *Id.* at 311.

67. *Id.* at 313.

68. Backer, "*Star Direct* Takes Restrictive Covenant Law in a New Direction."

69. *Star Direct* at 295–296.

70. Manitowoc Co. v. Lanning, 2018 Wis. 6 (Wis. 2018).

Recent trends in other states' legislation

In other states, recently enacted legislation relating to noncompetes generally indicates a shift toward limiting the enforceability of noncompetes. In brief, recent legislation generally seeks to do the following:

- Prohibit or restrict noncompetes within certain sectors, such as health care;
- Prohibit noncompetes among certain classes of workers, such as low-wage workers;
- Define legitimate or protectable business interests;
- Limit the duration of noncompetes to a specific number of years or months;
- Require employers to provide advance notice of noncompete requirements;
- Require employers to compensate employees during the period of enforcement; and
- Create penalties for an employer or entitle an employee to recover costs and attorney fees if an employer attempts to enforce an unlawful noncompete.

The appendix provides a table of recently enacted bills and affected statutes in other states.

Conclusion

For each enacted bill relating to noncompetes, scores of other introduced bills have made progress and garnered bipartisan support within state legislatures.[71] This activity surrounding noncompetes extends to the federal level, where legislators have introduced the Workforce Mobility Act of 2021 to restrict the use of noncompetes.[72] Moreover, in July 2021, President Joe Biden directed the Federal Trade Commission to consider promulgating rules "to curtail the unfair use of non-compete clauses."[73] As the debate on noncompetes continues to intensify, lawmakers must consider how changes to existing laws balance the interests of employees and employers—and what effect, if any, such changes will have on the economic well-being of the nation writ large. ■

71. For a useful and frequently updated survey of developments in this area, see Russell Beck, "The Changing Landscape of Trade Secrets Laws and Noncompete Laws around the Country," Fair Competition Law, http://www.faircompetitionlaw.com.

72. See the Workforce Mobility Act of 2021, introduced as S.483, 117th Cong. (2021) and H.R.1367, 117th Cong. (2021).

73. In July 2021, President Joe Biden issued an executive order directing the Federal Trade Commission (FTC) to "consider . . . [exercising] the FTC's statutory rulemaking authority . . . to curtail the unfair use of non-compete clauses." Executive Order on Promoting Competition in the American Economy, July 9, 2021.

Appendix

Recently enacted legislation relating to noncompete agreements

State & statutes	Legislation	Summary
Alabama Ala. Code §§ 8-1-190 to 8-1-197	2015 HB 352	Clarifies that only covenants that "preserve a protectable interest" are permissible, and defines protectable interests to include trade secrets and confidential information, among other things, but specifies that "job skills in and of themselves . . . are not protectable interests." Specifies that covenants are "subject to reasonable restraints of time and place," and "restraints of two years or less are presumed to be reasonable."
Arkansas Ark. Code Ann. § 4-75-101	2015 SB 998	Establishes standards of enforceability and reasonableness of covenants not to compete. A post-termination restriction of two years is presumed to be reasonable. Specifies that an employee's continued employment is sufficient consideration for a covenant not to compete. Defines protectable business interests to include the employer's trade secrets, intellectual property, customer lists, goodwill with customers, knowledge of business practices, methods, profit margins, costs, other confidential business information, training and education of employees, and other valuable data.
California Cal. Lab. Code § 925	2016 SB 1241	Requires a dispute over a voided covenant not to compete provision to be adjudicated in California under California law. Prohibits an employer from requiring an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would require the employee to adjudicate in a jurisdiction outside California a claim arising in California, or deprive the employee of the substantive protection of California law with respect to a controversy arising in California.
Colorado Colo. Rev. Stat. Ann. § 8-2-113	2018 SB 82	Creates an exception under which covenants not to compete are unenforceable with respect to physicians treating patients with a rare disorder for which the physician was previously providing consultation or treatment.

State & statutes	Legislation	Summary
Connecticut Conn. Gen. Stat. §§ 20-14p and 20-68l	2016 SB 351	Limits covenants not to compete among physicians, including limiting covenants to a period of one year or less and to a geographic region of 15 miles from the primary site where the physician practices, among other things.
	2019 HB 7424	Declares void and unenforceable any covenant not to compete that applies to an individual providing homemaker, companion, or home health services.
Delaware Del. Code Ann. tit. 24, § 4109	2013 HB 384	Prohibits home inspector trainees from being required to enter into a covenant not to compete with a supervising licensed home inspector as a condition of satisfying home inspector trainee requirements.
Florida Fla. Stat. § 542.336	2019 HB 843	Makes restrictive covenants unenforceable among certain licensed physicians who practice a medical specialty in a county where one entity employs or contracts with all physicians who practice such specialty.
Georgia Ga. Code Ann. § 13-8-53 *et seq*.	2011 HB 30	Establishes a standard of reasonableness relating to geography and time for restrictive covenants. Specifies that such covenants are only enforceable among certain employees, such as those who solicit customers, engage in making sales, or perform managerial functions.
Hawaii Haw. Rev. Stat. § 480-4	2015 HB 1090	Prohibits noncompete clauses among employees of technology businesses.
Illinois 820 Ill. Comp. Stat. 90	2016 SB 3163	Makes restrictive covenants unenforceable among low-wage employees, i.e., those whose hourly rate equals or falls below $13 or the minimum wage as required by federal, state, or local laws, whichever is greater.

State & statutes	Legislation	Summary
Illinois, cont. 820 Ill. Comp. Stat. 90	2021 SB 672	Prohibits covenants not to compete and covenants not to solicit among unless an employee's annual earnings exceed $75,000 or $45,000, respectively. Earnings thresholds increase over time. Codifies the enforceability of covenants not to compete and covenants not to solicit based on five standards, including that the employee worked for the employer at least two years after signing the covenant. Additionally, the covenant must serve a legitimate business interest, must not impose undue hardship on the employee, and must not be injurious to the public. Makes covenants not to compete and covenants not to solicit illegal and void unless employees are informed about their obligations. Entitles an employee to recover costs and reasonable attorney fees if, in a civil action or arbitration filed by an employer, an employee prevails on a claim to enforce a covenant. Authorizes courts to reform or sever provisions of a covenant not to compete or a covenant not to solicit rather than hold such a covenant unenforceable, and enumerates factors courts may consider in deciding whether reformation is appropriate. Authorizes the attorney general to investigate any person or entity engaged in a pattern of practice prohibited under 820 Ill. Comp. Stat. 90 and to initiate or intervene in a civil action in the name of the people of the state to obtain appropriate relief.
Maine Me. Stat. tit. 26 § 599-A	2019 HB 538	Prohibits noncompete agreements for employees earning wages at or below 400 percent of the federal poverty level. Specifies that noncompete agreements are enforceable only to the extent that they are reasonable and no broader than necessary to protect the employer's trade secrets, confidential information that does not qualify as a trade secret, or good-will. Creates a fine of $5,000 for certain violations.
Maryland Md. Code Ann., Lab. & Empl. § 3-716	2019 SB 328	Makes null and void any noncompete or conflict of interest provision in an employment contract that restricts the ability of an employee who earns equal to or less than $15 per hour or $31,200 annually to enter into employment with a new employer or to become self-employed in the same or similar business.

State & statutes	Legislation	Summary
Massachusetts Mass. Gen. Laws ch. 149, § 24L	2017 HB 4732	Requires employers to provide any noncompetition agreement to an employee upon formal offer of employment or 10 business days before the start of employment, whichever is earlier. Establishes standards and disclosure requirements for noncompetition agreements entered into upon separation from employment. Specifies that noncompetition agreements must protect an employer's legitimate business interests, which include trade secrets, confidential information, and the employer's goodwill. Generally prohibits the restricted period of time from exceeding 12 months from the end of employment, and restricts the geographic reach to only those areas in which the employee provided services or had a material presence within the last two years of employment. Requires the noncompetition agreement to be supported by a garden leave clause, i.e., a provision that provides for the payment of wages, or another mutually agreed upon consideration during the restricted period.
Nevada Nev. Rev. Stat. Ann. § 613.195	2017 AB 276	Provides that noncompetition covenants are void and unenforceable unless the covenant (1) is supported by valuable consideration; (2) does not impose any restraint that is greater than is required for the protection of the employer; (3) does not impose any undue hardship on the employee; and (4) imposes restrictions that are appropriate in relation to the valuable consideration supporting the covenant. Provides that a noncompetition covenant may not restrict a former employee of an employer from providing service to a former customer or client if (1) the former employee did not solicit the former customer or client; (2) the customer or client voluntarily chose to leave and seek the services of the former employee; and (3) the former employee is otherwise complying with the noncompetition covenant. Provides that certain covenants entered into as the result of reorganization, restructuring, or reduction of force by an employer are only enforceable for such time as the employer pays the employee's salary, benefits, or equivalent compensation.

State & statutes	Legislation	Summary
Nevada, cont. Nev. Rev. Stat. Ann. § 613.195	2021 AB 47	Prohibits an employer from bringing an action to restrict a former employee from providing services to former customers and clients under certain circumstances. Prohibits noncompetition covenants among employees paid solely on an hourly wage basis, exclusive of any tips or gratuities. Requires a court to award reasonable attorney fees and costs to an employee if the court finds that a noncompetition covenant is unlawful or impermissibly restrictive.
New Hampshire N. H. Rev. Stat. Ann. §§ 275:70, 275:70-a, and 329:31-a	2016 SB 417	Declares unenforceable any new or renewed contracts that restrict the right of a physician to practice medicine in any geographic area or for any period of time after the termination of employment.
	2019 SB 197	Prohibits noncompete agreements among low-wage employees, defined as an employee who earns an hourly rate less than or equal to 200 percent of the federal minimum wage.
New Mexico N.M. Stat. Ann. §§ 24-1I-1 to 24-1I-5	2015 SB 325	Declares restrictive covenants unenforceable among certain health care practitioners, defined to mean dentists, osteopathic physicians, physicians, podiatrists, and certified registered nurse anesthetists.
	2017 SB 82	Adds certified nurse practitioners and certified nurse-midwives to the definition of health care practitioners above.
North Dakota N.D. Cent. Code § 9-08-06	2019 HB 1351	Revises provisions relating to the enforceability of contracts in restraint of trade to replace the words "specific county, city, or a part of either" with "reasonable geographic area and . . . reasonable length of time."
Oregon Or. Rev. Stat. §§ 410.631 and 653.295	2015 HB 3236	Limits the duration of enforceable restrictive covenants to 18 months.
	2017 SB 949	Declares noncompetition agreements and nonsolicitation covenants unenforceable among home care workers.
	2018 SB 1534	Declares noncompetition agreements and nonsolicitation covenants unenforceable among personal support workers, in addition to home care workers.
	2019 HB 2992	Specifies that a noncompetition agreement may be voided if the employer does not provide a signed, written copy of the terms of the agreement within 30 days after the date of termination of employment.

State & statutes	Legislation	Summary
Oregon, cont. Or. Rev. Stat. §§ 410.631 and 653.295	2021 SB 169	Declares noncompetition agreements unenforceable unless an agreement meets specified criteria. Among these, an employee's annual gross salary must exceed $100,533, adjusted annually for inflation. Reduces the maximum term of a noncompetition agreement from 18 to 12 months. Specifies that a noncompetition agreement must be a written agreement.
Rhode Island R.I. Gen. Laws Ann. §§ 5-37-33 and 28-59-1 to 28-59-3	2016 HB 7586	Declares unenforceable restrictive covenants that limit the right of licensed physicians to practice medicine in any geographic area, to provide treatment to current patients, or to solicit a physician-patient relationship with any current patient.
	2019 HB 6019	Declares unenforceable noncompetition agreements among low-wage employees, undergraduate or graduate students participating in an internship or short-term employment, and employees under 18 years of age.
South Dakota S.D. Codified Laws § 53-9-11 and 53-5-11.1	2021 HB 1154	Prohibits contracts restricting the right of health care providers to practice in any geographic area and for any period of time after the termination of employment, or to treat or seek to establish a provider-patient relationship with current patients.
Utah Utah Code Ann. § 34-51-101 to 34-51-301	2016 HB 251	Limits the duration of enforceable post-employment restrictive covenants to one year.
Washington Wash. Rev. Code § 49.62.005 to 49.62.900	2019 HB 1450	Makes a noncompetition covenant void and unenforceable unless certain criteria are met, including the following: the employer discloses the terms of the covenant in writing; the employee's annual earnings exceed $100,000, adjusted annually; and the employee is not terminated as the result of a layoff, unless the employee is provided compensation. Makes void and unenforceable a noncompetition covenant against an independent contractor, unless the independent contractor's earnings from the party seeking enforcement exceed $250,000 per year, adjusted annually. Authorizes the state attorney general to pursue any and all relief upon a violation of this chapter.